



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 110 of 2004

KENNEDY NJERU SIMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of attempted defilement of a girl of 16 years contrary to section 145 (2) Penal Code. There was an alternate charge of indecent assault on a female contrary to section 144 (1) Penal Code.

When the appellant was brought before court he pleaded “it is true.” A plea of guilty was entered against him. The facts were read out to him by prosecutor and he stated “**the facts as stated by prosecution are true and I admit them.**” He was convicted and sentenced to 15 years imprisonment. The offence was committed on 24/9/2004 and he was sentenced to imprisonment on 27/9/2004. He was unhappy with the sentence and he filed petition of Appeal on 7/10/2004.

In his grounds of appeal he emphasized that the sentence to be harsh and excessive to affect the years of his youth and to affect his entire family who were left without anybody to take care of them. He asks for a non custody sentence. This offence used to carry the sentence of imprisonment for a period of 5 years with hard labour until the law was amended enhancing sentence to imprisonment with hard labour for life. The amendment was carried in Act 5 of 2003. The admitted facts show that the victim was aged 13 years. The appellant approached she was with a companion then as they walked to fetch water. The victim companion was chased away by appellant. The victim was thus left alone when the appellant attacked her dragged her into a nearby bush and tore her underpants in readiness for defilement. The victim screamed loudly, bit his right thumb and his chest. It was because of the bites and screams that weakened the accused and the victim was able to run away. Later the matter was reported to police and the victim was taken to hospital where it was confirmed there was no penetration. The Trial Magistrate considered these facts and mitigation by the appellant and that he was a first offender. However in sentence the appellant he said “the offence the accused committed is serious and particularly so in this era of “**HIV/AIDS**” The facts of the case do not show that the victim was exposed to “**HIV/AIDS virus**” and the victim did not endure the trauma. She fought back and saved herself in the circumstance.

I find the Trial Magistrate in sentencing was thinking as if the offence had been committed completely and he misdirected himself.

I therefore set aside the sentence of 15 years imprisonment and substitute the same with imprisonment of 10 years from the date of sentencing. The upshot is that the appeal succeeds to that extent. The sentence is reduced to an imprisonment of 10 years only.

Dated this 9th October, 2006.

J. N. KHAMINWA

JUDGE

9/10/2006

Khaminwa Judge

Njue Clerk

Appellant Present

Mr. Kimathi for Omwega for State Counsel.

Judgment read in open court.

J.N. KHAMINWA

JUDGE