

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 60 of 2005

(From the original conviction and sentence of the Chief Magistrate's court at Nakuru in Criminal case No.706 of 2005 – E. Ominde (S. R.M))

APUI ACHAU LOPUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Apui Achau Lopui was charged with the offence of **Defilement of a girl** contrary to **Section 145(1) of the Penal Code**. The particulars of the offence were that on the 4th of March, 2005 at *[Particulars withheld]* Estate within Nakuru District, the appellant had unlawful carnal knowledge of MN, a girl under the age of 16 years. The appellant was alternatively charged with **Indecent Assault of a female** contrary to **Section 144(1) of the Penal Code**. The particulars of the offence were that on the same day and in the same place, the appellant unlawfully and indecently assaulted MN by stripping her naked and touching her private parts. When the appellant was arraigned before the trial court, he pleaded guilty to the charge and was convicted on his own plea of guilty. He was sentenced to serve 14 years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

At the hearing of the appeal, the appellant abandoned his appeal against conviction and instead urged his appeal on sentence. He submitted that he had not known that he had committed the offence because at the material time he was drunk. He pleaded with the court to exercise leniency on him by reducing the term of imprisonment that was imposed on him by the trial magistrate. Miss. Opati for the State urged this court not to interfere with the sentence, because in her view, the said sentence was too lenient putting into consideration the offence that the appellant was convicted of. She urged this court to dismiss the appeal.

I have considered the submissions made before me by the appellant and by Miss. Opati on behalf of the State. The appellant pleaded guilty to the main charge of defilement when he was arraigned before the trial magistrate. He was convicted on his own plea of guilty. He is not challenging his conviction on this appeal. He is however pleading with this court to exercise leniency on him and reduce the sentence that was imposed by the trial magistrate. Miss. Opati for the State however opposes the plea by the appellant for his sentence to be reviewed. The appellant is basically pleading with this court to exercise mercy on him and reduce the term of imprisonment which was imposed upon him. The State opposes the appeal filed by the appellant. The appellant's appeal is basically against sentence. This court is therefore being called upon to reconsider the sentence that was imposed upon the appellant by the trial magistrate. When a magistrate sentences an accused person, he is exercising judicial discretion. An appellate court will not interfere with the exercise of discretion by a trial court unless it is established by the appellant that the trial magistrate exercised his discretion wrongly or in breach of the law.

In this appeal, the appellant was convicted for defiling a girl aged 3 ½ years. The appellant states that he was drunk when he committed the offence and therefore was not aware of what he had done. I do not think that the law excuses an accused person from criminal liability if he pleads that he was drunk when he committed the offence. I agree with Miss. Opati when she submitted that taking into account the totality of the facts of this case, the sentence that was imposed by the trial magistrate was lenient. The

maximum sentence for an accused person who is convicted for the offence of defilement is life imprisonment. I will not therefore interfere with the exercise of discretion by the trial magistrate when he sentenced the appellant.

I find no merit with the appeal and hereby dismiss it. The conviction and sentence of the appellant by the trial magistrate is hereby confirmed.

It is so ordered.

DATED at NAKURU this 24th day of November, 2006

L. KIMARU

JUDGE