

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 276 of 2004

(From the original conviction and sentence of the Senior Resident Magistrate's court at Narok in Criminal case No.594 of 2003 – S.M.Githinji – S.R.M)

BENSON OYIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Benson Oyie 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 11th of September, 2003 at [*particulars withheld*] area, Enabelbel Narok District, the appellant unlawfully had carnal knowledge of MN, a girl under the age of 16 years. He was alternatively charged with the offence of **Indecent Assault on 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 a girl under the age of 16 years by touching her private parts. The appellant pleaded not guilty to the charge and after a full trial he was convicted on the main count of defilement. He was sentenced to serve 15 years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

Although the appellant in his petition of appeal appealed against both conviction and sentence, at the hearing of the appeal he abandoned his appeal against conviction and instead pleaded with this court to reduce the sentence that was imposed upon him by the trial magistrate. He told the court that the sentence was too long. He urged this court to review the sentence in view of the problems that he had undergone while in prison. Mr. Mugambi, learned State counsel, opposed the appeal on sentence. He submitted that the sentence that was imposed on the appellant by the trial magistrate was lenient in the circumstances putting into consideration the fact that the appellant had defiled a minor aged 6 years. He urged this court not to interfere with the said sentence.

I have considered the submissions made before me by the appellant and the response thereto made by the Mr. Mugambi on behalf of the State. As stated earlier in this judgment, the appellant is not appealing against conviction. He is only appealing against the sentence. He however pleaded with this court to reduce the term of imprisonment that was imposed by the trial magistrate. 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 the present appeal, the appellant was convicted for defiling a minor aged 6 years. The appellant infected her with a sexually transmitted disease. Taking into account the entire facts of this case, the sentence of 15 years imprisonment imposed was lenient in the circumstances. Had the State given a notice of enhancement of sentence to the appellant before this appeal was argued, this court would have been inclined to consider such a request for enhancement of sentence. As it were, no such notice was given to the appellant before the hearing of the appeal.

In the circumstances of this case therefore, I do not find merit with the appeal filed by the appellant. The

appeal against conviction and sentence is hereby dismissed. The conviction and sentence of the trial magistrate delivered on the 9th of June, 2004 is hereby confirmed.

It is so ordered.

DATED at NAKURU this 24th day of November, 2006

L. KIMARU

JUDGE