REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 111 of 1993

(From original conviction and sentence in Criminal Case No. 375 of 1993 of the Principal Magistrate's Court at Kericho – Mr. W. K. Tuiyott

JOHN OTIRA TARO……..…….……APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT

The Appellant has appealed against the original conviction and sentence in **Kericho Principal Magistrate's Court No. 375 of 1993**. In that case, the Appellant had been charged for the following offences:

(a) Defilement of a girl, contrary to Section 145 (1) of the Penal Code.

(b) Grievous harm, contrary to Section 134 of the Penal Code.

The facts of the prosecution case as stated in the Charge Sheet for the first Count are as follows:

"**On the 10th March, 1993 at [*particulars witheld*] in Kericho District of the Rift Valley Province, had carnal knowledge of J AO, a girl under the age of fourteen years.**

The second offence was also stated to have been committed against the same complainant on the said date. When the Appellant was arraigned in Court on 15th March, 1993 he pleaded **"guilty"** to both charges and he was convicted accordingly. Consequently, the learned Magistrate the **late Mr. William Tuiyott** then Senior Principal Magistrate passed the following sentence:

Count I:

Accused sentenced to 14 years imprisonment and 20 strokes.

Count II:

Accused sentenced to 10 years imprisonment and 5 strokes.

During the hearing of the appeal, Mr. Olaly Cheche for the Appellant submitted that the two offences should **not** have been separated because one was as a result of the other. Besides the above, Mr. Cheche also submitted that the decision by the Lower Court was wrong since the Appellant should **not** have been given the maximum sentence as he is a first offender. He added that the late trial Magistrate had completely ignored the mitigation of the Appellant. Apart from the above, he also submitted that the late trial Magistrate should have noted that the offences were one and the same. In addition to the above, he also took issue with the fact that the 1st Count had omitted the word **"unlawfully**" which made the charge fatally defective. In conclusion, **Mr. Cheche** submitted that the Appellant aged 53 years old has been in the custody for about 12 years.

On the other hand, the State through **Mr. Koech,** Senior State Counsel has pointed out that the appeal is only against sentence and hence the Appellant's Counsel should have restricted himself to that issue alone. Besides the above, Mr. Koech also submitted that the plea was unequivocal and hence **cannot** be challenged. However, he conceded that the two offences were committed during the same transaction and that the sentence should have run concurrently. He went ahead and qualified the above, by stating that the sentence for Count I should be served fully. The reason for the above was that the law has been amended and hence the maximum sentence for Count I is life imprisonment. In conclusion, the Senior State Counsel submitted that the Appellant was 40 years old while the complainant was only 6 years old when the offences were being committed. In fact, when the sentence was being passed, the complainant was still admitted in hospital.

This Court has carefully perused the submissions by both Counsels. From the record, it is apparent that the Appellant had appealed against the sentence. That was clearly stated in the Petition of Appeal dated 26th March, 1993. Secondly, the supplementary grounds of appeal filed on 9th February, 2004 also dealt with the same issue. The aspect that it emphasized was the issue of the sentence to be consolidated.

Having stated the above, it is apparent that the Appellant should have been charged with the offence of defilement of a girl contrary to **Section 145 (1) of the Penal Code**. The second offence of grievous harm, contrary to **Section 134 of the Penal Code** should have been an alternative to the first offence. From the sequence of events, it is crystal-clear that the complainant had sustained serious injuries arising from the commission of the first offence. Common sense and good practice should have dictated that the second offence should have been an alternative. Apart from the above, a basic principle in law also dictates that **no** litigant should be punished twice for the same offence. Mr. Koech had earlier conceded that the sentence should have run concurrently.

In view of the above, I hereby set aside the sentence of 10 years imprisonment and 5 strokes of the cane that had been imposed on the Appellant for the Count 2. In addition to the above, I also set aside the 20 strokes of the cane that had been imposed on the Appellant for Count I. The same are hereby reduced to 5 strokes of the cane.

As far as the sentence of 14 years imprisonment for Count I is concerned, the Court hereby confirms the same given the total circumstances of the case. Basically, the Appellant was 40 years old when he committed the offence. On the other hand, the complainant was only 6 years old by then. The Appellant took advantage of a tender and innocent young girl who could **not** defend herself. Having done so, the Appellant should **not** expect any mercy or sympathy from this Court. The Appellant will just have to serve the full sentence that was imposed on him. It is only to that extent that the appeal succeeds. Right of Appeal.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of Mr. Olaly Cheche

for Appellant. Mr. Njogu for State.

MUGA APONDI

JUDGE

28TH SEPTEMBER, 2005