



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU

**Criminal Appeal 118 of 2002**  
**(From original conviction and sentence of the Senior Resident  
Magistrate's Court at Molo in Criminal Case No. 23 of 2002 –K.  
Ngeno –S.R.M)**

SIMON MBURU MIRINGU..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGMENT**

The appellant Simon Mburu Miringu, was charged with three offences under the Penal Code. He was charged with defilement of a girl under the age of 14 years contrary to **Section 145(1)**. The particulars of the offence were that on the 19th of August 2000 at [*particulars withheld*] in Nakuru District the appellant had carnal knowledge of MNN, a girl under the age of 14 years. He was further charged with assault causing actual bodily harm contrary to **Section 251**. The particulars of the offence were that on the 19th of August 2000 at [*particulars withheld*] in Nakuru District, the appellant unlawfully assaulted MNN causing her actual bodily harm. He was also charged with the offence of spreading an infectious sexual disease contrary to **Section 186**. The particulars of the charge were that on the same day and at the same place, the appellant unlawfully and negligently spread a sexually transmitted infection, namely Gonorrhoea to MNN. The appellant pleaded not guilty to the charges. After a full trial, the appellant was convicted as charged in respect of the first and the third count. He has however acquitted on the charge of assault. He was sentenced to serve fourteen years imprisonment with five strokes of the cane in respect of the first count of defilement. On count three, he was sentenced to serve one year in prison. The sentences were ordered to run consecutively. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal the appellant raised several grounds of appeal which may be summarized as hereunder: He was aggrieved that the trial magistrate had convicted him based on the evidence of the complainant that was inconsistent, inconclusive and contradictory; he was aggrieved that his defence had been disregarded by the trial magistrate before his conviction; he faulted the trial magistrate for convicting based on a charge that was defective; he was further aggrieved that the trial magistrate had not considered the age of the appellant and that of the complainant before convicting and sentencing the appellant. He was finally aggrieved that he had been convicted of infecting the complainant with a sexually transmitted disease yet no evidence had been adduced by the prosecution to support the charge.

During the hearing of the appeal, the appellant, who was acting in person, submitted that he admitted committing the offence of defilement which he was charged and convicted. He however submitted that he was sixteen years of age at the time he committed the offence. He submitted that he was a form one student at the time he committed the offence. He was remorseful and sought leniency from this court. He pleaded with this court to reduce the custodial sentence that was imposed on him. He further submitted that he had learnt his lesson by his imprisonment. He had become a useful member of the society as he had undertaken a commercial course in prison and passed. He had registered to sit for Kenya Certificate of Secondary Examination in October 2005. He urged the court to consider that he had been rehabilitated and changed his behaviour. He promised to be a good citizen if the custodial sentence imposed on him was reduced.

In response, Mr Koech, Learned State Counsel submitted that since the appellant was not challenging his conviction, the issue for the determination by the court was on the issue of sentence only. He submitted that there was no evidence that the appellant was a child or a student to the time he committed the

offence. Learned Counsel argued that from the proceedings of the trial magistrate it was clear that the appellant was aware what he was doing: - the appellant even chased away the people who had gone to rescue the complainant by threatening them with a panga. He submitted that the circumstances under which the offences were committed made the trial magistrate sentence the appellant to the custodial sentence, which in Mr Koech's view, were appropriate. He urged the court to dismiss the appeal on sentence and confirm the sentence of the trial magistrate court.

This being a first appeal in criminal cases, this court is mandated to reconsider the evidence adduced before the trial magistrate's court, re-evaluate the same and reach its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, the appellate court has to put in mind the fact that it neither saw nor heard the witnesses testify and therefore cannot be expected to make any finding as to the demeanour of the witnesses. In the instant appeal, even though the appellant in his petition of appeal challenged both his conviction and the sentence imposed, during the hearing of the appeal, he abandoned his appeal against conviction. He however pleaded with the court to reduce the custodial sentence imposed on him. Having carefully evaluated the evidence on record, the submission made by the appellant and the reply made thereto by the State, it is clear that although the appellant pleads that he was a child at the time he committed the offence, there was no evidence adduced before the trial magistrate to suggest that the appellant was aged less than eighteen years. For all intents and purposes, the appellant was a strong young adult. He forcefully took the complainant from the church where she had attended overnight prayers after threatening with a panga the Pastor and the youths who tried to rescue her. The appellant then took the complainant, who was then aged thirteen years, to his house which was about half a kilometer away where he defiled the complainant. The appellant now pleads for the leniency of this court. This is after he had defiled the complainant had infected her with a venereal disease, namely Gonorrhoea.

I have considered the plea by the appellant and also re-evaluated the reasons given by the trial magistrate when he sentenced the appellant. I find no compelling reason to interfere with the said sentence imposed by the trial magistrate. The appellant was an adult who knew what he was doing when he defiled the complainant. Although he was a first offender, he was sentenced to serve the maximum sentence of fourteen years imprisonment then provided by the law. The circumstances under which the appellant defiled the complainant rightly called for a stiff sentence. The appellant not only threatened the complainant with a panga, he also threatened and chased away the people who had gone to the rescue of the complainant. The appellant was wild and aggressive. He infected the complainant with a sexually transmitted disease. I find no reason whatsoever to interfere with the sentence imposed by the trial magistrate save to set aside the corporal punishment imposed, the same having been outlawed. I also order the two sentences imposed to run concurrently instead of consecutively. Otherwise the appeal filed by the appellant on sentence lacks merit. The same is dismissed. The sentence imposed by the trial magistrate, save as varied by this court, is hereby confirmed. It is so ordered.

**DATED at NAKURU this 25th day of November 2005.**

**L. KIMARU**

**JUDGE**