



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 191 OF 2003**

**(From Original Conviction and Sentence in Criminal Case No. 1054 of 2003 of the Senior Resident Magistrate's Court at Kilifi P.M. Mutani, Esq., Senior Resident Magistrate)**

**JAFAR MOHAMED OMAR ..... APPELLANT**

**Versus**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The Appellant in this appeal was charged with the offence of defilement contrary to section 145(1) of the Penal Code. In the alternative he was also charged with indecent assault contrary to section 144 of the Penal Code. He pleaded not guilty but after trial he was convicted on the main charge of defilement and sentenced to seven years imprisonment with seven strokes of the cane. He appealed against both conviction and sentence. At the hearing of the appeal, however, he abandoned the appeal against conviction and proceeded with the one on sentence.

In his written submission the Appellant argued that the sentence of seven years imprisonment with seven strokes of the cane was in the circumstances of this case harsh. Miss. Mwaniki, learned State Counsel, argued that the sentence is quite lenient and urged me to dismiss the appeal.

During the trial Appellant, apparently not knowing that was not a defence, contended that he had sexual intercourse with the complainant with her consent. The evidence was that he locked the complainant in a toilet and threatened her with death, and then he defiled her. I have, upon perusing the record, found that the conviction was proper the appellant having in his unsworn statement admitted the offence. So even if he had not abandoned the appeal against sentence it was going to be dismissed any way.

The Appellant was a labourer at the complainant's home. He took advantage of his position and defiled a young girl of 11 years. She could not report the matter because of fear, the Appellant having threatened her with death. If he had not infected her with a venereal disease which caused her mother to question her, he could have continued to defile her.

At the time of the commission of the offence and trial the offence of defilement carried maximum

sentence of 14 years imprisonment with corporal punishment. After the July 2003 amendment the maximum sentence is now life imprisonment with hard labour, but I am not taking that into account. What I have instead considered is that the appellant in his petition of appeal alleged that he was 16 years old at the material time but his age has, pursuant to an order of this court, been assessed at 19 years.

Having considered all these factors I find that the sentence of seven years imprisonment is not harsh and dismiss this appeal against sentence. I, however, set aside the order for corporal punishment in line with the recent amendment. Save for this this appeal is hereby dismissed in its entirety.

DATED this 20th day of July 2004.

D.K. Maraga

**AG. JUDGE**