NJARAMBA NG'ANG'A KIRURU.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Judgment arising from the original conviction and sentence in Criminal Case No.1876 of 2005 in the Senior Resident Magistrate's Court at Kigumo by S. M. Mokua – S.R.M. dated 3rd October, 2007)

J U D G M E N T

Njaramba Ng'ang'a Kiruru, the Appellant herein, was initially tried on the charge of Defilement of a Girl contrary to Section 145(1) of the Penal Code. The particulars of the offence are that: ***On the 18th day of November 2005, at H[..] Village in Maragua District, within Central Province had carnal knowledge of AWM, a girl under the age of 16 years***. Plea was taken on 29th December 2005. On 4th October 2006, the Lower Court record shows that the charge was amended to include an Alternative Count of **Indecent Assault contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006**. The Appellant had undergone a trial, then he was convicted and sentenced to serve 20 years imprisonment on the main charge. Being aggrieved, the Appellant filed this appeal and put forward the following grounds:

"1. That the imposed sentence is oppressive and excessive in regard I am a person of good character whilst evidence of good character is admissible in respect to Section 56 of the Evidence Act.

2. That the Learned Trial Magistrate misdirected herself in finding such a stiff sentence on me whilst there was no adequate evidence adduced by the Prosecution's case to decide the same.

3. That the imposed sentence is harsh and excessive in regard to my mitigation that I had adduced which could have preferred a lesser severe sentence.

4. That the considered and decided sentence of 20 years imprisonment is harsh and oppressive if it could be meant for rehabilitation purposes."

When the appeal came up for hearing, the Appellant successfully applied to abandon the sentence against conviction.

It is the submission of the Appellant that the sentence meted out against him is harsh, excessive and unlawful. Mr. Kaigai, Learned Provincial State Counsel, concurred with the Appellant that the sentence meted out against him under the provisions of Sexual Offences Act was unjust. He urged this court to correct the error and pronounce the sentence under the provisions of the Penal Code.

The Principles of sentencing are well settled. The Appellate Court will not interfere with the discretion of a trial court in respect of an order on sentence unless it is shown that the trial court did not consider relevant factors or considered irrelevant factors or applied the wrong principles before sentencing or that the sentence is manifestly excessive. In the appeal before this court, it is apparent that the Appellant was tried on a charge of **Defilement of a Girl** contrary to **Section 145(1)** of the **Penal Code**. On 4th October 2006, the Prosecution successfully applied for the charge to be amended to include an alternative count of **Indecent Assault** under **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**. It is apparent that the main charge was not amended nor withdrawn. It is curious to note that in writing his judgment, the Learned Senior Resident Magistrate assumed that the Appellant had been charged under **Section 8(1)** of the **Sexual Offences Act No.3 of 2006**. He proceeded to convict him under the aforesaid section yet it is clear from the record that the Appellant was tried for the offence under Section 145(1) of the Penal Code.

The Learned Senior Resident Magistrate therefore fell into error when he meted out a sentence under **Section 8(1)** of the **Sexual Offences Act**. The Sexual Offences Act came into effect on 21st July 2006. The offence the Appellant was convicted for took place on 18th November 2005. There is no provision in the Sexual Offences Act making the Act apply retrospectively. The Senior Resident Magistrate fell into error when he convicted and sentenced the Appellant under the provisions of the Sexual Offences Act. He therefore applied the wrong principles in sentencing the Appellant.

With respect, I agree with the Appellant that the sentence meted out against him is unlawful, hence it must be interfered with. I hereby allow the appeal, set aside the sentence of 20 years imprisonment. I will instead pronounce the sentence under the provisions of **Section 145(1)** of the **Penal Code**. In the aforesaid section, the offence attracts a maximum sentence of life imprisonment with hard labour. I have looked at the Record of Appeal and it is clear that the Appellant is a first offender and that he was remorseful. I have taken into account the fact that he has been in prison since 3rd October 2007. In essence, he has been in prison for about five years. Taking that into account, I pronounce the sentence of three years imprisonment from the date of this judgment with hard labour.

Dated and delivered this 6th day of July 2012.

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J. K. SERGON
JUDGE