



STEPHEN MAINA

NDUNG’U.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

*(Judgment arising from the original conviction and sentence in Criminal Case No.592 of 2005 in the*

*Senior Resident Magistrate’s Court at Mukurwe-ini by V.W. Ndururu – Ag. S.R.M.)*

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

The Appellant, i.e. **Stephen Maina Ndung’u**, was convicted for the offence of **Defilement of a Girl under the age of 16 years** contrary to **Section 145 (2) of the Penal Code**. He was sentenced to serve 10 years imprisonment. Being aggrieved, he preferred an appeal before this court. On appeal, he put forward the following grounds:

*“1. That the imposed sentence by the Learned Mukurwe-ini Magistrate lacks legality for the police negligently incarcerated me into their police cells for a prolonged period more than other prisoners and contravened Section 72(3) (b) of the Constitution and also the police did not give any affidavit showing reasons as to why they contravened Section 72 (3) (b) of the Constitution.*

*2. That the Learned Trial Magistrate erred in both points of law and facts in failing to resolve the prevailing doubts on the part of I, the Appellant.*

*3. That the Learned Trial Magistrate erred in both points of law and facts in finding a sentence of 10 years but failed to merit that the prosecution did not avail any evidence of the presence of spermatozoa neither the clothes the victim had worn on that particular day.*

*4. That the Learned Magistrate erred in both points of law and facts in dinging the 10 years imprisonment whereas the Prosecution’s case was not corroborated. (No independent witnesses).*

*5. That the Learned Trial Magistrate erred in points of law and facts in weighing the evidence on record partially upon the Prosecution and thus became obliged to reject my alibi defence which remains true.”*

When the appeal came up for hearing, the Appellant successfully applied to abandon the appeal against conviction. This judgment is in respect of the appeal against the sentence. The particulars of the offence are that: **On 16<sup>th</sup> day of July 2005, at {particulars withheld} in Nyeri District within Central Province, had unlawful carnal knowledge of R. W. M., a girl under the age of 16 years.** The prosecution submitted the evidence of 16 witnesses in support of its case. The Appellant denied the offence by giving unsworn testimony. He is now before this court claiming that the sentence of 10 years imprisonment is harsh and excessive in the circumstances. Mr. Kaigai, Learned Provincial State Counsel, has urged this court to dismiss the appeal against sentence because the same is neither harsh nor excessive. In the case of **Wanjema =vs= R [1971] E A Page 494 D, Trevelyan J.** restated the principles of sentencing as follows:

*“A sentence must in the end, depend upon the facts of its own particular case.....*

*An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on a wrong or the sentence is manifestly excessive in the circumstances of the case.”*

I will apply the above principles to this case. The Appellant pleaded for leniency before the trial court. It is also noted in the judgment of the trial court that he was a first offender. Under **Section 145(1)** of the **Penal Code** (now repealed), the offence attracts a sentence of life imprisonment with hard labour. The sentence meted out upon the Appellant is 10 years imprisonment.

In my view, I find the sentence neither harsh nor excessive. In fact, the sentence should be corrected which I hereby order so that the Appellant serves 10 years imprisonment from the date of sentence in addition to hard labour. Consequently, the appeal is dismissed in its entirety save that the sentence is corrected as hereinabove proposed.

**Dated and delivered this 6<sup>th</sup> day of July 2012.**

.....  
**J. K. SERGON**  
**JUDGE**

In open Court in the presence of the Appellant and Miss Maundu for the Director of Public Prosecutions.