REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Criminal Appeal 54 of 2004
THOMAS MBOYA ASIRA ……..…… APPELLANT

V E R S U S

REPUBLIC ……...……..…… RESPONDENT

JUDGEMENT

The Appellant was charged with defilement of a girl contrary to section 145 (1) of the Penal Code. The particulars of the charge were that on the 18th day of September, 2003, at Managerial Estate, Mumias Sugar Company, N. Sub-location, N. Location in Butere/Mumias District within Western Province, the appellant unlawfully had carnal knowledge of L. A. who at the time was under the age of 14 years. The appellant pleaded guilty to the charge and did confirm the particulars of the offence were correct. He was convicted on his own plea of guilty and sentenced to 14 years imprisonment.

Being dissatisfied with the conviction, the appellant filed this appeal with three main grounds of Appeal which are

1. ***That the trial magistrate erred in upholding the conviction without observing that the appellant's plea of guilty was as a result of torture by the police officers.***
2. ***That the appellant prays for leniency in the appellate court as he did not know the result will be harsh like the imposed sentence of 14 years.***
3. ***That the trial magistrate erred by not considering my mitigation which was true in its totality.***

I do wish to point out that it is unfortunate the appeal was filed in 2004 but was only admitted for hearing on 31/3/2009. The Criminal Registry seems to have slept on its responsibilities.

On his first ground of Appeal, the appellant argues that he pleaded guilty because he was tortured. The lower court record does not indicate that the appellant raised this issue before the lower court. The trial court was able to see the appellant physically and note whether he was indeed tortured. This being the case, this court cannot fault the conviction on this allegation as the police cannot respond to the allegations. I find no substance in this ground of Appeal.

The second ground is that the 14 years jail period is excessive. Section 145 (1) of the Penal Code was repealed by Act 3 of 2006. However, in 2003 when the appellant was charged that section was the operating law.

The law allowed the sentence imposed by the learned magistrate. The victim of the appellant's unlawful

conduct was a 10 year old girl whose life was greatly affected by the incident. I find no reason to interfere with the sentence passed by the trial court.

Lastly, the appellant contends that his mitigation was not considered by the trial court. In mitigation, the appellant prayed for leniency and submitted that he was drunk. The trial magistrate considered the appellant's mitigation before passing the sentence. This ground of appeal too must fail.

In the end, I do find that this appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 8th day of October, 2009.

SAID J. CHITEMBWE

J U D G E