



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 305 OF 2012

BETWEEN

ERASTUS IMBUSIA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Judgement of the High Court of Kenya at Kisumu (Warsame J)

dated 30th May, 2006

in

H.C.CR.A.NO.122 OF 2005

JUDGMENT OF THE COURT

The appellant faced a charge of defilement of a girl Contrary to **Section 145 (2)** of the Penal Code. The particulars of the offence were that:

“On the 17th day of March 2005 at [particulars withheld] Kisumu District within Nyanza Province had unlawful carnal knowledge of MA a girl under the age of fourteen years.”

He pleaded not guilty but after full hearing in which seven prosecution witnesses gave evidence and he also gave sworn statement in his defence, the learned Senior Resident Magistrate (W.B. Mokaya), in a judgement dated 17th June 2005 found him guilty, convicted him and after giving him opportunity to mitigate which the appellant did not positively utilise, sentenced him to life imprisonment with hard labour.

The appellant felt dissatisfied with that sentence. He appealed to the High Court against the sentence. The High Court (Warsame J. as he then was) dismissed that appeal on sentence, and confirmed it. The learned Judge, we note, was so much taken up with the horror of the offence that he did not appreciate that the appellant was charged under the Penal Code as the offence was committed before the advent of the Sexual Offences Act. Had he directed his mind to it, he would have appreciated that life imprisonment under that law when it obtained, was maximum sentence for that offence and the court had discretion on whether to order a less severe sentence. He would have also realised that there was no

provision for had labour as an additional punishment under that Section.

Be that as it may, the appellant is still dissatisfied and he has now come before us again on appeal against sentence only. He asks us to reduce the sentence. Mr. Abele, the learned Assistant Director of Public Prosecutions, submitted that the sentence of life imprisonment was not mandatory sentence as the trial court felt and in any case the sentence of hard labour was not provided for in the relevant provisions under which the appellant was charged.

Under **Section 361 (1) (a)** of the Criminal Procedure Code, we have no jurisdiction to entertain an appeal on matters of fact and severity of sentence is set out therein as being a matter of fact. We have jurisdiction to entertain an appeal against the

illegality of the sentence. In this case, the appellant was charged under the Penal Code and Mr. Abele is plainly right that under that provision, life imprisonment was a maximum sentence and not a mandatory minimum sentence. There was also no provision of hard labour in respect of the offence under that provision. The learned Senior Resident Magistrate did not appear to direct her mind to that. Unfortunately, the learned Judge on first appeal used all his time in his judgment in pouring out his anger at what the appellant did and giving reasons why the appellant deserves to be removed from the society. He did not address those issues at all.

In our view, both courts should have addressed those two issues. We have, on our own, considered them and having done so, whereas we agree that hard labour should not have been added to the imprisonment sentence, and we allow the appeal to that extent, we are nonetheless of the view that the sentence of life imprisonment was well deserved even though the court had discretion to award a lesser sentence. The victim was a child of 2 ½ years. The reasons given by the appellant before the High Court and before us cannot sell. Indeed, in our mind, just like the first appellate court, we cannot conceive a worse case in respect of Sexual Offences. Maximum sentences are normally reserved for the very worst cases in any category of offences and in our view this was the worst case in the category of Sexual Offences even under the Penal Code and the appellant has only himself to blame.

In short the appeal is allowed only to the extent that hard labour is set aside, but save for that, the appellant's appeal against sentence of life imprisonment is dismissed.

Dated and Delivered at Kisumu this 4th day of October, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is the
true copy of original.

DEPUTY REGISTRAR