



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, WAKI & ONYANGO OTIENO, JJ.A.)
CRIMINAL APPEAL NO. 158 OF 2008**

BETWEEN

MAPINGA LUKA KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nakuru (Maraga, J) dated 30th June, 2008

in

H. C. CR. A. 30 OF 2006)

JUDGMENT OF THE COURT

The appellant in this appeal, **Mapinga Luka Kamau**, was charged in the Chief Magistrate’s Court at Nakuru with two counts of defilement of a girl under the age of 16 years contrary to **section 145 (1)** of the Penal Code, each of which count had an alternative count of indecent assault of a female, contrary to **section 144 (1)** of the Penal Code. In the first count, the particulars were that:-

“On the 14th day of March, 2004, at N[...] Town in Nakuru District within Rift Valley Province, unlawfully had carnal knowledge of G.W, a girl under the age of 16 years.”

And its alternative count was that of indecent assault of the same **G.W1**. The particulars of the second count were the same except that the victim was **I. W**, and the alternative charge to that second count was also the same but I was the complainant.

The appellant denied both counts and their alternatives. However after a full hearing, in which both complainants, I’s mother **G.W2** (PW 2), **GW1’s** auntie, **P.G.M** (PW 4), a clinical officer at Naivasha, **George Kariuki** (PW 5) and a police constable, PC Woman **Purity Tanui** (PW 6) gave evidence, and after the appellants sworn statement in defence was received, the learned Senior Resident Magistrate (**A. B. Mongare**) found the appellant guilty as charged in the two main counts of defilement, convicted him of

the same and sentenced him to serve imprisonment for seven (7) years in respect of each count, the sentences to run consecutively.

The appellant was not satisfied with the convictions and the sentence meted out to him. He appealed to the High Court against both convictions and the two sentences. The appeal was placed before Koome, J. (as she then was) who after full hearing and consideration dismissed it both as against conviction and as against the sentences. In so dismissing that appeal, the learned Judge had this to say:-

“I am nonetheless satisfied that the children understood the importance of telling the truth and told the truth. The medical evidence that the children had injuries to their genitalia amply corroborated their evidence. I find that his conviction is safe. Consequently I dismiss his appeal against conviction.

The appellant defiled children of 7 and 10 years. These children will be traumatized for life. I therefore do not find sentence of 7 years imprisonment harsh even though the trial court directed that these sentences do run consecutively. The appellant and his ilk should be kept away from young children. His appeal against sentence is also dismissed.”

The above is what prompted this appeal before us, which was originally premised on six grounds of Appeal filed by the appellant in person but which grounds were at the hearing of the appeal abandoned by the appellant who conducted his appeal in person. In his written submissions filed on 14th January, 2012, the appellant stated at the beginning as follows:-

“Your Lordship I pray that I be allowed to withdraw my appeal against conviction and the Honourable court do consider the sentence handed to me by the lower court and upheld by the High Court.”

He thereafter set out in written submissions, seven grounds in support of his seeking a reduction of the sentences imposed on him. These were in summary that the convictions and sentences were based on erroneous finding that he never denied committing the offence, a mistake that might militate a retrial being ordered but he does not wish to undergo a retrial; that the aggregate sentence is harsh and excessive as the two sentences were ordered to run consecutively, and finally that he is ailing as he is suffering from kidney problems.

In response, Miss Idagwa, learned State Counsel opposed the appeal, contending that two minors were defiled and under the provisions of **section 14 (1)** of the Criminal Procedure Code, the learned Senior Resident Magistrate was entitled to impose the sentences and to order them to run consecutively as ages of the minors were aggravating circumstances. Further she submitted that the sentences were not excessive if it is considered that the maximum sentence of the offences was life imprisonment.

The facts giving rise to the entire saga were simple and straightforward. The appellant and the two complainants lived within the same vicinity. The first complainant G.W1 was ten (10) years old and was living with her auntie P. G. M in the same area at Naivasha whereas the second complainant I.W was seven (7) years old and lived with her mother in the same area also at Naivasha. On 14th March, 2004, I was instructed by her mother to go to church in the morning as it was a Sunday. The appellant was a well known person in that area as he used to fetch water on pay for a number of the residents of that area including Irene’s mother G.W2 (PW 2). GW1 said in evidence that the appellant had asked her to go to his house in the morning of that Sunday near school gate. The appellant did not tell her why he wanted her to go there, but he wanted her to go there with I. GW1 asked I to accompany her to the appellant’s house. There were other young sisters of GW1 who also accompanied her to appellant’s house. They found the appellant who prepared tea for them and gave the two Kshs.1/= each. The appellant then called I to his bed (which was skirted off from the main room by a curtain). He undressed I and defiled her as she cried. He released her and called GW1 to the same bed. He undressed her, defiled her and then warned both not to tell anybody what had happened lest he would beat them up. The two young girls complied and never told their auntie and mother respectively till one week later and only when Irene’s mother asked her whether she went to the church. When asked, I told her mother that the appellant had defiled each of them. The complainants were taken to hospital and George Kariuki (PW 5) a Clinical Officer at Naivasha who examined both of them formed the opinion that both were defiled. The appellant

was thereafter arrested, charged, found guilty, convicted and sentenced as we stated hereinabove.

We have anxiously considered the appeal which is only against sentence. We have considered the grounds of Appeal, the facts that gave rise to the saga, all of which we have set out above. We have also considered the effect of the offence on the complainants who were very young children at the time the offence took place which is that they will remain traumatized throughout their lives notwithstanding whatever counseling that may have been carried out to help them. The maximum sentence as at the time the offence took place was sixteen (16) years with hard labour and not life imprisonment as submitted by the learned state counsel. This, in effect means that the appellant was, in respect of each count, sentenced to prison a term of less than half provided by the law. Each sentence was lawful and in our view not excessive. The appellant complains against the order directing the sentences to run consecutively. That order in our view is lawful as it is provided for under **section 14 (1)** of the Criminal Procedure Code which states:-

“Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose, and those punishments when consisting of imprisonment shall commence, the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”

The learned Senior Resident Magistrate, in awarding the sentences and ordering that the two sentences do run consecutively did not exceed the powers donated to her under the law. In our view, the learned Senior Resident Magistrate exercised her discretion judiciously and the sentences are lawful. The appellant has only himself to blame for his beastly act upon the young children and even worse, in doing so, by offering them goodies to enable him to perpetrate such actions.

In short, this appeal has no merit. It is dismissed

Dated and delivered at Nakuru this 23rd day of February, 2012.

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR