IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 231 OF 2010

BETWEEN
JOHN MWENDO KISOI...APPLICANT

AND

REPUBLIC...RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Waweru, J.) dated 7th May, 2010
in
H.C.CR.A. NO. 95 OF 2006)
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JUDGMENT OF THE COURT

The appellant was tried and convicted by Machakos Senior Resident Magistrate (S.A. Okato) for the offence of defilement of a girl under the age of 16 years contrary to ***section 145 (1)*** of the Penal Code. Upon his conviction, he was sentenced to serve 30 years imprisonment. His first appeal to the superior court did not challenge the conviction and was limited to the sentence which the appellant contended was manifestly harsh and excessive. The superior court, (Hatari Waweru J) re-examined the sentence and found, correctly in our view, that the sentence was unlawful. That is because the trial court considered the sentence on the basis of amendments made by Parliament to ***sections 145 (1)*** of the Penal Code by ***Act No. 5 of 2003*** to increase the age of the girl to 16 years and to increase the maximum sentence to imprisonment for life with hard labour. That amendment however came into effect on 25th July, 2003 whilst the offence facing the appellant was committed between 1st January, 2002 and 2nd October, 2002. The provisions of ***section 145 (1)*** of the Penal Code, then applicable, provided a maximum sentence of 14 years imprisonment with hard labour together with corporal punishment. Corporal punishment was, however, outlawed before the appellant was sentenced and therefore he was only liable to imprisonment for 14 years together with hard labour, which was the sentence substituted by the superior court.

In this second appeal the appellant appeals against that sentence, pleading that he was *"remorseful and repentant of what really happened"*; that he was a first offender; that he was a family man with children to feed, and that the excessive sentence ought to be reduced so that he can be free to go home.

What *"really happened"* as the trial court found, which the appellant does not challenge?

The complainant was a 12 year-old primary school girl in standard 4, *("the minor")*. Her mother had died

leaving her and her 8 years old brother under the care of their father, who worked away from home. In his absence, the children stayed with their aunt. The appellant was her father's brother and therefore, her paternal uncle who was a married *jua kali* artisan. They were resident in one homestead in Makueni District. On diverse dates between January and October, 2002, the appellant forcefully had carnal knowledge of the minor on threats that he would kill her if she divulged his activities to anybody else. On the third occasion however, the minor gathered carriage and told her aunt and her grandmother. Her father also returned home and was informed. When the appellant was confronted with the facts he admitted and offered some money (Shs.800/=) to the father so that the minor may be taken to hospital for examination, but the father refused. He reported to the police who had the minor examined by a doctor and the doctor found that she had a perforated hymen thus confirming penetration. The appellant was then arrested and charged with the offence stated earlier.

It is clear to us that in challenging the severity of sentence in this second appeal the appellant did not raise any issue of law to take it beyond the purview of ***section 361 (1) (a)*** of the Criminal Procedure Code. As such the appeal remains one on facts and therefore one in which the jurisdiction of this Court is ousted.

It may be unusual to impose the maximum sentence on a first offender but there is no prohibition for doing so in appropriate cases. ***Section 26 (2)*** of the Penal Code provides:

"(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term."

Sentencing is therefore at the discretion of the trial court. In this case the discretion to impose the maximum sentence was in our view properly exercised as the crime was particularly heinous and the appellant did not offer any plea of guilty to save the court the time taken to hear the matter. We would not have disturbed it even if we had the jurisdiction to do so. The appeal is dismissed.

Dated and delivered at Nairobi this 4th day of March, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR