



IN THE COURT OF APPEAL  
AT NYERI

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

CRIMINAL APPEAL NO. 226 OF 2007

BETWEEN

P.M.N..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nyeri (Kasango, J) dated 28<sup>th</sup> September, 2007*

In

**H. C. Cr. A. No. 189 of 2005)**

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JUDGMENT OF THE COURT

The appellant, **Peter Mwaura Nganga**, was tried and convicted by the Senior Resident Magistrate's Court, Nanyuki, (R.N. Muriuki), 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 life imprisonment. He appealed to the High Court challenging both conviction and sentence. That court (Kasango, J) after re-evaluating the evidence, upheld the conviction, but reduced the sentence to 30 years imprisonment on the ground that the same was "*harsh*" given that the appellant was a first offender.

The evidence before the trial court which that court and the High Court accepted, was that at about **12 noon** on **13<sup>th</sup> March, 2003**, N.N (the complainant), aged eight years, accompanied her father to the river, to feed the cows. As the father, T.N (PW1) continued watching over the cows, he sent the complainant back to the house to warm the food. Just before she reached home, she met her uncle, the appellant herein, who asked her to come into his (appellant's) house. She did so, and he promptly lay her on the bed, removed her clothes, removed his trouser, and had sexual intercourse with her, inflicting considerable pain on her. When he was done, he told her to go home quickly, as he followed her out through the door. Just then, her father arrived, and asked her why she was coming out of her uncle's house, and she told her father what had happened – that she had been defiled by her uncle, the appellant. A neighbour, J.W.M (PW5) also saw the complainant come out of the appellant's house, followed by the appellant. The father, PW1, reported the matter to the police, and took the complainant to Nanyuki hospital where a clinical officer, Mr. Miricho Ndonga (PW3) examined and treated her. In his evidence, Mr. Ndonga confirmed that the complainant had been defiled, that she had bruises on her private parts with white discharge, and that she had been infected with a venereal disease. He also examined the appellant and found him to have syphilis at that time.

In his defence, the appellant simply said that he had been framed by the complainant's father because of a land dispute existing between him and the complainant's father.

However, at the end of it all, the Senior Resident Magistrate believed the prosecution case, rejected the appellant's testimony, convicted and sentenced him to life imprisonment.

The appellant appealed to the High Court, and as we stated before, that court, by its judgment dated **28<sup>th</sup> September, 2007**, dismissed the appeal against conviction, and altered the sentence to 30 years imprisonment.

The appellant is now before us in this second and perhaps the final appeal and that being so the jurisdiction of this Court is confined to considering only issues of law – see **section 361** of the Criminal Procedure Code.

Although the appellant filed long and protracted home-made grounds of appeal, and submitted hand-written submissions, the only real issue in this appeal is the legality of sentence.

Clearly, the sentence of life imprisonment meted out to the appellant herein is unlawful. The trial court appears to have considered the sentence on the basis of the amendments made by Parliament **to section 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 **25<sup>th</sup> July, 2003** whilst the offence facing the appellant was committed on **13<sup>th</sup> March, 2003**.

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 with hard labour.

The High Court, while correctly upholding conviction herein, erred in sentencing the appellant to 30 years imprisonment, clearly an unlawful sentence, at the material time.

Finally, we would wish to note, for the benefit of the learned Magistrate herein, and other judicial officers, that the language used in recording proceedings, should be as nearly as possible the precise language used by the witness. It is inappropriate and, indeed, undesirable to use technical terms, unless the witness actually used those terms. For example, the record of evidence of the complainant herein shows that the complainant stated, among other things, "*that (the appellant) defiled me*"; "*that the person who defiled me is on the dock.*" It is obviously not possible that an eight year old girl would have used those technical words. We would encourage the use of simple language, as nearly as possible the precise words, said by the witness.

Accordingly, and for reasons outlined, we allow the appeal only insofar as sentence is concerned, and quash the sentence of 30 years imprisonment imposed by the High Court, and substitute the same with imprisonment for **14 years** with hard labour to run from the date of conviction by the trial court, that is from **11<sup>th</sup> July, 2005**. Orders accordingly.

Dated and delivered at Nyeri this 28<sup>th</sup> day of October, 2011.

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**