



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

**CRIMINAL APPEAL 25 OF 2006**

**GEOFREY MONGARE ONDIMU .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(An appeal from a judgment of the High Court of Kenya at Kisii (Bauni, J.) dated 5<sup>th</sup> March, 2005**

**in**

**H.C.C.R.A. NO. 2 OF 2003)**

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**JUDGMENT OF THE COURT**

The appellant herein, **Geoffrey Mongare Ondimu**, was arraigned before the Principal Magistrate's Court at Nyamira on a charge of defilement of a girl under the age of 16 years contrary to **section 145(1)** of the **Penal Code**. The particulars of the offence were that on the 14<sup>th</sup> day of November, 2003 at B[particulars withheld] in Nyamira District of the Nyanza Province the appellant unlawfully had carnal knowledge of **SKN** a girl under the age of 16 years. The appellant was also charged with an alternative charge of indecent assault on a female contrary to **section 144(1)** of the **Penal Code**.

The trial of the appellant commenced on 27<sup>th</sup> November, 2003 before the Principal Magistrate at Nyamira (K.W. Kiarie Esq.), when the complainant (**SK**) and other prosecution witnesses testified. The appellant defended himself in a sworn statement on the 1<sup>st</sup> December, 2003. In convicting the appellant on the main charge of defilement of a girl under the age of 16 years, the learned trial magistrate in his judgment delivered on 31<sup>st</sup> December, 2003 stated, inter alia: -

“From the evidence on record therefore, I find that the prosecution has proved its case against the accused person beyond any reasonable doubts (sic) in the substance (sic) charge. I find him guilty and accordingly convict him. I make no findings on the alternative charge.”

Having convicted the appellant on the main charge the learned trial magistrate proceeded to sentence the appellant to thirty (30) years imprisonment. In sentencing the appellant the learned trial magistrate stated: -

**“I have considered that the accused is a first offender. Sexual offences are very serious offences for they touch on the health of the victims considering the high prevalence of HIV/AIDS. They are very repugnant to morality and justice when they touch on small children.**

I am enjoined to mete out a stiff sentence. I sentence the accused to serve 30 (thirty) years imprisonment.”

Being aggrieved by the decision of the trial court the appellant filed an appeal to the High Court challenging both conviction and sentence. The appeal in the superior court came up for hearing before Bauni J. who in his judgment delivered on 5<sup>th</sup> March, 2005 reviewed the evidence adduced before the trial magistrate and in that judgment dismissed the appellant's appeal by stating: -

**“From the above therefore I find that the conviction by the court was proper and based on sound evidence and I therefore uphold the conviction.**

**The appellant did not appeal against the sentence. He was jailed for 30 years. Though he was a first offender he had defiled a girl**

**of 6 years and most properly has ruined her life for good. I don't feel that the sentence of 30 years was excessive or harsh. The offence attracts a maximum sentence of life imprisonment.**

**All in all I uphold the conviction and sentence and dismiss the appeal.”**

From the foregoing it would appear that the learned Judge misapprehended what was before him. In his petition of appeal and supplementary grounds of appeal the appellant's appeal was clearly against both conviction and sentence. The learned Judge re-evaluated the evidence adduced during the trial and came to the conclusion that the appellant's conviction was based on sound evidence and that the sentence was neither excessive nor harsh in the circumstances of the case.

Still aggrieved by the decision of the superior court the appellant has now come to this court by way of second appeal. In his Memorandum of Appeal the appellant sets out the following grounds: -

- “1. That the learned trial magistrate erred in law and fact by relying on the evidence of medical report P3 form which was not fool proof.**
- 2. That both the magistrate and the 1<sup>st</sup> appellate court judge wholly relied on the said medical evidence notwithstanding that the report should have been corroborated with an independent of DNA-Deoxyribonucleic acid. The DNA evidence would have removed any doubt whether the appellant was the perpetrator of the offence**
- 3. That the learned trial magistrate erred in law and fact by not scrutinizing the evidence of the prosecution which was not proved beyond reasonable doubt to prevent a miscarriage of justice.**
- 4. That the appellant beg leave to be served with the trial court proceedings of judgment to enable me erect more reasonable grounds.”**

It would appear that pursuant to ground 4 above the appellant filed a further petition in which he set out six more grounds of appeal. All these grounds are challenging both conviction and sentence. The appellant is challenging findings of fact. No issue of law is raised.

We have endeavoured to set out the journey of the appellant from the trial magistrate's court to this Court. This being a second appeal only matters of law fall for determination. There are concurrent findings of fact by both the trial and the first appellate court as to the appellant's involvement and hence that being the position and since we have no valid reason to interfere with the conviction of the appellant we uphold conviction. As regards sentence we have no jurisdiction to interfere this being a second appeal. By virtue of **section 361(1) (a)** of the **Criminal Procedure Code** this Court cannot entertain an appeal against severity of sentence. The section provides: -

“A party to an appeal from a subordinate court may, subject to sub-section (8), appeal against the decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

**(a) on a matter of fact, and severity of sentence is a matter of fact; or ”**

In view of the foregoing the appellant's appeal must be and is hereby dismissed in its entirety.

**Dated and delivered at Kisumu this 16<sup>th</sup> day of June, 2006.**

**S.E.O BOSIRE**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR