



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1011 of 2003

HENRY KORIR
.....**APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

HENRY KORIR, hereinafter referred to as the Appellant, was arraigned before the Chief Magistrate's Court at Kibera on 23rd July, 2003 charged with one count of defilement of a girl contrary to Section 145 (1) of the Penal Code. He also faced an alternative count of indecent assault on a female contrary to Section 144 (1) of the Penal Code. Following a full trial, the Court convicted the Appellant on the alternative count of indecent assault. Upon conviction the Appellant was sentenced to 21 years imprisonment. The Appellant was aggrieved by both the conviction and sentence and hence lodged this Appeal.

He set out four grounds in his petition of Appeal to wit:-

1. **THAT** the learned trial Magistrate erred both in law and fact in convicting him as charged whereas the evidence adduced in support of the charge thereof did not support the charge.
2. **THAT** the Learned trial Magistrate further erred in law and fact in failing to appreciate that the examination carried out on the Complainant did not connect the Appellant with the offence charged nor did it point to the Appellant's guilt.
3. **THAT** the Learned trial magistrate erred in law and fact in failing to consider the Appellant's defence which had displaced the prosecution case
4. **THAT** the Learned trial Magistrate erred in law and fact in imposing such harsh and excessive sentence.

When the Appeal came up for hearing before me, the Appellant applied to withdraw and or abandon the Appeal on conviction and instead pursue the Appeal on sentence only. The state not objecting, the Appellant's request was granted. Hence the Appeal proceeded on sentence alone.

In support of his Appeal on sentence, the Appellant submitted that the sentence of 21 years imposed by the trial Court on him was harsh and excessive. That he was a first offender and remorseful. Finally the Appellant pointed out that he had already served 2 out of the 21 years imprisonment term imposed.

Mrs. Obuo, Learned State Counsel opposed the Appeal on sentence. She submitted that in sentencing the Appellant to 21 years imprisonment the Learned trial Magistrate took into account the fact that the Complainant was a minor of 3 1/2 years at the time when the offence was committed on her. Counsel submitted that the sentence imposed was neither harsh or excessive. That the maximum sentence the offence attracts is 21 years. That the Complainant sustained injuries between her private parts. Counsel concluded her submissions by stating that the sentence imposed was legal and should not be interfered with.

I have carefully considered the submissions of the Appellant as well as those of the Respondent. The Principles upon which an Appellate Court acts when dealing with issues of sentence are now well settled. To start with in the case of OGALO S/O OWUORA VS REPUBLIC 1954) 19 EACA, 270 it was stated:-

(i). *The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant, he might have passed a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate unless it is evident that the Magistrate acted upon some wrong principles or overlooked some material factors. (See also JAMES VS REPUBLIC (1950) 10 EACA 147)*

2. *The trial criterion is that if the sentence is manifestly excessive in view of the circumstances of the case, the sentence will be disturbed. The Appellate Court should not interfere with the sentence of a lower Court unless it is satisfied that the same was so severe as to amount to a miscarriage of justice. (SEE NILSON VS REPUBLIC (1970) EA 599)*

Finally in the case of WANJEMA VS REPUBLIC (1971) EA 493, the Court stated thus:-

“.....Appellate Court should not interfere with the discretion which a trial Court exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.....”

In a nutshell therefore the Appellate Court will only interfere with the sentence passed by the subordinate Court when it is evident that:-

- (i). The trial Court exercised the discretion wrongly
- (ii). The trial Court acted upon wrong principles
- (iii). The sentence imposed is illegal
- (iv). The sentence imposed is so severe as to amount to a miscarriage of justice.

The offence for which the Appellant was convicted of carries a maximum sentence of 21 years with hard labour. Although the Appellant was a first offender the Learned trial Magistrate found it worthwhile to impose the maximum sentence aforesaid. Although in imposing the sentence, the Learned trial Magistrate stated that the Appellant had been convicted of a morally repugnant offence and that the Complainant sustained severe injuries as a result, I do not think that those were such reasons as would have forced the hand of the Court to impose the maximum sentence. In my view maximum sentence should be imposed in cases where it is shown that the accused is a serial offender with regard to certain classes of offences, for instance, if it is shown that the accused is a serial defiler, or he at least has a previous record of the same offence. That was not the case here. The Appellant was a first offender and although the offence committed was repugnant, I think that the sentence imposed was harsh and excessive in the circumstances. I would therefore interfere with the same to the extent that the Appellant will now serve a jail term of 10 years. I note that the section also calls for imposition of hard labour. The trial magistrate omitted this aspect of the sentence. It shall be imposed.

In the result then I allow the Appeal on sentence to the extend that the Appellant will now serve 10 years

imprisonment with hard labour effective from 24th October, 2003.

Dated at Nairobi this 29th day of March, 2006.

.....
MAKHANDIA

JUDGE