Case Number:	CRIMINAL APPEAL 21 OF 2004
Date Delivered:	08 Feb 2007
Case Class:	Criminal
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	Martha Karambu Koome
Citation:	ZACHARIA WAITHAKA MWAURA v REPUBLIC [2007] eKLR
Advocates:	Mr. Mugambi for the respondent
Case Summary:	Criminal practice and procedure-defilement-appellant charged with defilement and convicted accordingly-appeal against sentence-whether the sentence was harsh in consideration of circumstances surrounding the appellant-whether the appeal had merit-Penal Code section 145 (1)
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

information.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 21 of 2004

[From the original conviction and sentence in Criminal Case No.944 of 2003

Chief Magistrate's Court, Nakuru S. MUKETI (S.R.M)]

ZACHARIA WAITHAKA MWAURA …….. APPELLANT

VERSUS

REPUBLIC …….……..…….. RESPONDENT

JUDGMENT

The appellant ***Zacharia Waithaka Mwaura*** was charged with the offence of **defilement of a girl under 14 years** contrary to **Section 145 (1)** of the **Penal Code**. The particulars of the charge stated that on the 26th day of April 2003 at ***[Particulars withheld]*** Farm Njoro in Nakuru District of the Rift Valley Province had carnal knowledge of ***G A K*** a girl under the age of fourteen years.

The appellant pleaded not guilty to the charges and after a full trial he was convicted and sentenced to fourteen (14) years imprisonment. The appellant has appealed against the sentence imposed by the trial court and in his grounds of appeal, he has pleaded for leniency for reasons he is suffering from acute pneumonia and it is not possible to receive appropriate treatment while in prison. He also states that he is remorseful and regrets the beastly act that lead to his conviction and sentence.

During the presentation of the appeal, the appellant further argued that he was 17 years of age when the offence took place although the court noted that he was 19 years, he ought to have been tried as a child. He contended that the imprisonment to a term of fourteen years is harsh to a child like him and it is not to the best interest as a child like him. He urged this court to set him free as he as trained in carpentry grade 3 while in prison so that he can contribute to national development.

This appeal was opposed by the learned State Counsel ***Mr. Mugambi*** who argued that the offence of defilement was proved by the trial court through the evidence adduced by the prosecution's witnesses. There was medical evidence to prove that the complainant was defiled which was corroborated by the complainant. As regards the sentence Counsel submitted that the same is appropriate considering the seriousness of the offence.

This being the first appeal this court has a duty to re-evaluate the evidence adduced before the trial court and arrive at its own independent decision on whether to uphold the conviction and sentence of the appellant. *See* the case of **Njoroge Vs Republic [1987] K.L.R page 19.**

I hereby wish to review the evidence that was before the trial court briefly. ***G A K***, **PW 1** was the complainant in this matter. After the court duly established whether the child understands meaning of taking an oath, she told the court that the appellant was well known to her. It is important in this matter to state the evidence by **PW 1** verbatim.

*"My names are **G K**. I stay in **[Particulars withheld]** Farm Njoro. I am in class 1. I know the accused. His name is **Zacharia**. He looks after my grandfather's cattle. We have lived with him for a long time. He used to sleep in a house behind the kitchen. When not in school, I used to look after children. I was born in 1995. When we came out of school we are the ones who used to look after the cattle. On 26.44.2004 at 6.00 p.m., I was at home. **Wangare** told me to go and report the accused. The accused used to call me to his house – he used to remove his clothes. He used to tell me to keep the child down. After removing his clothes he used to remove mine. He used to remove his trouser and underwear and he used to remove my clothes and he then used to do me. He used to tell me to raise my legs and he used to put his thing for urinating in mine for urinating. He then used to promise to bring me doughnuts. He used to tell me to go. He used to do this to me when I was in standard 1 and in standard 2. On the 26th he again did this to me. It is in a house we live with Kuwa my uncle. On this day, he removed his trouser and his pant. He removed my clothes... He made me to lie on the bed. He told me to raise my legs. He put his thing of urinating in my private parts. He then told me to go. I was in pain. My mother and grandmother used to live together. It is near. I used to tell Salome what **Zacharia** was doing. We went to look after cows with **Wangare** and I told her. **Wangare** told me to tell my mother. I told her. She told my grandmother. My grandmother, my aunt and mother screamed. He also used to do the same to John. John mentioned it to me. Accused identified. It is my grandmother who pays his salary."*

PW 1's evidence was also supported by that of ***M W***, **PW 2** aged 14 years whom the complainant used to confine in regarding what the appellant was doing to her. She told the court that she advised the complainant to tell her mother and on 29th April 2004, ***J A K***, **PW 3** was told about this sexual assault. She immediately inspected the complainant's private parts and saw that they have been interfered with. She informed her mother about what the appellant who was employed as a cattle herder had done to the complainant and with the help of ***S K M***, **PW 4** they confronted the appellant who attempted to run away. **PW 4** chased him and tied him on his hands and escorted him to the Njoro Police station where he was arrested and booked in by ***P.C Eric Muriungi*****, PW 5. PW 1** was taken to the hospital where she was examined by ***Dr. Vitalis Ogutu***, **PW 6** who filled and signed the P3 form which he produced as an exhibit. He noted that the complainant had a bruised and inframed labia majora, there was discharge on the vagina and his conclusion was that the appellant was being habitually being defiled but there was no penetration.

Put on his defence, the appellant gave unsworn statement and denied the offence.

The evidence before the trial court, rising only the issues of credibility of the witnesses especially the complainant. The trial court accepted the complainant's evidence and this court can not fault that decision which was based on the trial court own assessment of the demeanor and credibility of the witness. Furthermore the evidence of the complainant was corroborated by that of her cousin and her mother. The evidence by the doctor also confirmed that the appellant was being defiled habitually.

Am therefore satisfied that the appellant was convicted based on sound evidence. On the issue of sentence, it is not clear from the proceedings that the appellant raised an issue regarding his age which he is raising in this appeal. It is only in mitigation that the appellant indicated that his age is reflected as 19 years by this is not his age. There is no material before this court to suggest that the appellant was below the age of 18 years when he committed this offence. In this regard, there is no justification for this court to interfere with the sentence imposed by the lower court.

The principles to be considered by the court while exercising its jurisdiction to review or utter a

sentence imposed by the trial court were settled in the case of **Ogalo son of Owuor [1954] E.A.C.A at page 270** where the Court of Appeal held as follows: -

"***The court does not utter a sentence on a mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case***."

Taking the totality of the evidence before the trial court and in particular the sentence that is prescribed by the law, am inclined to interfere with the sentence imposed by the trial court.

In the result, the appeal is dismissed, the sentence imposed by the lower court confirmed.

Judgment read and signed in 8th February 2007.

MARTHA KOOME

JUDGE