



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 109 OF 2007

JOSEPHAT MWAI MAGONDU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence by J.N. ONYIEGO Senior Resident Magistrate

at Kerugoya in Criminal Case No. 1838 of 2006 on 26th June 2007)

J U D G M E N T

The Appellant herein was charged before the Senior Resident Magistrate Mr. J.N. Onyiego Kerugoya with the offence of **Defilement contrary to Section 145(1) of the Penal Code**. He also faced an alternative charge of **indecent assault contrary to Section 144(1) of the Penal Code**. The particulars are contained in the charge sheet. The appellant pleaded not guilty to both charges and the case proceeded to full trial and he was convicted on the principal charge and sentenced to 15 years imprisonment. He was aggrieved by both the conviction and sentence and hence the appeal herein. He raises 5 grounds of appeal:

- 1. The learned trial magistrate failed to consider that there was a grudge between him and the complainant.***
- 2. Medical evidence was not considered.***
- 3. No evidence of bleeding as no exhibit was produced***
- 4. Contradictory evidence adduced***

5. Defence was not considered.

During the hearing of the appeal, the Appellant said he was only challenging sentence and handed in hand written submissions. He pleaded for release as he was remorseful and had reformed. He was now of poor health following his stay in prison.

The state through Ms. Matiru pointed out something in the charge sheet with the words “**carnal connection with A.N.M a girl aged 16 years**”. But she left it to the court. She said the sentence was lenient.

Before I even re-evaluate and re-consider the evidence in the lower court, I wish to deal with two issues of law and these are:

1. The legality of the proceedings on 2 limbs

- **1st - Repeal of Section 145(1) of the Penal Code**
- **2nd – the words carnal connection as appears in the particulars of the charge sheet.**

The Appellant was first arraigned in court on 22/11/2006, when his plea was taken and he pleaded ‘Not Guilty’. He was charged under Section 145(1) of the Penal Code. The Sexual Offences Act repealed a number of sections in the penal code which dealt with sexual offences. And Section 145 of the penal Code is one of such sections. The commencement date of the Sexual offences Act was 21st July 2006. Therefore the case against the appellant herein was not covered by the transitional clauses in the new Act.

The law is clear that one must be charged with an offence that is known in law. As at the date of accused’s arraignment in court there was no offence known as Defilement contrary to Section 145(1) of the Penal Code.

Section 134 of the Criminal Procedure Code states;

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

Even if the appellant had been properly charged under the penal code – the particulars would have been that he had unlawfully had carnal knowledge of the complainant. However in the charge that faced the appellant the particulars were that “**he had carnal connection of A.N.M a girl under the age of sixteen years**”.

What is carnal connection? This was not a term under the then Section 145 of the Penal Code. Did this give reasonable information as to the nature of the offence the accused faced? NO. I can see the learned

trial magistrate in his Judgment states that the Appellant had carnal connection/knowledge.

He must have discovered this discrepancy when it was too late for him to have the charge sheet amended. Had the learned trial magistrate been keen enough and checked the charge sheet as he took plea or even during the hearing he would have saved the situation and called upon the prosecution to amend the charge sheet or he would have rejected the charge under Section 89(5) of the Criminal Procedure Code at the time of taking plea. He did neither of the two.

The principal of the law governing Charge Sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner that the accused maybe able to plead to a specific charge that he can understand. It also enables the accused person to prepare his defence to the charge. This was the holding in the case of ***Sigilai & Another Vs Republic [2004] 2 KLR 280***. The words “**CARNAL CONNECTION**” were ambiguous.

My finding therefore is that the proceedings conducted by the learned trial magistrate were a nullity ***ab initio*** as they proceeded on a nonexistent provision of the law and the particulars did not disclose any known offence under the law. With the above findings, I do not see the need of proceeding to analyze the evidence.

I therefore allow the appeal and quash the conviction and set aside the sentence of 15 years.

The Appellant shall be set free unless otherwise lawfully held under a separate warrant.

DELIVERED, SIGNED AND DATED AT EMBU THIS 26TH DAY OF JANUARY 2012.

**H.I. ONG’UDI
JUDGE**

**In the presence of:-
M/s Matiru for State
Appellant in person
Njue CC**