REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 29 of 2007

MUVENGEI MATANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Kitui PM Criminal Case No. 207 0f 2006 – T. M. Mwansi, RM)

J U D G M E N T

1. The Appellant was charged with **attempted defilement of a girl under the age of sixteen years** contrary to **section 145(2)** of the **Penal Code**. It was alleged that on 2nd February 2006 at about 5.00 p.m., at [*particulars withheld*] of the Eastern Province, he attempted to have carnal knowledge of one **A M K**, a girl of nine (9) years of age.

2. By the time the Appellant was tried, **section 145** (among others) of the **Penal Code** had already been repealed. Purportedly placing reliance upon the transitional provisions in **section 48** and the **First Schedule** of the **Sexual Offences Act** the trial magistrate tried the Appellant under that Act and he was convicted of attempted defilement of a child contrary to **section 9(1)** of theAct. He was sentenced to serve **fifteen (15)** years imprisonment on 7th February 2007.

3. The Appellant has appealed against both conviction and sentence and has put forward five grounds of appeal which, for clarity, can be rephrased as follows-

(i) The complainant was not examined by a doctor on the day of the alleged offence in order to confirm the presence or otherwise of spermatozoa.

(ii) Whereas the Appellant was arrested by PW3 and two other persons, those others did not testify and no reasons were given by the prosecution for the failure to call them as witnesses.

(iii) When the complainant was eventually medically examined there was no evidence of penetration or presence of spermatozoa.

(iv) The trial court did not accord the Appellant sufficient time to prepare his defence.

(v) The Appellant's defence was not considered by the trial court.

4. The Republic supports the conviction and sentence.

5. I have considered the written submissions of the Appellant who was unrepresented, as well as the oral submissions of the learned State Counsel.

6. **Section 48** of the **Sexual Offences Act** provides as follows-

"48. The provisions of the First Schedule shall apply."

The transitional provisions in the First Schedule are as follows-

"1. Notwithstanding the provisions of any other Act, the provisions of this Act shall apply with necessary modifications upon the commencement of this Act to all sexual offences.

2. For greater certainty, the provisions of this Act shall supersede any existing provisions of any other law with respect to sexual offences.

3. Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws."

7. Section 145 of the Penal Code, along with several other sections of the same Code, was repealed by the Sexual Offences Act. See **paragraph 1** of the **Second Schedule**. By dint of paragraph 3 of the First Schedule, the Appellant's trial should have proceeded under the repealed section 145(2) of the Penal Code to its logical conclusion.

8. Section 145(2) of the Penal Code provided as follows before it was repealed on 21st July 2006-

"**145(2) Any person who attempts to have unlawful carnal knowledge of a girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life;**

Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of fourteen years or was his wife."

9. The offence of which the Appellant was convicted under section 9(1) of the Sexual Offences Act was different from the offence under the repealed section 145(2) of the Penal Code. Section 9(1) of the Sexual Offences Act provided-

"9.(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

And subsection (2) of the same section provides-

"(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

10. The offence is different in that under the repealed law the offence was in an attempt to have **"unlawful carnal knowledge of a girl under the age of sixteen years**". Under the Sexual Offences Act the offence is in attempting **"to commit an act which would cause penetration"**.

11. So, not only is the offence different, but the punishment prescribed is also different. Under the repealed law the punishment is **liability to imprisonment with hard labour for life**. Under the Sexual Offences Act the punishment is **liability to imprisonment for a term of not less than ten years.**

12. It was thus a fatal misdirection for the trial court to try and convict the Appellant for an offence

under the Sexual Offences Act, an offence that did not exist in law when the alleged acts of the Appellant were committed. The conviction is untenable in law and must be set aside. It is hereby set aside. Needless to say the sentence imposed upon the Appellant is also set aside.

13. The only other thing to consider is whether I should order a retrial of the Appellant. I think not. The Appellant was convicted and sentenced on 7th February 2007. He has been in prison from that date, a period of over five (5) years. But not undeservedly so. If the Appellant had been properly tried, as he should have been, for the offence under the repealed section 145(2) of the Penal Code, there was overwhelming evidence of his commission of the offence, and I would have had no hesitation in upholding the conviction. The maximum punishment he would have received is life imprisonment with hard labour. He has already served over five (5) years. It is sufficient punishment. I will thus not order his retrial.

14. In the event the Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

15. The delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

DATED AT NAIROBI THIS 29TH DAY OF AUGUST 2012

H. P. G. WAWERU
JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA
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JUDGE