



SIVESTER MUSYOKA MWEMA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from conviction and sentence in Machakos SPM Criminal Case No. 2618 of 2005 – S. A. Okato,SRM)

J U D G M E N T

1. The Appellant was charged with, tried and convicted of **defilement of a girl under the age of 16 years** contrary to **section 145(1)** (since repealed) of the **Penal Code**. He was sentenced to serve 30 years imprisonment. He has appealed against both conviction and sentence.

2. It was alleged in the charge that on 28th September 2005 at Machakos District within Eastern Province he had carnal knowledge of one **LMM**, a girl under the age of 16 years.

3. The Appellant put forth the following grounds of appeal (which I have rephrased for clarity) in his original petition of appeal -

(i) The conviction was based upon inconclusive evidence.

(ii) The trial court erred in basing the conviction upon the uncorroborated evidence of the complainant.

(iii) The sentence imposed was manifestly harsh and excessive.

4. The Appellant also filed supplementary grounds of appeal as follows-

(i) That the trial was a nullity as his fundamental rights under section 72(3) of the **Constitution** (since repealed and replaced) were violated.

(ii) That the charge was fatally defective as it omitted a vital ingredient of the offence – the words “unlawfully and without her consent”.

(iii) That the charge was not proved beyond reasonable doubt as the complainant was not asked to identify the Appellant in court.

5. The Appellant filed written submissions which I have considered. I have also considered the submissions of learned State Counsel for the Respondent.

6. **Section 145(1)** (since repealed) of the **Penal Code** provided-

“145. (1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.

(2) ...

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 above the age of sixteen years or was his wife.”

7. Because of the possible defence set out in the proviso set out above, the unlawfulness of the carnal knowledge is an integral ingredient of the offence under section 145(1) and must be alleged in the particulars of the charge. In the charge facing the Appellant that integral ingredient of the offence was not alleged in the particulars of the offence. The charge was thus fatally defective for that reason, and I so hold.

8. That being my view of the matter, I must allow the Appellant’s appeal. The conviction is quashed and the sentence imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

9. 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