



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO 170 OF 2009

JAMES KAMAU KIHU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

James Kamau Kihui hereinafter referred to as the Appellant was charged before the SRM Kerugoya Court with the offence of defilement of a girl contrary to **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006**. He faced an alternative charge of indecent assault on a female contrary to **Section 11(1)** of the same Act. He was tried and convicted on the main count and sentenced to life imprisonment. Being dissatisfied with the said conviction, he filed this Appeal through Igati Mwai & Co. Advocates.

The particulars of the 1st count are as hereunder:-

“On 14th day of June 2008 at around 1600 hours at K Village in KIRINYAGA DISTRICT... had “CARNAL CONNECTION” of T.W.G a girl aged 6 years”.

The defect of the charge was pointed out by counsel for the Appellant before the trial court but the learned magistrate made a ruling that the charge was not defective. As rightly conceded by learned counsel for the state, this charge was fatally and manifestly defective. As the particulars stand, they do not spell out any offence. There is no ingredient defined as “carnal connection” in the Sexual Offences Act. It is not clear where the drafter of the charge sheet got it from or what it actually means.

That charge in my considered view discloses no triable offence. It follows therefore that the conviction of the Appellant was based on a defective charge and the conviction based thereon cannot therefore be sustainable. This Appeal was therefore properly conceded by the state. I allow the same and quash the conviction and set aside the sentence.

Learned counsel for the state has nonetheless entreated the court to order a retrial. He submitted that the complainant who was aged 6 years was candid in her evidence and that the same was corroborated by the medical evidence. Is a retrial tenable in the circumstances? Whether or not to order a retrial is determined by the circumstances of each case.

Principally, the court will consider whether the interests of justice will be served by a retrial. The court will also consider if the evidence adduced before the trial court was otherwise sufficient to support a conviction. As stated by the court of Appeal in the case of **MWANGI VS REPUBLIC (1983) KLR 522**

“An order for a retrial is the proper order to make when an Accused has not had a satisfactory trial and a retrial should not be ordered unless the Appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result”.

In this case, I have perused and carefully considered the evidence adduced before the trial court. It is my finding that were it not for the defect in the charge, the rest of the evidence could have resulted in a safe conviction.

I need not say more lest I run into the danger of influencing the future trial court.

I also note that the appellant was sentenced slightly over 1 year ago and a retrial will not therefore be prejudicial to him. This is my view is a good case for a retrial. I therefore order that the Appellant herein be released forthwith from prison custody. He will nonetheless be transferred to Kerugoya police station for the proper charges to be framed and for him to be escorted to Kerugoya court for trial by a magistrate with jurisdiction other than Mr. S.N. Mbungi.

I so order.

W. KARANJA

JUDGE

Signed by the above but Delivered and dated at Embu this 27th day of January 2011

H.M OKWENGU

JUDGE