



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 47 OF 2008

ANTHONY IRUNGU KINYUA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

The Appellant was charged with the offence of attempted defilement of a girl under the age of 16 years contrary to Section 145(2) of the penal code. He faced an alternative charge of indecent assault on a female contrary to Section 144(1) of the penal code. The particulars of count 1 on which he was found guilty and convicted stated that on the date, time and place in question the Appellant “attempted to have carnal connection of J.N.W a girl of under age of 16 years”. He was convicted on that charge and sentenced to 10 years imprisonment. Aggrieved by the conviction and sentence, he filed this Appeal through Igati Mwai Advocate. He proffered 5 grounds of Appeal. Learned counsel for the state nonetheless conceded the appeal not on any of the grounds raised by the appellant but on the ground that the charge was fatally defective. I too am of the view that the charge was indeed fatally defective and the same could not found a conviction. There is no ingredient in a charge of defilement known as “unlawful connection”. I do not need to go into the details of why the charge is defective. I will only state that the particulars as they are do not disclose any offence. The Appeal ought therefore to be allowed on that ground only.

The learned counsel for the state has requested for a retrial – a request which was strongly opposed by the defence counsel. Is a retrial tenable in the circumstances of this case? The broad principles which the court needs to consider before ordering a retrial is whether such an order would be in the interests of justice and whether the same would be prejudicial to the Accused. The court also must look into the evidence adduced and see if the same would sustain a conviction if the retrial is ordered. In this case, counsel for the Appellant has submitted that the evidence was all based on hearsay and the same would still not have supported a conviction had the charge not been defective. I have perused and carefully considered the evidence before the trial court. The complainant did not testify. Her mother who was said to have testified on her behalf did not even see the complainant either with the Appellant or leaving the

appellant's house. The charge was also not supported by the medical evidence. Even if I were to order a retrial, the evidence before court would not suffice to support a conviction.

The Appellant has also served almost ? of his sentence and it would be grossly prejudicial to him to order that he be retried. For these two reasons, I allow this Appeal in its entirety, quash the conviction and set aside the sentence of 10 years imprisonment. I further order that the appellant herein be set at liberty unless he is otherwise lawfully held.

W. KARANJA

JUDGE

Signed by the above but delivered and dated by the undersigned at Embu this **10th day of February 2011**

H. M. OKWENGU

JUDGE

In presence of:- Matiru for state, Accused.