



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 141 of 2009

SAMUEL LIMARENG SHAKAMERAPPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged and convicted of rape contrary to section 140 of the Penal Code by Bungoma Resident Magistrate. He was sentenced to seven (7) years imprisonment. He appeals against both conviction and sentence.

Mr. Situma for the Appellant argued all the grounds of appeal together. He submitted that the age of the complainant was not established. Secondly, that it was not established that the complainant was ever examined or treated. The charge is defective according to the Appellant and does not disclose an offence.

The Senior Principal State Counsel, Mr. Onderi conceded to the appeal. He agreed with the defence that the charge was defective having omitted some material particulars. There was no corroboration to the evidence as required by the law at that time since the Appellant was charged under the Penal Code. The state further submitted that the offence was not proved beyond reasonable doubt.

As for the charge sheet, I agree that the word “*unlawfully*” was committed under section 140 of the Penal Code an offence will only be disclosed where the act is unlawful as defined. The omission of the word “*unlawfully*” is fatal to the charge given the fact that the offence charged is pegged on that material word. The charge was defective and could not sustain a conviction.

On the evidence adduced, the key witnesses PW1, PW2 and PW3 contradicted themselves on the age of the complainant. For one to be convicted of rape, the age of the complainant has to be established that she was over 14 years. This was not done. The doctor said that the P.3 form did not indicate whether the complainant had been treated before examination. The P.3 form was filled about three months after the incident. This complicates the case further in that corroborative evidence which would have assisted in proof of the case was lost.

The accused who was a prison warder denied the offence and said he had signed off duty at the material time and returned his gun. His defence notwithstanding, the prosecution’s case was a mess bound to fail. Starting with a defective charge and followed by contradictory evidence, the prosecution cannot prove the case even if it was sent for retrial. I find it not suitable for retrial due to want of proof.

It is my finding that the magistrate erred in proceeding to hear the case and convict the Appellant on the basis of a defective charge. The contradictions in the evidence and lack of corroboration are issues which were not addressed in the judgment.

For these reasons, the appeal is successful. I therefore set aside the conviction and sentence. The Appellant is therefore set at liberty unless otherwise lawfully held.

F. MUCHEMI

JUDGE

Dated, delivered and signed at Bungoma

This 19th day of January, 2010 in the presence of the Appellant, the defence counsel Mr. Situma and the state counsel.

