



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 177 of 2009

**(Appeal arising from the judgment of [MS. M.I.G. MORANGA, SRM]
in the Chief Magistrate's Court at Kakamega
in Criminal Case No.3441 of 2006)**

Z.K.J..... APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

1. At the hearing of the present Appeal, Mr. Karuri, learned Senior State Counsel conceded that the conviction and sentence on the main count of defilement contrary to **Section 8 (2)** of the Sexual Offences Act was in error and that the Appellant should in fact have been convicted of the alternative charge of indecent assault contrary to **Section 11 (1)** of the Act.

2. In conceding to the Appeal in the above terms, Mr. Karuri agreed with the Appellant that age is a crucial factor in sexual offences under **Section 8** of the Act and I also agree.

3. In the charge sheet, the Appellant was charged with defiling N.C, *"a girl aged 16 years."* In evidence however, her age became completely unclear. I say so because the complainant, PW1, said as follows, in examination-in-chief;

"I am 16 years old."

In cross-examination she said;

"I was married on 4/9/2006. I am 16 years old. I was born in 1990."

4. The above evidence was being tendered on 28.2.2007 and so she could well have been slightly over 16 years and approaching 17 years.

5. PW3, father of the complainant said;

"My daughter was born in March 1992,"

This evidence was being tendered on 6.12.2007.

6. PW5, Kizito Sifuna, Clinical Officer, stated as follows-

“.....she was approximately between 15 to 17 years.”

In the P3 Form (Exhibit, 1), the age of the complainant was given as “17 years” on page 1 and “15 years” on page 3. These contradictions are material because **Section 8** of the Sexual Offences Act provides for sentences depending on the age of the victim.

7. Further in Hamisi vs R. [1991]KLR 93, Wambilyanga J. held as follows;

“The learned magistrate thus misdirected himself in law when he conducted a trial of the appellant on a charge which was misconceived, inappropriate and unsuitable to the given facts. As soon as the age of the girl appeared to be under 14 years the learned magistrate should have realized that the charge of rape was a wrong one as a conviction on it would only be recorded after it was established that she had not consented to the alleged sexual intercourse.”

8. I adopt his reasoning as applies to this case and I find that no charge, where age was contested, could properly be proved in such circumstances. The count of defilement under **Section 8 (1)** of the Act was not proved and the court could not convict under any of the subsections to Section 8.

9. I will therefore allow the appeal on the main count. What then do I do in respect of the alternative charge under **Section 11 (1)** of the Act?

10. In her judgment, the learned Senior Resident Magistrate had this to say on that count;

“I make no judgment on the alternative count of indecent assault since the main charge has been proved against the accused person.”

11. What I gather is that because she had already convicted on the main count, no alternative decision could be made and I agree. Mr. Karuri however argues that since he was not acquitted of that count, this court can convict him accordingly. Again I agree. This court has the mandate to look at the whole case afresh and if an offence is disclosed in the alternative count, having allowed the appeal on the main count, then it can properly convict on the alternative charge.

12. What amounts to indecent assault? In Gitau vs R. [1983] KLR 222, it was held inter - alia as follows;

“1. An assault accompanied by utterances suggestive of sexual intercourse is an indecent assault. The touching, for example, of the breasts or private parts of a female without being accompanied by utterances suggestive of sexual intercourse is also indecent assault. The test is usually whether the assault was intentional and whether it was indecent. A simple assault may constitute indecent assault if it is accompanied by utterances suggestive of sexual intercourse.

2. The intention indecently to assault the female must be evidenced by the assault itself. The offence is complete if a female is indecently treated by touching her private parts even if the intention is not sexual intercourse.

3. To strip a female naked constitutes indecent assault even if it is done for the

sake of it and it is not accompanied by further indecent gestures either by speech or physical contact. To march the female who has been stripped naked in a street aggravates the indecent assault.”

- 13.** It is important to note that from the above elucidation of the law, the age of the female is not important. In the present case, it matters not whether the complainant was 15, 16 or 17 years. What matters is whether the Appellant, did anything that would constitute indecent assault.
- 14.** From the evidence of PW1, N.C, the complainant stated that her uncle, the Appellant entered their house on the material date, removed his trouser, tore off her underpants and then penetrated her sexual organ. When he was done, she immediately told her grandmother and later her father. The next day, the Appellant tried to commit suicide by swallowing rat poison.
- 15.** PW2, R M, saw the Appellant outside PW1’s father’s compound and when she was in her house, PW1 ran in and told her that she had been defiled and the Appellant had threatened her with a knife. The next day, as the family gathered to deliberate over the matter, the Appellant took poison.
- 16.** PW3, I.M, father of the complainant received the report of the incident on the same day i.e. 3.4.2006 and the next day, he informed his own father what had happened and when the Appellant was summoned, he took poison.
- 17.** To my mind, the evidence of the complainant was unshaken, the offence was committed by her paternal uncle. She immediately reported the incident to her grandmother who had seen the Appellant at the scene, minutes before PW1 made her report. PW2 confirmed that she saw the torn underpants worn by PW1 and her father received the same report the same day. He acted by calling a family meeting but the Appellant took rat poison. That evidence also prints to guilt on the part of the Appellant. I see no reason to disbelieve it and the defence that the case was triggered by bad blood between him and PW1’s father was an afterthought. I dismiss it as such and even if a dispute over land existed, it cannot be the basis for dislodging the clear-cut evidence that the Appellant committed a sexual offence alone and with no land as the prize for his bravado.
- 18.** In the end, I find that the appellant ought to have been acquitted on the main count of defilement but ought and is hereby convicted of the alternative count of indecent assault contrary to **Section 11 (1)** of the Sexual Offences Act.
- 19.** That being the case, the Appellant is sentenced to serve twenty (20) years imprisonment from 11.11.2009. The prior sentence of 15 years is set aside.
- 20.** Orders accordingly.

Delivered, dated and signed at Kakamega this 21st day of April, 2010

**ISAAC LENAOLA
J U D G E**