



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Criminal Appeal 198 of 2009
DANIEL MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant herein was originally charged with the offence of Rape contrary to section 140 of the penal Code with an alternative charge of indecent assault on a female contrary to Section 144(1) of the penal code. The offences are said to have been committed on 19.04.2003 which was long before the enactment of the Sexual Offences Act No. 3 of 2006. He pleaded not guilty to both the main and the alternative charges. The matter dragged in court and it was still pending when the Sexual Offences Act was enacted and sections 140 and 144 of the Penal code repealed.

On 28.04.08, the prosecutor presented an amended charge sheet before the court. The Appellant was charged with incest contrary to Section 20(1) of the Sexual Offences Act with an alternative of indecent Act contrary to Section 11(6) of the Sexual Offences Act.

The trial proceeded and he was found guilty and convicted on the lesser charge of indecent act Contrary to Section 11(6) of the Sexual Offences Act. He was sentenced to 5 years imprisonment.

Being aggrieved by the said conviction and sentence, he filed this Appeal. He proffered 4 grounds of Appeal through Mogusu & Co. Advocates. I must say however that none of those grounds would have persuaded me to allow this Appeal. Indeed the only ground worth mentioning here is ground No. 4 where the Appellant claims that the proceedings were conducted in Kiswahili while the appellant understood Kiambu language.

I have perused the record before the trial court. I agree that the language used in court was either Kiambu or Kiswahili. I do note however that the Appellant in his defence opted to testify in Kiswahili language. This clearly shows that he understood Kiswahili language which he made his language of choice for purposes of giving his evidence. He cannot therefore turn round in this appeal and claim that he did not understand Kiswahili.

It is noted that Mr. Mogusu never raised the issue of the illegality of the sentence as one of his grounds of Appeal. He appears to see the light when he came to court to present the Appeal. Section 350(2) of the C.P.C. precluded him from raising that ground. This provision

states in part;

“...The Appellant shall not be permitted, at the hearing of the Appeal to rely on a ground of Appeal other than those set out in the petition of Appeal.”

I nonetheless allowed him to proceed after the state counsel indicated that he was going to concede with the Appeal. The learned counsel for the state conceded the Appeal on the ground that the conviction was based on a non-existent provision of the law. The conviction was done under Section 11(6) of the Sexual Offences Act which was repealed by Act No. 7 of 2007 and which was therefore not part of our laws by the time the Appellant was charged with the said offence. This was contrary to Section 77(15) of the Constitution of Kenya which provides:-

“In this section, “criminal offence” means a criminal offence under the law of Kenya”

There was no law in Kenya creating the offence the Appellant was convicted for as at the time he was charged, tried and convicted.

This Appeal therefore succeeds on that ground only.

I am satisfied that the Appeal was properly conceded. I allow the same and quash the conviction and set aside the sentence imposed by the trial court.

I also direct that the Appellant be set at liberty unless he is otherwise lawfully held.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 15th day of July 2010.

In presence of:- Ms. Matiru for the state.