



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

**AT NYERI**

**Criminal Appeal 154 of 2006**

**DANIEL KIRAGU KAGAI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the conviction and sentence of*

*M.R. GITONGA Principal Magistrate in Chief Magistrate's*

*Criminal Case No. 4003 of 2004 at NYERI)*

**JUDGMENT**

The appellant DANIEL KIRAGU KAGAI was charged in the Chief magistrate's court, Nyeri with the offence of defilement of a girl contrary to the then section 145(1) of the Penal Code. He also faced an alternative charge of indecent assault on a female contrary to the then section 144(1) of the Penal Code. He pleaded not guilty to both charges and he was tried. However at the end of the trial, he was convicted of the main count of defilement and sentenced to a term of 15 years imprisonment.

Being aggrieved by the said conviction and sentence the appellant has preferred this appeal through Messrs S.K. Njuguna & CO Advocates setting out 9 grounds of appeal as contained in his "Memorandum" of appeal dated 22<sup>nd</sup> August, 2006. Ideally it should be intituled "Petition of appeal." In my view however, ground one is sufficient to dispose of this appeal. In that ground the appellant has complained that the evidence led in respect of count I and which was the main count and for which he was convicted did not disclose an offence known in law. The particulars in the charge sheet were stated as follows:-

"DANIEL KIRAGU KAGAI: On the 2<sup>nd</sup> day of November, 2004 at Nyeri district of the Central province, had carnal knowledge of SW a girl under the age of 14 years."

Section 145(1) of the Penal Code provides that a person who "unlawfully" and carnally knows a girl under the age of fourteen years is guilty of a felony." Thus failure to include the word "Unlawful" in the particulars of the charge sheet rendered count I bad in law. In the case of *NGENO-VS-REPUBLIC [2002] 1 KLR 457 the High Court (Ondeyo J)* whilst dealing with a similar situation like the one obtaining herein stated in her judgment at page 459 thereof thus:-

*"A charge under section 145(1) of the Penal Code must, in the particulars include the word, "Unlawful". Failure to state in the particulars that the carnal knowledge was unlawful, renders the*

*charge fatally defective, as was held by the court of appeal in the case of DANIEL NYARERU ACHOKI-V-REPUBLIC, Criminal Appeal No. 6 of 2000.”*

As a result of omitting the word “unlawful” the court in NGENO’S case held that the charge did not disclose any offence and the appellant was wrongly convicted. The appeal was therefore allowed.

In the case of *DANIEL NYARERU ACHOKI -V-REPUBLIC, Criminal Appeal No. 6 of 2000 (UR)* referred to in the judgment of Ondeyo J aforesaid the appellant had been convicted of attempted rape, the court of appeal observed,

*“So a charge of rape must allege in its particulars:-*

- (i) that the act of sexual intercourse was unlawful;*
- (ii) that the act of sexual intercourse was without the consent of the woman or girl.*

*We suppose it is the lack of consent which makes the act of carnal knowledge unlawful, but the section uses both expressions, that is “unlawful” and “without consent” and the prosecution would be well advised to use both. Whether the charge be one of rape under section 140 or attempted rape under section 141 of the penal code the particulars must nevertheless state that the attempted unlawful carnal knowledge was without consent of the woman or girl.”*

The particulars of the offence of defilement upon which the appellant was convicted did not state that the carnal knowledge of the complainant by the appellant was unlawful. That being the case that charge did not disclose an offence known to law and the appellant was thus wrongly convicted of it. Mr. Orinda, learned senior principal state counsel, shares the same sentiments as the court on the issue. Indeed he boldly stated that this was a bizarre case as it suggested that defilement was lawful. The charge sheet is defective as it did not indicate that the defilement was unlawful. He therefore conceded the appeal on that ground.

Mr. Njuguna, learned counsel appeared for the appellant and forcefully argued the defectiveness of the charge as outlined above. Indeed he was responsible for digging up all the authorities that I have referred to herein above.

Mr. Orinda was thus right in conceding to the appeal. Accordingly I allow the appeal, quash the conviction recorded against the appellant, set aside the sentence imposed and order that the appellant be set at liberty forthwith unless held for some other lawful cause. Those shall be my orders in the appeal.

*Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**