



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal Case 327 of 2005

JULIUS MUMUNYU KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence in Senior Resident Magistrate's Court at Kigumo in Criminal Case No. 344 of 2005 dated 5th June 2005 by L. Nyambura Senior Resident Magistrate)

JUDGMENT

The Appellant herein **JULIUS MUMUNYU KAMAU**, was charged with the offence of defilement of a girl contrary to *Section 145 (1)* of the Penal Code. Particulars being that on the 11th day of February, 2005 at Maragua District of the Central Province he, had carnal knowledge of M N, a girl under the age of sixteen years. He also faced an alternative charge of indecent assault of a female contrary to *Section 144 (1)* of the Penal Code. Particulars being that on the 11th day of February, 2005 at Maragua District of the Central Province, unlawfully and indecently assaulted M N by touching her private parts.

The Appellant denied the charge and his trial ensued. The prosecution called a total of seven (7) witnesses. P.W. 1 Dr. Lyndon Marani testified that he examined the Complainant on 14th February, 2005 with a history of defilement. Upon examining her he noted that she had oedema of labia majora and minora and also inflammation of labia minora. Though the hymen was intact, the vagina wall was inflamed. She had fluid discharging from the said area. She had pus cells and bacteria which was consistent with STD. He concluded that the girl had been infected with STD. She also told the Court that he examined the Appellant who was also positive with pus cells and when pus cells were examined, they had bacteria consistent with STD. He then produced the P3 forms in Court in respect of the Complainant and the Appellant.

P.W. 2 EN was the mother to the Complainant. She testified that as she was washing her daughter the Complainant herein on 12th February, 2005, she jerked with pain and started to cry. Her daughter confirmed to her that she had been sexually assaulted and when she checked her genitalia, she found it swollen and had burns with watery discharge. She took her to hospital and reported the matter to Maragua Police Station. She told the Court that the Complainant had told her that it was Mumunyu, the Appellant who had sexually assaulted her.

P.W. 3, MM the grandmother to the Complainant also testified. Her testimony was to the effect that she was informed of the fact that the Complainant was crying while being washed. That when she was asked

what it was, she said that the Appellant had sexually assaulted her. She then checked on the Complainant's genitalia. It was swollen and she had some discharge. Matter was then reported to the Police.

P.W. 4 NJN the father of the Complainant, testified along the same lines as P.W. 2 and P.W. 3. However, he maintained that when they asked the Complainant who had defiled her, she told them it was the Appellant who had even threatened her in the event that she was to report the said incident to any person.

P.W. 6 the Complainant M NN testified that the Appellant sexually assaulted her after inviting her to his house on her way from school so that he could give her mangoes. He later laid her on his bed and defiled her.

P.W. 5 P.C. Gakii told the Court that she received a report of defilement and took Complainant to hospital.

P. W. 7 P.C. Charles Macharia arrested the Appellant and escorted him to Maragua Police Station. He was then charged with the present offence.

The Appellant denied the offence and claimed that he was framed in the case.

The trial Court having carefully considered and evaluated the evidence tendered, found the case against the Appellant proved to the required standard, convicted the Appellant and sentenced him to 20 years imprisonment with hard labour. Aggrieved by the said conviction and sentence, the Appellant preferred the instant appeal lamenting that the learned Magistrate erred in law and fact in not evaluating the evidence tendered properly, in not indicating the language in which some of the witnesses testified, in holding that the offence had been proved when there was no evidence of penetration and finally that the sentence imposed was manifestly harsh and excessive.

When the appeal came up for hearing, the Appellant, with the permission of the Court, tendered written submissions which I have carefully read and considered. Mr. Orinda, Senior Principal State Counsel, appeared for the State and opposed the appeal. He submitted that the Appellant was well known to the witnesses. The medical evidence showed that the Complainant was infected with STD. The Complainant too at the time was also infected with STD. The evidence was circumstantial and direct. The allegation of a frame up did not hold any water. The Complainant could not have infected herself with STD merely to frame the Appellant. The conviction of the Appellant was thus safe and the appeal ought to be dismissed.

As a first Appellate Court, I have carefully evaluated and considered the evidence tendered before the trial Court bearing in mind, however, the injunctions stipulated in the case of OKEMO V REPUBLIC (1972) E.A. 32.

However, I think this appeal can easily be disposed off on a technicality. Apparently both the Appellant and the Learned Senior Principal State Counsel missed this technical point in their submissions. However, as a first Appellate Court, I am bound to consider it whether or not it has been raised by either of the parties in their submissions. What is the technical point in issue here? To my mind, the evidence led in respect of the main Count and for which he was convicted did not disclose an offence. The particulars in the charge sheet stated that:

“JULIUS MUMUNYU KAMAU: On the 11th day of February, 2005 at G Village in Maragua District within Central Province had carnal knowledge of M N a girl under the age of sixteen years.....”

Section 145(1) of the Penal Code under which the Appellant was charged provides that a person who unlawfully and carnally knows a girl under the age of sixteen years is guilty of a felony. Thus failure to include the word “unlawful” in the particulars of the Charge Sheet rendered the main count bad in law. In the case of NGENO V REPUBLIC (2002) 1 KLR 457, Ondeyo J (as she then was), whilst dealing with a similar situation like the one obtaining herein stated in her judgment as follows:

“.....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, Cr. Appeal No. 6 of 2000.”

In the case of DANIEL NYARERU ACHOKI (Supra), 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, the Charge Sheet did not disclose an offence known to law and the Appellant was thus wrongly convicted of it.

On this ground alone, I would allow the appeal, quash the conviction and set aside the sentence of 20 years imprisonment plus hard labour imposed on the Appellant by the trial Court. The Appellant shall forthwith be set at liberty unless held for some other lawful cause.

Dated and delivered at Nyeri this 29th day of January 2009.

M. S. A. MAKHANDIA

JUDGE