



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

Criminal Appeal 319 of 2008

CHARLES KARUGA KINYUA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Karatina in Criminal Case No. 1171 of 2006 dated 24th November 2008 by L. Mbugua – Ag. P.M.)

J U D G M E N T

CHARLES KARUGA KINYUA whom I will hereafter refer to as “*the appellant*” was convicted and sentenced to serve ten (10) years imprisonment for the offence of sexual assault contrary to section 5(1) (b) of the Sexual Offences Act. He appeals to this court against both conviction and sentence and has preferred 6 grounds through **Messrs Ng’ang’a Munene & Co. Advocates** to wit:-

“1. That the learned magistrate erred in law for totally

failing to consider the appellant defence in her judgment thus ignoring the tenet rules of natural justice. A miscarriage of justice was therefore occasioned.

2. That learned magistrate in both law and fact in failing

to consider that the prosecution had totally failed to establish a case against the appellant on (sic) the required standards.

3. That learned magistrate erred in both law and fact in

failing to consider that the prosecution witness’ evidence was riddled with contradictions and thus totally insufficient to support a conviction.

4. The learned magistrate erred in law in failing to

consider that the charged (sic) sheet was totally defective in failing to state the act complained of was unlawful and/or the time of committing the offence.

5. The learned magistrate failed in law in failing to

inquire and uphold that the appellant’s constitutional rights under Section 72(3)(b) of the constitution had been infringed.

6. The learned magistrate erred in law and act (sic) for

failing to consider that the prosecution had failed to establish the age of the complainant at the time of the alleged offence was committed. A miscarriage of justice was therefore occasioned.

I shall deal with the 4th ground of appeal because if it succeeds, then it will have disposed of the entire appeal. In the said ground of appeal, the appellant contends that the charge sheet was defective in failing to state that the sexual assault was “unlawful”. In other words the charge was defective in that the word unlawful was not inserted in the particulars of the charge sheet. Section 5(1) (b) of the sexual offences Act under which the appellant was charged provides interlia:-

“Any person who unlawfully –

(a)

(b) **Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body is guilty of an offence termed sexual assault”.**

The particulars of the charge that faced the appellant in the trial court were framed as follows:-

“..... On the 3rd day of December 2006 at in Nyeri District of the Central Province manipulated your genital organs and committed an act of penetration to the anus of PWN a juvenile aged 16 years.”

To my mind the section under which the appellant was charged as aforesaid makes it clear that the offence is committed if the act of sexual assault is unlawful. It is clear from the wording of the section that sexual assault, *per se*, is not an offence. The sexual assault must be unlawful. Of course the mere mention of the words sexual assault by themselves connote that the act was without consent and therefore unlawful. However there must have been a reason for the framers of the statute to insist on the word “*unlawful*” in the particulars of the charge sheet even if the words sexual assault are sufficient to show that the act complained was unlawful.

Given the foregoing, a charge under the said Section must, ipso facto in the particulars thereof include the word, “*unlawful*”. Failure to state in the particulars, that the sexual assault was unlawful, renders the charge fatally defective. For this holding, I would draw corollary from the court of appeal decision in the case of **Achoki v/s Republic (2000) 2 E.A. 283**. In this case it was an appeal which involved an offence of attempted rape under section 141 of the Penal Code that was in issue. The charge sheet had failed to include the word “*unlawfully*” in its particulars though in the section creating the offence it has just in this case been inserted. The court held that a charge of rape, or attempt of it, must allege in the particulars that:

- 1. the act of sexual intercourse was unlawful and,**
- 2. that the act of sexual intercourse was without the consent of the woman or girl.**

The charge in that case did not state that the attempted carnal knowledge was unlawful and without the consent of the complainant. The court went on further to hold that the said charge did not disclose an offence and that the appellant in that case had been wrongly convicted. The same situation obtains here. Much as the court of appeal was dealing with the offence under the penal code and not as here where we are dealing with sexual offences Act the same reasoning applies. As can be gathered from the particulars of the charge presented in the trial court, there was no allegation that the sexual assault was unlawful, yet it is the unlawfulness that makes the sexual assault an offence. The particulars of a charge under the said section of the Sexual Offences must allege that the assault was unlawful otherwise, no offence is disclosed. I find that the charge in the present case did not therefore disclose an offence, and the appellant was wrongly convicted.

Mr. Orinda, learned Senior Principal State Counsel however conceded to this appeal on another ground. That there was no sufficient evidence of sexual assault. Indeed the said evidence was at variance with the charge sheet as one could not tell whether it was a case of sexual assault or defilement.

Mr. Nganga, learned counsel for the appellant supported **Mr. Orinda's** position. He submitted however further that there was nothing to show that any sexual assault was committed on the complainant nor was the age of the complainant proved and finally there were numerous contradictions in the prosecution case.

I totally agree with all the foregoing. Indeed I would still have allowed this appeal on those grounds. The evidence of the complainant and her witnesses was completely at variance with the charge sheet. The charge sheet talks of sexual assault by way of penetration of the complainant's anus. In her evidence in chief the complainant went along those lines initially. However under cross-examination, she was not sure whether the penetration was through her anus or her vagina. Yet when she reported the incident to her brother, **FMN**, she stated that the appellant had thrown her on the ground and raped her. She further told him that the appellant had seduced her and promised to use a condom. So was this case of defilement or sexual assault.

There were also numerous contradictions in the evidence of the complainant that went to the root of the prosecution case. The complainant was not sure whether the defilement and or sexual assault was committed on her as she stood against the tree or on the ground. There were contradictions as to when she made the first report of the incident to her brother and the circumstances of the attack. These contradictions could not have been a mere coincidence considering the fact that the appellant, complainant and most of her witnesses were related. Indeed the appellant was a cousin of the complainant. Given this relationship is it possible that our criminal justice system was maliciously invoked to by the complainant settle family scores and or discord. That possibility cannot be ruled out.

In the result I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of November 2009

M. S. A. MAKHANDIA

JUDGE