

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 338 of 2004

B R W.....**APPELLANT**

Versus

REPUBLIC.....**RESPONDENT**

(Being appeal against the conviction and sentence of T. W. Murigi, Senior Resident Magistrate, in the Senior Principal Magistrate's Criminal Case No. 612 of 2004 at Murang'a)

JUDGMENT

The Appellant faced the charges of defilement of a girl under the age of 14 contrary to *Section 145(1)* of the Penal Code and in the alternative a charge of indecent assault of a female contrary to *Section 144(1)* of the Penal Code. After the hearing before the lower court, the Appellant was convicted of the charge of defilement. The Court on 14th October 2004 sentenced the Appellant to life imprisonment with hard labour. The Appellant preferred this appeal raising various grounds relating to the prosecution's case. When the appeal came up for hearing on 6th June 2007, the Appellant indicated to the Court that he was abandoning all the grounds of appeal except that he was now appealing against his sentence. The State in response was of the view that the sentence meted out to the Appellant was legal and proper. The evidence presented before court was by the mother of the child that was assaulted. The evidence shows that at the time of the offence the child was 1½ years old. The Appellant is a brother to the mother of the child. The Complainant's mother gave evidence of how she had left the child on the bed and she went out to the garden. On her return she found the Appellant who was then in her house standing next to the bed and was assaulting the child. She confirmed that on approaching the Appellant covered his private parts and zipped his trouser. The evidence of P.W.3 was by the doctor who examined the child a day after the assault. The doctor was able to confirm that there were bruises to the external genitalia. The doctor also found that there was a tear on the posterior side of the baby's vagina. The vaginal swab that was taken from the child showed signs of trauma. The doctor concluded that there was attempted defilement but there was no penetration. The doctor found that the baby had suffered infection which was due to the bruising. The Appellant in his defence stated that he did not go to his sister's house but rather that he was in his mother's house at all time when the offence occurred. He further stated that the mother of the child had a grudge against him. The Appellant in the case of the charge for defilement, faced the following particulars of the offence:

“On the 26th day of December 2003 at [particulars withheld] village in Muranga district of the Central Province had carnal knowledge of E W W a girl under the age of 14 years.”

This is the charge that the Appellant was convicted by the lower court. *Section 145(1)* provides as follows:

“Any person who unlawfully and carnally knows any girl under the age of fourteen years is guilty of a felony and is liable to imprisonment with hard labour for fourteen years together with corporal punishment.”

It is clear from that section for one to be convicted of that offence the particulars of the offence in the charge ought to specify that the carnal knowledge was unlawful. As can be seen in the particulars stated hereinbefore the same did not state that the carnal knowledge was unlawful. In the case of **ACHOKI -V- REPUBLIC (2002) 2 E.A. 283** the Court of Appeal in considering an appeal relating to *Section 141(1)* of

the Penal Code found that the failure of the prosecution to state in the particulars that the act of the rape was unlawful, rendered the conviction of the Appellant wrongful. The Court of Appeal stated that a charge under that section which failed to state in the particulars that the act of raping was unlawful failed to disclose an offence known to law. In this case the Appellant was convicted on that charge of defilement. The particulars of the offence failed to state that the act of carnal knowledge was unlawful. Failure of the prosecution to so state makes the conviction of the Appellant to be wrongful. That conviction therefore shall be set aside. That as it may be, the Appellant was charged with indecent assault contrary to *Section 144(1)*. The evidence before court sufficiently supports the conviction of the Appellant on the alternative charge.

Accordingly the Court does hereby set aside the sentence passed against the Appellant on 14th October 2004 of life imprisonment for conviction of defilement. The Court, however, substitutes the conviction to the alternative charge of indecent assault contrary to *Section 144 (1)* of the Penal Code. The Court substitutes the sentence of the Appellant to ten years imprisonment on that conviction which sentence will run from the original sentence by the lower court. The Appellant shall also serve that sentence with hard labour.

Dated and delivered at Nyeri this 28th day of September 2007.

MARY KASANGO

JUDGE