REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 303 of 2004

D K G.....……..…….……..APPELLANT

Versus

REPUBLIC…….....…..……RESPONDENT

(Being appeal against the conviction and sentence of A. Lorot, Resident Magistrate, in the

Resident Magistrate's Criminal Case No. 1169 of 2004 at Gichugu)

JUDGMENT

The Appellant was charged with defilement of a girl under 16 years contrary to *Section 145(1)* of the Penal Code. He was also charged with the alternative charge of indecent assault on a female contrary to *Section 144(1)* of the Penal Code. The particulars of the charge of defilement are as follows:

"DAVID KARIUKI GATIBA: On diverse dates between 17th December 2004 at [particulars withheld] Village in Kirinyaga District within Central Province had carnal knowledge of J W W a girl then aged 9 years."

The Appellant was convicted for this count and sentenced to life imprisonment. *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 and similarly the sentence is hereby set aside. That as it may be, the Appellant was charged with indecent assault contrary to *Section 144(1).*

Since the Appellant faces an alternative charge, the Court will consider whether the evidence tendered suffices to support the alternative charge. The Complainant at the time of giving evidence was 9 years old. On being examined by the magistrate the magistrate found that being of tender age she would not take the oath but had sufficient intelligence to give evidence. She gave evidence that the Appellant was her cousin. They used to stay together before she was placed in a Children's' home. She further stated that whilst they were staying together the Appellant by using force often took her to the coffee plantation and forced her to have sexual intercourse. She was afraid to tell anyone but did eventually tell her aunt who she called by the name of F W. That aunt reported the matter to the Complainant's teacher. She further stated that when the matter was reported to the police the mother to the Appellant assaulted her.

P.W.2 gave evidence and said that she was the teacher of the Complainant. She confirmed that the aunt to the Complainant made the report to her. She in turn informed the school counselor. P.W.3 the counselor, on getting that report assisted the Complainant to report the matter to the police and also took her to the health centre. The clinical officer on examining the Complainant confirmed that the Complainant had bruise on her lower lip which was 15 hours old. He further confirmed that there were no spermatozoa found in the vagina of the Complainant. He did however, confirm that her hymen was not there which confirmed that she was used to sexual intercourse. The Appellant in his defence denied committing the offence and said that the charges against him were false. On being cross-examined he said that the Complainant had been coached on what to say. On being asked by prosecution who could have coached her the Appellant replied that he did not know. He called a witness who turned against him in his evidence and the Appellant sought to cross-examine him. I have considered and re-evaluated that evidence and I am satisfied that it does support the conviction of indecent assault against a female. I therefore do hereby substitute the conviction of the Appellant with a conviction against that of the alternative charge. I also do hereby sentence the Appellant to 10 years imprisonment with hard labour which sentence will begin to run from the date of conviction and sentence by the lower court.

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

MARY KASANGO

JUDGE