REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 334 of 2004

GEOFFREY MWANGI MITHI……...…....……..APPELLANT

Versus

REPUBLIC……..…….……RESPONDENT

(Being appeal against the conviction and sentence of A. Lorot. Murigi, Resident Magistrate, in the Resident Magistrate's Criminal Case No. 1313 of 2003 at Gichugu)

JUDGMENT

The Appellant was charged with defilement of a girl under the age of 14 contrary to *Section 145* of The Penal Code. He also faced an alternative charge of indecent assault of a female contrary to *Section 144* of The Penal Code. After trial at the lower court he was convicted of defilement and was sentenced to serve life imprisonment. The particulars the charge of defilement are as follows:

"***GEOFFREY MWANGI MITHI: On the 21st day of March 2004 at [particulars withheld] village in Muranga District of the Central province, had carnal knowledge of M W N 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 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 was facing an alternative charge, the court will consider whether the evidence of the lower court can support the alternative charge. The charge of indecent assault related to a child who was three years old. The lower court noted that the child was intelligent enough to give an unsworn statement. The child stated that the Appellant's son known as A was her friend. On the material day she had gone to visit A. The Appellant was at the home and he took the child to his bedroom. She stated that he put her on the bed, removed her clothing and put a thing that she described as a "sweet potatoe" in her private parts. She stated that that thing came from in front of his trousers. She felt pain and cried.

Nobody came to her assistance and the Appellant warned her not to tell her mother. She, however, did tell her mother and her grandmother. P.W.2 was the Complainant's mother. She said that the Complainant was born in 1999. She left their homestead at 10.00 a.m. to visit the Appellant's home. That she often visits that home to see her friend A. She returned to her home in the afternoon when she informed her mother that she was itching. On examination the mother found that the vaginal entry was swollen and enlarged. She together with the child's grandmother took the child to the Police Station and hospital. P.W.1 was the child's grandmother. On returning from church and being told that the child had been defiled she examined the child and she found that there was mucous fluid in her private parts. P.W. 3 was the clinical officer who confirmed that the child was taken to him for examination and confirmed that there was obvious injuries with whitish discharge on the genital opening. On examination there was indication of urinary infection. The Appellant in his defence denied committing the offence on the date given. On being cross-examined he, however, confirmed that he was at home on that material day.

I have re-examined that evidence and I am of the view that it does prove the alternative charge beyond reasonable doubt. I therefore substitute the conviction of the Appellant to the alternative charge of indecent assault of a female contrary to *Section 144(1).* I do also substitute the sentence of the Appellant to 18 years imprisonment with hard labour. That sentence begins to run from the date of conviction by the lower court.

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

MARY KASANGO

JUDGE