REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 96 of 2004

JOHN MUCHUI ARITHO……...……...……..……..APPELLANT

Versus

REPUBLIC…….……..……RESPONDENT

(Being appeal against the conviction and sentence of P. C. Tororey, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 1085 of 2003 at Nanyuki)

JUDGMENT

The Appellant was charged and convicted of defilement of a girl under 14 contrary to *Section 145* of The Penal Code. On being convicted he was sentenced to life imprisonment. The particulars of that offence are as follows:

"***JOHN MUCHUI ARITHO: On the 27th day of May, 2003 at [PARTICULARS WITHHELD] location in Meru Central District of the Eastern Province, had carnal knowledge of K N R a girl under the age of fourteen years."***

Alternative charge was:-

"***JOHN MUCHUI ARITHO: On the 27th day of May, 2003 at Kithithina Sub-location, Kirimara Location in Meru Central District of Eastern Province indecently assaulted K N R a girl under the age of fourteen years by touching her private parts."***

The Appellant was convicted by the lower court on the 1st count. *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 carnal knowledge of a girl. 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 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 proceed to consider the evidence to find whether it supports that alternative charge. The child who was seven years old gave evidence that on the

material date she returned from school at 1.00 p.m. She found the Appellant the only adult at home. He was an employee of her parents. He used to work in the shamba and he used to take care of the animals. He called the child to his house with an intention, as he stated, to send her to buy cigarettes. The Appellant instead took the child to the bed saying that he wanted to show her something. Instead he removed her underwear and he removed also his trousers. He also removed his inner wear. She said that he removed the thing that men use to urine with. He lay on the child and put that thing on the part where she urinates. The child felt pain and screamed and this made him stop what he was doing. The child picked up her underwear but noticed that she was bleeding from her vagina. She waited until her mother came and reported to the mother. P.W. 2 was the mother to the child and she confirmed what the child told her. She repeated the evidence tendered by the child. Similarly P.W.3, the father of the child also repeated the evidence of the child. P.W.4 was the clinical officer. He confirmed that the child who he examined was 7 years old. She had bruises and was discharging blood from her vagina. He concluded that there was trauma in her private parts. There was evidence of penetration. In his defence the Appellant denied the offence. He said that he had sent the child to buy cigarettes. He claimed that the present charge was brought by the parents of the child to cover up his claim for salary arrears.

Having considered that evidence and the defence of the Appellant I find that the alternative charge is sufficiently proved beyond a reasonable doubt. I will therefore substitute the conviction of the Appellant to the alternative charge of indecent assault on a female contrary to *Section 144(1)* of the Penal Code. I further substitute the sentence of 15 years imprisonment with hard labour which sentence will begin to run from the date of sentence by the lower court.

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

MARY KASANGO

JUDGE