REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 373 OF 2003

JONATHAN KINUTHIA ……..……...…… APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

(Appeal from original Conviction and Sentence of the Resident Magistrate's Court at Kangema in Criminal Case No. 557 of 2003 dated 13th October 2003 by R. N. Muriuki (Miss) – R.M.)

J U D G M E N T

Jonathan Kinuthia whom I will hereafter refer to as "the appellant" was convicted and sentenced to serve Six (6) years imprisonment with hard labour for the offence of defilement of a girl contrary to section 145(1) of the Penal Code. He appeals to this court against conviction and sentence and has preferred 8 grounds through **Messrs Kirubi Mwangi Ben & Co. Advocates**. I shall first address the first ground of appeal because if it succeeds, then it will have disposed of the entire appeal. In the first ground of appeal, the appellant states that:-

The charge was defective in that the word "**unlawfully"** had "**carnal knowledge"** were not inserted in the particulars of the charge. Arguing this ground **Mr. Mwangi**, learned counsel for the appellant submitted that failure to include the magic word "**unlawful"** in the particulars of the charge rendered the charge fatally defective. For this submission counsel referred this court to the following authorities:-

1. Ngeno v/s Republic (2002) 1 KLR 457

2. Achoki v/s Republic (200….) 2 E.A. 283.

I am aware that the first authority being a High Court decision is not binding on me but is of persuasive authority only. However the 2nd authority is a court of appeal decision which is binding on me nonetheless.

Mr. Orinda, Principal State Counsel was not impressed by the appellant counsel's submission on the issue. His take on the issue was that there was nothing that would enable this court to presume that in a case of defilement consent is not a material factor. Though omission of the word "unlawful" was a material defect, counsel maintained that this being a first appellant court, it was a curable defect, if the circumstances of the case were all taken together.

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

"…….. **On the 6th day of July 2003 at Murang'a District within Central Province had carnal knowledge of M W K a girl under the age of 16 years.**

Section 145(1) of the Penal Code defines what constitutes a charge of defilement. The Section as it then was before its repeal by act No. 3 of 2006 was worded in the following terms:-

"**Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life."**

To my mind the section makes it clear that the offence is committed if the act of carnal knowledge of a girl under the age of sixteen is unlawful. It is clear from the wording of the section that having carnal knowledge of a girl under the age of sixteen years, *per se*, is not an offence. The carnal knowledge must be unlawful. From the wording of the section, it is possible for a man to have lawful carnal knowledge of a girl under the age of sixteen years and that is why there is a proviso to section 145(1) which is in the following terms:-

"**Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or about the age of sixteen years or was his wife."**

I entirely agree with **Ondeyo J** in her reasoning in Ngeno case (supra) particularly when she states that it is possible for a man to have lawful carnal knowledge of a girl under the age of fourteen (now sixteen) years taking into account the proviso to section 145(1) of the Penal Code. It is therefore clear from the proviso that the act of having carnal knowledge of a girl aged below sixteen years becomes lawful in any of the following cases:-

1. If the said girl though aged below sixteen years is the wife of the accused at the time of the offence.

2. If it appears to the court that the accused person believed or had reasonable cause to believe the girl to be or over sixteen.

Given the foregoing, a charge under Section 145(1) of the Penal Code must, ipso factor in the particulars include the word, "unlawful". Failure to state in the particulars, that the carnal knowledge was unlawful, renders the charge fatally defective. The court of appeal held as much in the case of **Achoki v/s Republic (supra).** In this case it was an appeal which involved an offence of attempted rape under section 141 of he Penal Code that was in issue. 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. As can be noted from the particulars of the charge presented in the trial court, there was no allegation that the carnal knowledge was unlawful, yet it is the unlawfulness that makes the carnal knowledge of a girl under the age of sixteen years an offence. The particulars of a charge under section 145(1) of the Penal Code must allege that the carnal knowledge 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.

The charge having been fatally defective for failure to disclose an offence, I allow this appeal, quash the

conviction of the appellant and set aside the sentence of six years imprisonment plus hard labour. The next issue which immediately comes to mind is whether to order a retrial or not. Neither **Mr. Orinda** or **Mr. Mwangi** submitted on the issue. I still have to consider the issue though. Indeed I have anxiously considered the same. In doing so, I have considered the law and the circumstances of this case. There are several court of appeal decisions on the matter. See or instance **Pascal Clement Braganza v/s Republic (1957) E.A. 152, Ahmed Sumar v/s Republic (1964) E.A. 481, Manji v/s Republic (1966) E.A. 313, Mwangi v/s Republic (1983) KLR 522, Elirema & Another v/s Republic (2003) KLR 537** and **Bernard Lolimo Ekimat v/s Republic, criminal appeal No. 151 of 2004** (unreported).

Recently in the case of **Tajiri Kalume Kahindi v/s Republic, Criminal appeal No. 270 of 2006 (unreported)**, the court of appeal has added other considerations apart from those set out in the authorities cited above as to when the appellate court should order a retrial. The court stated and I quote "……. **We may add that the period that the appellant has taken in custody must also be considered as well as whether the witnesses would be traced in good time to mount a successful retrial."**

In the present appeal the offence was committed on 6th July 2003. This is almost five years ago. The appellant was sentenced for 6 years imprisonment on 13th October 2003. Accordingly he has served four years of the sentence, quite a substantial portion of the jail term.

I think that taking into account all these factors and in the interest of justice a retrial ought not to be ordered. I may also add that if a retrial was to be ordered in the circumstances of this case I may inadvertently be infringing on the appellant's constitutional right to a fair and speedy trial within a reasonable time and even double jeopardy.

In the result I decline to order a retrial with the consequence that the appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 31st day of October 2007

M. S. A. MAKHANDIA

JUDGE