REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 333 of 2004

BENJAMIN MAINA MUIRURI..……......…………..……..…..APPELLANT

Versus

REPUBLIC………………………..…………….…………RESPONDENT

(Being appeal against the conviction and sentence of L. Nyambura, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 388 of 2004 at Kigumo)

JUDGMENT

The Appellant at the lower court was charged with defilement of a girl contrary to *Section 145(1)* of the Penal Code. The alternative charge was indecent assault on a female contrary to *Section 144 (1)* of the Penal Code. In the second count he was charged of being in possession of canabis contrary to *Section 3 (1)* of the Act No. 4 of 1994. On being tried at the lower court the Appellant was convicted of defilement and was acquitted on count two. After conviction he was sentenced to life imprisonment with hard labour. The particulars of count one are as follows:

"***BENJAMIN MAINA MUIRURI: On the 23rd day of February, 2004 at Karugia Village in Margua District within Central Province had a carnal knowledge of K. W. N. a girl under the age of sixteen years."***

As can be seen from the above particulars, there is no use of the word unlawful. *Section 145 (1)* of the Penal Code requires that the defilement be stated to be unlawful in the particulars. In the case of **ACHOKI -V- REPUBLIC (2002) 2 E.A. 283,** the Court of Appeal in considering an appeal relating to *Section 145(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)* and the court will review the evidence to confirm whether the evidence supports that count. P.W.2 was on the material day coming from school. She was a standard two pupil. She saw the Appellant and described him as someone who she knows burns charcoal. He lifted the Complainant. She was in the company of another pupil called Eunice. He ordered Eunice to sit down. He removed the Complainant's clothes. He laid on her and inserted his penis in her and she felt pain. She began to bleed and he left telling her not to tell anybody otherwise he would kill her. She went home crying. Eunice her companion confirmed that on that day they were coming from school. They saw Maina who normally burns charcoal. She confirmed that she had seen him before. She saw the Appellant lift up the Complainant and take her to the bush. He had ordered Eunice to sit down and had warned her if she moved he would cut her with a panga. Eunice confirmed that the Appellant removed the Complainant's panties then later the Complainant came bleeding from her private part. She was also crying and Eunice escorted her to her home. P.W.1 is the mother of the Complainant. On being told that her child had been defiled she took her to Maragua District Hospital and also to the Police. She confirmed that her daughter was bleeding from her vagina and she identified her blood stained school uniform. Her daughter was admitted in hospital for nine days. P.W. 4 was the doctor at Maragua District Hospital who filled the P.3 form for the Complainant. He was shown the blood stained panties and school uniform. The Complainant had been defiled at 2 pm and he saw her at 8 pm. She was walking

with a limp and her legs apart. She had swollen genitalia and bruises and her clitory was torn and lacerated. Her hymen was broken and blood was oozing from her vagina. He formed the opinion that her injuries were caused by an external force trying to penetrate her vagina. He confirmed that she was admitted in hospital. In his defence the Appellant denied the charge. He denied knowing anything about the defilement of the complainant.

Having re-examined that evidence it is clear to the Court that the charge of indecent assault is proven beyond a reasonable doubt. Therefore the Court will convict and does convict the Appellant of that charge. I find that I am in agreement with the finding of the lower in respect of the second count and I am in agreement with his acquittal of the same. The Court therefore does hereby set aside the conviction and sentence in respect of count one. The Court substitutes the conviction of the Appellant to the alternative count of indecent assault. The court does hereby sentence the Appellant to 20 years imprisonment and that sentence will begin from the date of conviction by the lower court.

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

MARY KASANGO

JUDGE