



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Criminal Appeal 102 of 2004

FRANCIS NYAGA WAMUTIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with offence of Defilement of a girl contrary to Section 145(1) of Penal Code. Two charges of defilement of 2 girls.

That Section provides “ Any person who unlawfully and carnally knows any girl under the age of 16 (14 before amendment) years is guilty of a felony and is liable to imprisonment with hard labour for life (This offence was committed on 23/11/2002 before the present amendment).

The State Counsel Mr. Kimathi submits that the charge sheet is fatally defective because there is omission of the word “unlawful” in the particulars of the offence. For that reason he has conceded the appeal on this count. It is clear a person may have carnal knowledge with a girl and it becomes an offence only when it is unlawful. Therefore omission of the word “unlawful” in the charge does not constitute an offence.

However the charge sheet carries other two alternative charges of indecent assault on a female contrary to Section 144(1) Penal Code). The appellant pleaded not guilty to the alternative charges and a plea of not guilty was entered. Therefore he was tried on the two counts. However the Trial Magistrate made no finding in the alternative charges, which is correct procedure. The State Counsel now requests the court to sentence the appellant on those two counts. It is submitted that the evidence of PW1 and PW2 was corroborated by evidence of PW3 and is sufficient to prove the offence. The appellant had filed written submissions saying he did not know how to read. His 3 grounds of appeal complain of lack of specimen, shallow investigation and that his defence was not considered but it was true.

I have perused the evidence of the 2 girls PW1 and PW2 and it is clear that the appellant committed the offence by touching private parts of each complainant. The appellant was seen near the children by PW4. He was found in the unfinished house sleeping. This is where the girls said they were. Also medical examination showed that hymen was broken there was pus cells. 2nd complainant had bruises on her virgina wall which was painful.

It is my finding that the prosecution presented to court sufficient evidence to support conviction on the alternative charges.

I therefore find the appellant guilty as charged on the two counts. I convict him. On the sentence the

Appellant reiterated his innocence in mitigation. He showed no remorse. When this offence was committed, punishment was 5 years with corporal punishment. The punishment has now been greatly enhanced because the society feels threatened by offences of this nature against females.

I therefore sentence the appellant to 5 years imprisonment on each alternative count. The sentences shall run consecutively from 19/8/2004.

Dated this 22nd November, 2007.

J. N. KHAMINWA

JUDGE

Conviction and sentence in the first count is quashed and set aside.

J.N. KHAMINWA

JUDGE

22/11/2007.

22/11/2007

Khaminwa – Judge

Njue – Clerk

Mr. Kimathi for State

Appellant present

Read in open court

J. N. KHAMINWA

JUDGE