

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 45 of 2005

JOHN NJUKI MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant who was tried and convicted on a charge of Defilement of a girl contrary to section 145 (1) Penal code complains that the charge sheet was defective in that the particulars of charge omit the words “**unlawful**” as required under section 145 (1) and the age of a girl is 16 not 14 as stated in the charge. The old law was changed from 14 years to 16 years by Act of 5 of 2003.

The authorities cited in support ***Criminal Appeal No. 6 of 2000- Achoki vs Republic*** as on the basis of offence of rape or attempted rape under section 141 (1) where it was held that omission of the words “**unlawfully**” renders the charge defective. It should be the same for offences under section 145 (1) where the offence is “**unlawfully and carnally**” defiles a girl under 16 years.

The other major complaint is that the learned Magistrate failed to comply with the procedure set out under sections 19 of Oaths and Statutory Declaration Act Cap 15 Laws of Kenya in receiving the evidence of a young child of tender years. In this respect he cited three authorities:-

- 1. *Ochero Obagwa vs Republic Criminal Appeal No. 92 of 2003 where it was held then non compliance with section 19 aforesaid may render conviction being quashed. The authority also refers to Evidence Act Section 124 where the evidence of a young child should be corroborated.***
- 2. *Johnson Muiruri vs Republic 1983 KLR 445 and Ouserio vs Republic [1985] KLR 618 these two authorities are in support of this ground 3.***

On these authorities the appellant argues that conviction cannot be upheld as the Trial Magistrate failed to comply with the provisions of the law. Furthermore the other ground argued is No. 5 which challenges the medical evidence the P3 form was not completed by the examiner and the notes relied upon were not produced in court. The evidence of Clinical Officer was also challenged that the girl admitted to having had sexual experience before- her hymen must have been ruptured.

This appeal is conceded by State Counsel on quite different grounds that the defence of Alibi was not considered though supported by witnesses. He also faulted the evidence of PW8 which showed that the complainant was not liable. There was doubts about the prove of the case.

Upon considering the authorities cited and upon hearing the submissions of the Counsel for appellant and upon the State conceding this appeal it is my view that there are sufficient grounds to warrant orders allowing the appeal. It is clear the Trial Magistrate did not comply with the provisions of law as set out above thus prejudicing the appellant’s case.

I therefore allow the appeal and I quash conviction and set aside sentence.

The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated the 1st March, of 2006.

J. N. KHAMINWA

JUDGE