



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 121 of 2003

SAMUEL NDUNGU MACHARIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Conviction in District Magistrate's Court at Kigumo in Criminal Case No. 1188 of 2002 dated 2nd April 2003 by Ms L. Nyambura – R.M. – Kigumo)

J U D G M E N T

Samuel Ndungu Macharia (hereinafter referred to as the appellant) was tried and convicted by the Resident Magistrate Kigumo for the offence of Defilement of a girl contrary to section 145 (1) of the Penal Code. He was sentenced to serve 3 years imprisonment and now appeals against his conviction and sentence.

The particulars of the charge against the appellant stated as follows:

On the 11th day of December 2002 at [particulars withheld] in Maragua District of the Central Province, he had carnal knowledge of RW a girl under the age of 14 years.

The appellant has filed grounds of appeal which includes the following:

- ***That the charge against the appellant was defective.***
- ***That the evidence against the appellant was hearsay evidence contradictory and uncorroborated and***
- ***That the trial magistrate did not warn herself about convicting on the uncorroborated evidence of the complainant.***

Prior to the amendment to section 145 (1) of the Penal Code introduced by Act 3 of 2003, section 145 (1) of the Penal Code stated as follows:

“145 (1) 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.

(2) Any person who attempts to have unlawful carnal knowledge of a girl under the age of fourteen years is guilty of a felony and is liable to imprisonment with hard labour for five years with or without corporal punishment.

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 above the age of fourteen years or was his wife.”

The above was the law under which the appellant was charged as the amendment came into effect thereafter. It is evident from the above that it was necessary to state in the particulars of the charge not only that the appellant had carnal knowledge of the complainant but also the fact that such carnal knowledge was unlawful. It is rather inconceivable that the law should provide for “lawful” carnal knowledge of a girl under the age of 14 years but such is the effect of the proviso to section 145 of the Criminal Procedure Code as reproduced above. For it made it lawful for a person to have carnal knowledge of a girl under the age of 14 years if he had reasonable grounds to believe and did in fact believe that the girl was above the age of 14 years or if the girl was his wife. Obviously this is a repulsive situation, but that is the law which I am obliged to apply. There is little consolation in the amendment introduced by Statute Law (Miscellaneous) Amendment Act No. 3 of 2003 which has retained the proviso to section 145 of the Penal Code but altered the age of the minor to 16 years.

I concur therefore with the holding of Hon. Ondeyo J in the case of **Ngeno v/s Republic [2002] 1 KLR 457** that a charge under section 145 (1) of the Penal Code must include the word unlawful in its particulars and that failure to state in the particulars that the carnal knowledge was unlawful rendered the charge fatally defective.

It follows that this appeal succeeds on the basis that the charge did not disclose an offence. The appeal is accordingly allowed conviction quashed and sentence set aside. The appellant shall be set free unless otherwise lawfully held.

Dated and signed this 30th day of November 2005

H. M.OKWENGU

JUDGE

Judgment delivered this 25th day of May 2006.

In the presence of: -

Mr. Orinda for State

Gikaria – court clerk

Appellant - absent