



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

CRIMINAL APPEAL 206 OF 2004

DANIEL BURURE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the Resident Magistrate's Court at Kehancha in Criminal Case No.719 of 2004 – SEREM M. K. K. ESQ., R.M)

JUDGMENT

The appellant DANIEL BURURE was convicted by the Resident Magistrate Kehancha for the Offence defilement of a girl between the age of 16 years contrary to S.145(1) of The Penal Code. He was sentenced to 45 years imprisonment.

Mr. Abisai submitted that the charge was defective. There was no word “unlawful” in the particulars of the charge sheet.

Further he pointed out that the appellant was charged with an alternative count of indecent assault. The trial magistrate only said he convicted the appellant as charged.

He further submitted that the sentence of 45 years was excessive.

Mr. Kemo the learned Senior State Counsel conceded to the appeal and said indeed the charge was defective. He asked court to order for a retrial.

Indeed the charge of defilement was defective. S.145 (1) of the Penal Code is clear. It states:

“Any person who unlawfully and carnally knows any
girl under the age of 16 years is guilty of a felony
and liable to imprisonment with hard labour for life.”

It is clear that the charge sheet has to clearly indicate that the act was unlawful and that was missing in the charge sheet. The inclusion of such word is important because in the provisos of S.145(2) P.C. it is provided that one can carnally know a girl of that age and yet would not be guilty.

I therefore concur with the counsel for the appellant and the State Counsel that the charge sheet as it is

defective and on that score the appeal succeeds.

Also the trial magistrate was not candid if he convicted the appellant on the main charge or the alternative charge. If it was the main charge then he should have gone further and state that he was not making any finding on the alternative charge. This was not done.

There is yet another error committed by the magistrate. He sentenced the appellant to 45 years imprisonment. He was of rank of Resident Magistrate.

S.7(2) (a) of C.P.C. clearly provides that a Resident Magistrate can impose a sentence of up to seven years except in offences under S.278, 308(1) or 322 of the Penal Code where he can impose any sentence prescribed by the law. S.145(1) P.C. is not one of those exception sentences and as such the Resident Magistrate had no jurisdiction to impose a sentence of 45 years. The sentence was illegal.

Mr. Kemo asked Court to Order a retrial. However to do so would be futile. The court has found the charge sheet is defective. I can't order he be retrialed on that defective charge.

In the circumstances the appeal is allowed. I quash the conviction of the appellant and set aside the sentence imposed. He be set at liberty forthwith unless otherwise legally held.

Dated 26th October 2006

KABURU BAUNI

JUDGE

Delivered in presence of

cc. Mobisa

Mr. Chirchir for State.

Appellant P.I.P.

KABURU BAUNI

JUDGE