



**REPUBLIC OF KENYA**

**Fredrick Ngetich v Republic**

**High Court, at Kericho**

**February 24, 2004**

**Musinga Ag J**

**Criminal Appeal No 116 of 03**

February 24, 2004, Musinga Ag J delivered the following Judgment. The appellant was charged in Kericho Principal Magistrate's Court Criminal Case Number 1527 of 2003 with two counts. The first one was of abduction of a girl under the age of 16 years contrary to Section 143 of the Penal Code the particulars of the offence being that on 24th May, 2003 at [particulars withheld] in Kericho District within Rift Valley Province, unlawfully detained C.K a girl aged 13 years without the consent of her parents.

Count two was of defilement of a girl contrary to Section 145(1) of the Penal Code the particulars of the offence being that on the 24th day of May, 2003 at [particulars withheld] in Kericho District within Rift Valley Province, had Carnal knowledge of C.K a girl under the age of fourteen years.

He also faced an alternative charge of indecent assault on a female contrary to Section 144(1) of the Penal Code, where he was accused of touching the private parts of the aforesaid girl who was said to be 13 years old as per the alternative charge.

He was tried and convicted on count two and sentenced to fourteen years imprisonment. He preferred an appeal against the conviction and sentence.

Mr. Motanya for the appellant took issue with the age of the complainant because the charges showed that she was 13 years but in court she said that she told him she was born in 1987. The complainant's mother said that she gave birth to her on 30/5/89 but did not produce any documentary evidence to prove the actual date of birth. He submitted that the prosecution should have ascertained the actual age of the complainant by producing her birth certificate or sending her to a doctor for age assessment

The Senior State Counsel, Mr Mutuku said that the state did not support the conviction and said that her age should have been determined. He said that the court did not consider what the appellant said regarding her age.

In a charge as the one under which the appellant was convicted, it was necessary that the age of the complainant, PW 1, be proved because the proviso to Section 145 states that it is a sufficient defence to any charge under the Section if it is made to appear to the court that the person so charged had reasonable cause to believe and did in fact believe that the girl was above the age of fourteen or was his wife. This Section has since been amended to increase the age of the girl from fourteen to sixteen. PW 3 had told the court that PW 1 had said that appellant was her husband and the appellant said that PW 1 was his wife.

Another issue which the trial court should have considered is the conduct of PW 1. She cheated her mother that she was going to collect firewood but she boarded a vehicle and went to the house of the appellant whom she said was her friend. When she arrived, the appellant was not at home and a male friend of his opened the appellant's house for the complainant. She told the friend to lock the door from outside so that no one would know whether she was in the house. The appellant later came home and found the complainant in his house. They stayed for some time then the appellant left and returned in the evening. They had a meal together and according to her own words, she initially slept on the floor and the

appellant on his bed. She, however decided to join the appellant on his bed. They both undressed and engaged in sex. She said that it was the first time she was having sexual intercourse before with another man sometimes in the year 2002. This was not an innocent young girl who was seduced and lured to bed by the appellant. Even a year earlier she had had sexual intercourse with a different man. She went to the appellant's house of her own volition having lied to her mother that she was going to collect firewood. She made considerable effort on her own with the sole intention of having sex with the appellant. The appellant even made arrangement for her to sleep on the floor while he slept on his bed but she woke up and joined the appellant on his bed and they had sex. I think it was very harsh on the part of the trial court to have convicted and sentenced the appellant to fourteen years imprisonment for this sexual act committed in the circumstances aforesaid. The appellant stated that he believed the girl was over 16 years and her conduct showed that she consented to having sex with the appellant. While the law must protect young girls from paedophiles, Section 145 of the

Penal Code does not create an offence of strict liability and even where the conviction is unchallengeable or even where the accused person pleads guilty, the circumstances under which the offence was committed must be taken into account in meting out sentence.

In **MUSYOKI VS REPUBLIC (1981) K.L.R.** 160 the appellant pleaded guilty to a charge of defilement of a girl under age fourteen contrary to Section 145(1) of the Penal Code and was sentenced to four years imprisonment with hard labour and fifteen strokes of the cane. His appeal against sentence was dismissed by the High Court. On appeal, he produced a letter written to him by the girl who he allegedly defiled. The letter showed that the girl was friendly and encouraged the appellant. The court held that once it was admitted by the accused that the girl was eleven, the production of a medical and birth certificate to support the allegation that she was under 14 was unnecessary. The court further held that the romantic letter by the girl to the appellant should have been produced, as this would have guided the court in sentencing. It was also held that there was an error in sentencing and the error could only be corrected by reducing the sentence.

In the present case, the conviction was unsafe as earlier alluded to because there was no medical or birth certificates produced in court to show that the girl was actually under fourteen years. The burden of proof was upon the prosecution. It was not for the appellant to prove the age of the complainant, PW 1. The appellant also believed that she was above fourteen years and there was an averment by PW 3 that PW 1 and the appellant regarded themselves as husband and wife.

For these reasons I allow the appeal and quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.