REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.407 OF 2000

(From original conviction and sentence in Criminal Case No.2501/2000 of the Chief Magistrate's Court at NAKURU -W.K. TUIYOT(C.M.)

ALFRED KIPTANUI KANGOGO……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

J U D G M E N T

The Appellant was charged with DEFILEMENT OF A GIRL contrary to Section 145(1) of the Penal Code. The particulars of the charge were:-

> **"On the 13th day of November, 2000 at [*particulars witheld*] in Subukia in Nakuru District of the Rift Valley Province, had Carnal knowledge of I.C.T. a girl under the age of fourteen years. "The Appellant pleaded guilty to the said charge on the prosecution giving the facts of the case, the Appellant responded thus:- "That is what happened."**
>
> The facts in part were:-
>
> **"The accused later went there and defiled the child then he released her,"**

With due respect to the trial court the charge before the court did not disclose an offence known in law.

Section 145(1) of the Penal Code defines defilement thus:-

> **"Any person who unlawfully and carnally knows any girl under the age of 14 years is guilty of a felony and is liable to imp - risonment with hard labour for 14 years together with corporal punishment."**

This definition makes it clear that it is the act of carnally knowing a girl unlawfully that is very vital to the charge.

The charge of defilement must allege in its particulars that the sexual act was unlawful. The particulars of the offence of defilement the appellant was charged with and convicted did not state that the defilement was unlawful. That charge did not disclose an offence known to law and the Appellant was wrongly convicted on it. The trial court ought to have rejected the charge under S.89(5) of the Criminal Procedure Code or directed the prosecution to amend it.

As it were, there was no charge before the court and the resultant conviction being wrong cannot be allowed to stand. There were other errors in the case but that of the charge being the main one I ignore the rest. The conviction is accordingly quashed and the sentence set aside.

The Appellant has served two years imprisonment. The offence calls for 14 years. Being a serious charge I will order for a retrial before the lower court.

Orders accordingly.

Dated and delivered at Nakuru this 13th day of March, 2003.

JESSIE LESIIT

JUDGE