



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEAL NO.225 OF 2001

(From original conviction and sentence in Criminal
Case No.1935/2000 of the Chief Magistrate's Court
at NAKURU - H.WASILWA(S.R.M.)

DENIS OKONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

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

“On the 28 th day of August, 2000 at [particulars withheld] in Nakuru District of The Rift Valley Province, you had a Carnal Knowledge of F.B a girl under the age of 14 years.”

The case was heard fully after which the Appellant was found guilty of the offence and sentence to 10 years Imprisonment and 7 strokes of the cane. The court omitted to order hard labour with this sentence which is Mandatory for a charge of defilement under Section 145(1) of the Penal Code.

The Appellant now appeals against both the conviction and sentence. The Appeal is opposed. The Appellant raised several grounds of appeal in his filed grounds but argued only

He argued that the case was a fabrication and that was the reason of the police being called for the case six days after it occurred.

He challenged the failure by the prosecution to call the housemaid of the home where the Complainant lived. He also raised issue with the AB, finding that the Complainant was found injured in her private parts while in her evidence she had said she felt no pain.

The Learned Counsel for the State in supporting the conviction submitted that in fact the Complainant's evidence was that she felt pain but only on the second occasion when the Appellant lay on top of her. He also submitted that PW6, the doctor who examined the Complainant confirmed she had been defiled therefore corroborating her evidence on the age of injuries.

I did consider the entire case and the submissions by the Appellant and the State Counsel.

The charge before the court was fatally defective. It merely alleged that the Appellant had “Carnal Knowledge” of the Complainant without alleging in the particulars that the said act was unlawful. Section 145(1) of the Penal Code is in the following terms:-

“Any person who unlawfully and carnally knows any girl under the age of 14 years is guilty of a felony and is liable to imprisonment with hard labour for 14 years together with corporal punishment.”

This definition makes it quite clear that the expression “unlawful” must be included in the particulars of the charge of defilement. I do suppose that it is the carnal knowledge committed unlawfully that makes it a penal offence. The particulars of the offence of defilement upon which the appellant was convicted and sentenced did not state that the defilement was unlawful. The charge did not disclose an offence known to law and the Appellant was wrongly convicted on it. See **DANIEL ACHOKI –V- REP KSM** CAP NO.6/2000. He was sentenced in May, 2001 for 10 years Imprisonment. It cannot be said that he has served a substantive part of the sentence.

I will quash the conviction, set aside the sentence and order for a re-trial of this case by a court of competent jurisdiction.

Orders accordingly.

Dated and delivered at Nakuru this 16th day of May, 2003.

JESSIE LESIIT

JUDGE