



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO.208 OF 2003**

**ALEX KIRWA KABERE.....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 are as follows:-

***“On the 8 th day of February, 2003, at [particulars withheld ] in Koibatek District within Rift Valley Province had carnal Knowledge of M.W a girl under the age of fourteen y ears.”***

He pleaded guilty to the charge. He appeals against the sentence of six years imprisonment with hard labour on grounds that he is a young person aged 14 years. The Learned State Counsel did not oppose the appeal against the sentence on grounds of the appellants age. He also urged the court to take into consideration the defective charge to which the appellant was convicted and sentenced.

I did consider the appeal and the submissions by both the appellant and the Learned State Counsel.

The appellant was produced in court on court’s directions. After going through prison records sent to the court, this court noted that the appellant was aged 14 years and yet was serving a prison term of six years imprisonment. That is contrary to the spirit of the Children’s Act No.8 of 2001.

After hearing the submissions and going through the lower court record, I have observed that indeed the particulars of the charge facing the appellant were fatally defective. The term “unlawful” was omitted in the particulars. The defect is incurable even under Section 382 of the Criminal Procedure Code. The Section provides:-

***“Section 382 Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent juris - diction shall be reversed or altered on appeal or revision on account of an error, ommission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, o mission or, irregularity has occasioned a failure of justice.”***

In my considered view the particulars of the charge facing the appellant were so defective as to occasion a failure of justice.

**In DANIEL ACHOKI –V- REP.** (KISM) CAP 6/2000, the Court of Appeal held that in a charge of RAPE where term “unlawful” was left out in the particulars of the charge as required under Section 139 of the Penal Code, the particulars of the charge did not disclose any offence known to law and that any conviction based on such a charge was wrong. Likewise in this offence of defilement of girls under 14 years old under Section 145(1) of the Penal Code the offence is committed if and only if

***“Any person (who) unlawfully and carnally knows any girl under the age of 14 years...”***

The charge before the court omitted the word unlawful and was therefore fatally defective. As already stated, the appellant was appealing only against the sentence having pleaded guilty to the charge. Even then, it is my considered view that this court should not allow a conviction to stand which was wrongly entered. The Learned State Counsel in his submissions agrees with this. Consequently, I find that the conviction against the appellant was wrong and should not be allowed to stand.

I will set it aside together with the sentence imposed. I must mention also that Trial Magistrate did not take into consideration the appellant’s age while convicting and sentencing him, as provided under Section 189 of the Children’s Act. Under the said Act those terms “conviction” and “sentence” cannot be used against a child offender such as the appellant in this case. The trial court also ignored the restriction on punishment under Section 190 of same Act, which removes the court’s jurisdiction to sentence any person below 18 years to a term of imprisonment. The appellant in this case was only 14 years old at time of sentence. He has been in prison since February, 2003 a period of six months. He was ordered to serve Hard Labour. The sentence was totally illegal. Given the period of incarceration that the appellant has suffered and his age and the illegality of the charge and the sentence imposed I do not find this a suitable case in which to order a retrial.

I will order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

**Orders accordingly.**

**JESSIE LESIIT**

**JUDGE**

**Dated, at Nakuru this 14th day of August, 2003.**

**In presence of Appellant in person**

**Mr. Onderi for State.**

**JESSIE LESIIT**

**JUDGE**