Ng'eno v Republic (Criminal Appeal 59 of 2001) [2002] KEHC 1099 (KLR) (3 May 2002) (Judgment)

Benard Kipkorir Ngeno v Republic [2002] eKLR

Neutral citation: [2002] KEHC 1099 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL 59 OF 2001

SC ONDEYO, J

MAY 3, 2002

BETWEEN

BENARD KIPKORIR NG'ENO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal fromthe judgment of the Resident Magsitrate's Court at Sotik, D Chepkwony Esq, in Criminal Case No 1572 of 2001 dated 7th November 2001)

Where the particulars of a crime describe an act as "unlawful", the word unlawful must be used in the description of the crime in the charge.
A charge under section 145(1) of the Penal Code (section 145 was since repealed) must in its particulars include the word unlawful. Failure to state in the particulars that the carnal knowledge was unlawful rendered the charge fatally defective.

Reported by Njeri Githang'a

Criminal Law *- defilement - defilement of a girl under the age of 14 years - elements of defilement of a girl under the age of 14 years contrary - where the penal provision described it as unlawful carnal knowledge - where the penal provisions provided provisos where the act could be lawful - where the charge sheet failed to state that the act of carnal knowledge was unlawful - whether a charge sheet for the crime of defilement of a girl under the age of 14 years under section 145(1) of the Penal Code failed to describe the crime as "unlawful" carnal knowledge as described under section 145(1) was fatally defective - Penal Code (Cap 63) Section 145(1) (section 145 was repealed)*

Criminal Procedure *- retrial - circumstances in which retrial may be ordered - where there was a defect in the proceedings - whether a retrial could be ordered where there was a fatally defective.*

Brief facts

The appellant was convicted on his own plea of guilty to the offence of defilement of a girl contrary to section 145(1) of the Penal Code and he was sentenced to imprisonment for ten years. The particulars of the charge stated that at the material time and place, he "had carnal knowledge of [the complainant], a girl under the age of fourteen years". In his appeal, the appellant stated that the trial magistrate had erred in failing to appreciate that the charge and its particulars did not disclose an offence in law and that the charge was fatally detective.

Issues

i. *Whether a charge sheet for the crime of defilement of a girl under the age of 14 years under section 145(1) of the Penal Code failed to describe the crime as "unlawful" carnal knowledge as described under section 145(1) was fatally defective - Penal Code (Cap 63) Section 145(1) (section 145 was repealed)*

ii. *Whether a retrial could be ordered where there was a fatally defective.*

Held

1. Section 145(1) of the Penal Code provided that a person who unlawfully and carnally knows any girl under the age of fourteen years was guilty of a felony. It was possible for a man to have lawful carnal knowledge of a girl under the age of fourteen years and that was why there wasa proviso to that section. Under that proviso, such an act was was lawful if the girl, though aged below fourteen years, is the wife of the accused at the material time, or where it appeared to the court that the accused person believed or had reasonable cause to believe the girl to be or over fourteen years.
2. A charge under section 145(1) of the Penal Code must in its particulars include the word unlawful. Failure to state in the particulars that the carnal knowledge was unlawful rendered the charge fatally defective. The charge did not allege that the carnal knowledge was unlawful. The charge did not therefore disclose any offence and the appellant was wrongly convicted. His conviction would be quashed and the sentence set aside.
3. A retrial could only be ordered if the proceedings themselves were defective. In the instant case, there was no charge before the court which could have formed the basis of the proceedings. A retrial would enable the prosecution to amend the charge and that would subject the appellant to double jeopardy.

Appeal allowed; appellant ordered released.

Editorial notes

Section 145(1) of the Penal Code was deleted by Act , 2nd Schedule.

Citations

Cases

Kenya

Achoki, Daniel Nyareru v Republic Criminal Appeal 6 of 2000; [2000] KECA 143 (KLR) - (Followed)

Statutes

Kenya

Penal Code (cap 63) sections 139, 141, 145(1)

Advocates

None mentioned

JUDGMENT

1. Benard Kipkorir Ng'eno , the appellant herein, was convicted on his own plea of guilty and sentenced to serve ten (10) years imprisonment on the offence of defilement of a girl contrary to section 145(1) of the *Penal Code*. Although it is mandatory under section 145(1) of the *Penal Code*, the learned trial magistrate did not sentence the appellant to hard labour and corporal punishment. He appeals against

conviction and sentence and has preferred five grounds. I shall first address the first ground of appeal because if it succeeds, then it will have disposed of the appeal. In the first ground of appeal, the appellant states that:-

> " 1. That the learned trial magistrate erred in law and fact in failing to appreciate that the charge as framed together with its particulars did not disclose an offence known to the law and the said charge was fatally defective."

2. Mr Onderi, appearing for the Republic conceded that a conviction on the charge of defilement of a girl cannot be sustained. The particulars of that charge were that:-

> " ... On the October 31, 2001 at [Particulars Withhheld] within Rift Valley Province, had carnal knowledge of SCC, a girl under the age of fourteen years."

3. Section 145(1) of the *Penal Code* defines what constitutes a charge of defilement. The section is in the following terms:-

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

4. The section makes it clear that the offence is committed if the act of carnal knowledge of a girl under the age of fourteen, is unlawful. It is clear from the wording of the section that having carnal knowledge of a girl under the age of fourteen years, *per se*, is not an offence. The carnal knowledge must be unlawful. From the wording of the section, it is possible for a man to have lawful carnal knowledge of a girl under the age of fourteen years and that is why there is a *proviso* to section 145(1) which is in the following terms:-

> " Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did infact believe that the girl was of or about the age of fourteen years or was his wife."

5. It is therefore clear from the *proviso* that the act of having carnal knowledge of a girl aged below fourteen years becomes lawful in any of the following cases:-

    1. If the said girl though aged below fourteen years is the wife of the accused at the time of the offence.

    2. If it appears to the court that the accused person believed or had reasonable cause to believe the girl to be or over fourteen years.

6. A charge under section 145(1) of the *Penal Code* must, in the particulars include the word, "unlawful". Failure to state in the particulars, that the carnal knowledge was unlawful, renders the charge fatally defective, as was held by the court of appeal in the case of *Daniel Nyareru Achoki v Republic*, Cr Appeal No 6 of 2000. In that appeal which involved an offence of attempted rape under section 141 of the *Penal Code*, the court held that a charge of rape, or the attempt of it, must allege in the particulars that:-

    1. the act of sexual intercourse was unlawful and,

    2. that the act of sexual intercourse was without the consent of the woman or girl.

7. Those ingredients of the offence of attempted rape are to be found in section 139 of the *Penal Code* which defines what constitutes the charge. The charge in that case did not state that the attempted carnal knowledge was unlawful and without the consent of the complainant and the court further held that the said charge did not disclose an offence and that the appellant in that case had been wrongly convicted.

8. In the present case, the particulars of the charge in the court below did not allege that the carnal knowledge was unlawful, yet it is the unlawfulness that makes the carnal knowledge of a girl under the age of fourteen years, an offence. The particulars of a charge under section 145(1) of the *Penal Code* must allege that the carnal knowledge was unlawful otherwise, no offence is disclosed. I find that the charge in the present case did not therefore disclose an offence, and the appellant was wrongly convicted. It is not known what the answer of the appellant could have been had the learned trial magistrate asked him if he knew the age of the complainant to be below fourteen years, or if the complainant was his wife. The answers to these two questions could have determined if the plea was one of guilty or not guilty. In the alternative, before reading the charge to the appellant, the learned trial magistrate should have satisfied herself that there was a valid charge in the first place, and either rejected the charge or amended the same herself by inserting the word "unlawful" before the word "carnal".

9. The charge having been fatally defective for failure to disclose an offence, I allow this appeal, I quash the conviction of the appellant, and set aside the sentence of ten years imprisonment. Although Mr Onderi urged the court to order a retrial, that cannot be. A retrial can only be ordered if the proceedings themselves are defective. In the present case, there was no charge before the court which could have formed the basis of the proceedings. A retrial will enable the prosecution amend the charge and that will subject the appellant to double jeopardy.

The appellant is ordered released unless held for some other reason not relevant to this case.

DATED AND DELIVERED AT KERICHO THIS 3RD DAY OF MAY, 2002

S.C. ONDEYO

JUDGE