REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 106 OF 2000

(From Original Conviction and Sentence in Criminal Case No.247 of 1999

of the Resident Magistrate's Court at Makueni: G.J.K. Kiia Esq. on 25.7.2000)

MUTUNGA MUTUA :: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

Coram: J. W. Mwera J.

Appellant not wishing to be present

Miss Makungu for Respondent

C.C. Muli

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J U D G E M E N T

The appellant was charged under S.162 (a) Penal Code in that on 24.9.99 at Miwani village, Ukia, Makueni he had carnal knowledge of WM against the order of nature.

The alternative charge C/s 164 Penal Code read that on the same day and place the appellant unlawfully and indecently assaulted the said WM a boy under the age of 14 years by touching his private parts.

After the trial the Learned Trial Magistrate said:

> "…….. the accused person is acquitted for the offence of unnatural offence contrary to section 162 (a) Penal Code. But the accused is found guilty and convicted for indecent assault on a boy contrary to section 164 of the Penal Code."

Extracting this bit of the Learned Trial Magistrate's final conclusion is inteded for the propounding of the principle of law that where there is a main charge or charges and alternative one(s), the proper way to end the determination is that where a finding of guilt is on either the main or alternative charge, it should be recorded something to this effect taking our present case in point:

> "I do not make a finding on the charge of committing an unnatural offence C/S 162(a) Penal Code

but I find the accused guilty and convict him for indecent assault on a boy ….”

Such conclusion leaves room on appeal in case it is found that evidence actually proved an offence under the charge of committing an unnatural offence. The appeal court then can legally convict on that charge. But if the lower court pronounced as the Learned Trial Magistrate did in error here pronounce an “acquittal” for that offence, the appellate court cannot later convict the appellant if it is of the view that the charge of committing an unnatural offence was actually proved. In such circumstances the appellate court shall not convict because the appellant may successfully argue that he had earlier been acquitted by the lower court!

In sum where a main charge is laid along with an alternative one, if a court finds guilty on one it should NOT make a finding on the other. That is the proper procedure. Back to our case, the Learned Trial Magistrate after convicting the appellant of indecent assault on a boy handed down a sentence of five (5) years, hard labour and two (2) strokes.

In the petition of appeal it was claimed that the charges against the appellant were false because he had differences with the complainant’s parents. That his defence was ignored. He prayed for the appeal to be allowed or the case retried. The Learned State counsel supported both conviction and sentence on the evidence on record.

The provision of law under which the appellant was found guilty reads:

> “164. Any person who unlawfully and indecently assaults a boy under the age of fourteen years in guilty of a felony and is liable to imprisonment for seven years, with or without corporal punishment.”

Stopping here for a while it shall be recalled that the Learned Trial Magistrate not only handed down a prison term as well as strokes but he added hard labour. This was an unlawful bit of the sentence and it may as well be set aside at this point.

Under the Penal Code there is a more or less similar provision of law on indecent assault but on females. It reads:

> “144.(1) Any person who unlawfully and indecently assaults a woman or girl is guilty of a felony and is liable to imprisonment with hard labour for five years, with or without corporal punishment. (2)……. (3)……”

This provision of law has perhaps been subjected to trials and appeals more often in our courts than S.164 Penal Code. So there is more case law on the former than the latter.

One of the cases involving S.144 (1) Penal Code is that of ISAAC OMAMBIA VS. R. CR.A. 47/95 (C.A.). Their lordships proceeded to define indecent assault on a female to mean that the offender did actually with his hand touch a females private parts otherwise called the genitalia or pudenda – not on the breasts or buttocks as the proof showed in that case. The appeal was allowed.

Because of dearth of case law in regard to S.164 Penal Code probably it is not in error to borrow from the Isaac Omambia case to see if indeed the victim in our present case was actually unlawfully and indecently assaulted.

The Clinical Officer Mr. Mutiso (P.W.6) who examined the boy complainant about two weeks after the alleged offence, was unable to establish that there had been penetration via his anus in order to place before the Learned Trial Magistrate evidence tending to commission of all unnatural act on him by the appellant. On that basis the Learned Trial Magistrate rightly concluded that that there was no sufficient evidence to prove that such an offence had been perpetrated against the complainant whose age (P.W.6) put at 3 years.

The complainant did not testify and probably so for his age which in fact the Learned Trial Magistrate ought to have taken in the usual process of taking testimony from children of tender age, tending to the aspect of how the appellant handled the victim. So even if it would be considered in order to borrow from the Isaac Omambia a case, the evidence on the alleged unlawful and indecent assault remains with gaps

Evidence had it from P.W.1, 2 and 3 particularly, that the child was found in a disused house with his trousers down. The appellant emerged from that house and fled. The child was crying, it had sperms round his anal opening – i.e outside it. From all these it can be safely put that the appellant attempted to commit an unnatural offence on the child. The Learned Trial Magistrate ought to have found so and convicted accordingly. If he did not, quite probably this could would have done so on this appeal. But as pointed out earlier when the Learned Trial Magistrate acquitted the appellant on this charge, and it has been said that was an error of procedure, this court is unable to substitute the conviction with one of attempted commission of an unnatural offence.

So all in all, even if this court is left with the impression that the appellant in the circumstances could have been found guilty of an attempt to commit an offence under S. 162 (a) Penal Code allows the appeal.

The appellant to be set at liberty forthwith unless otherwise lawfully held. Next time he may not be so lucky.

Judgement accordingly.

Delivered on 12th February 2001.

J. W. MWERA

JUDGE