REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 75 of 2008

GMH……..…….APPELLANT

V E R S U S

REPUBLIC ……..…..RESPONDENT

J U D G M E N T

The Appellant GMH was charged with attempted defilement of a girl under the age of 16 years contrary to section 145(2) of the Penal Code. in the alternative the Appellant was charged with indecent assault contrary to section 144(1) of the Penal Code. The particulars of the main count of attempted defilement were.

On the 29th day of June 2009 in Marsabit District within Eastern Province attempted to have carnal knowledge of HY a girl under the age of 16 years.

After the full trial the Appellant was convicted of the main count of defilement contrary to section 145(2) of the Penal Code and sentenced to 10 years imprisonment.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He has four grounds of appeal in his petition of appeal as follows.

1. That the learned trial magistrate failed to shift unfairly deserved benefit of doubt from the prosecution case to my defense.

2. That the condition for identification by the complainant were unfavourable.

3. That the trial magistrate did not take the judicial notice that the mentioned witness did not show up in court.

4. That I beg the honourable court to serve me with the court proceedings to enable me raise more reasonable grounds in support of my appeal.

When the appeal came up for hearing the Appellant abandoned his appeal against conviction. He argued instead against sentence. He urged the court to reduce the sentence stating he had fully reformed after being counseled on how to live peacefully with people. He said that he had even undergone training in welding and urged that if released he could do business. He said he was sorry for the offence.

Mr. Moses Mungai learned State Counsel for the state did not offer any submissions in this matter.

I have perused the record of the lower court. I noted that the Appellant had been charged with an offence under s.145(2) of the Penal code and in the alternative charge, under s.144 (1) of the Penal Code.

I noted from the particulars of the charge that the offence is alleged to have been committed on 29th June, 2007.

The Sexual Offences Act No. 3 of 2006 repealed certain provision of the Penal Code. Those provisions include sections 144 and 145 of the Penal Code. the Sexual Offences Act came into force in 21st July, 2006. That means that in 2007 when the Appellant is alleged to have committed this offence, the two sections had already been repealed and therefore effectively ceased to exist from the date of commencement of the Sexual Offences Act. That in effect means that for the offence to hold, the Appellant should have been charged under the Sexual Offences Act.

Issue is whether the mistake or error is one curable under S.382 (of the Criminal Procedure Act. Section 382 of the CPC stipulates:

382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission 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, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

An error or mistake can only be curable if it does not go to the substance of the charge or offence, in the case of an offence charged. Article 50(2)(n) (i) of the Constitution provides thus:

(2) Every accused person has the right to a fair trial, which includes the right—

(*n*) not to be convicted for an act or omission that at the time it

was committed or omitted was not—
(i) an offence in Kenya; or
(ii) a crime under international law;

Charging a person with a non-existent offence is not only a substantive defect but a major breach of the Constitutional provision under Article 50 (2). It cannot be curable under any law

The Appellant was charged and convicted of an offence which does not exist in law. That conviction and sentence is irregular and illegal. In the circumstances I allow the Appellants Appeal quash the conviction and set aside the sentence. The Appellant should be set at liberty unless otherwise lawfully held.

SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY 2013.

J. LESIIT
JUDGE