



REPUBLIC OF KENYA
Hamisi v Republic

High Court, at Mombasa

January 17, 1991

Wambilyangah Ag J

Criminal Appeal No 388 of 1990

Criminal Law – defilement of a girl under the age of 14 years – essential ingredients to be proved.

Criminal Law – rape – whether it is proper to prefer a charge for rape where the apparent age and obvious appearance of the complainant is less than 14 years.

The appellant was convicted on a charge of rape contrary to section 140 of the Penal Code.

The complainant who was aged 14 years had given unsworn evidence after the court had examined her and found that she did not understand the nature and importance of an oath.

The appellant in his defence stated that the complainant was his lover and the sexual intercourse was with her consent.

Held:

1. For a defilement charge the essential ingredient to be proved are mainly that the age of the girl who was defiled is less than 14 years and it matters not that she consented to proven sexual intercourse with an accused. By virtue of her age, she is legally considered incapable of consenting to sexual intercourse.
2. In a case where the police were made aware right from the initial stage that the girl in question was only 13 years and where her obvious appearance or physical stature warranted the learned magistrate to treat her as a child of tender years, a realization should have dawned on each of them that a rape charge where lack of consent on the part of complainant is a crucial element to the charge was inappropriate.

Retrial ordered.

Cases

No cases referred to.

Statutes

1. Penal Code (cap 63) sections 140, 145(1)

2. Evidence Act (cap 80) section 124

January 17, 1991, **Wambilyangah Ag J** delivered the following Judgment.

The appellant was convicted by the Ag Resident Magistrate Kwale on a charge of rape contrary to section 140 of the Penal Code.

The following aspects came to the fore during the trial and as I will highlight them in the later part of the judgment I find it convenient to set them out here.

(a) Whether rape is the proper charge where the girl who was ravished is found to be aged 13 years.

(b) This being a sexual offence what sort of corroboration was necessary.

The complainant was examined by the learned trial magistrate as to her intelligence to testify and as to whether she could understand the nature and importance of an oath before one could be administered to her. It transpired that she was too young and unintelligent to be sworn and so the learned trial magistrate directed that she gives an unsworn evidence.

The appellant had been cohabiting with her sister. He met with the complainant at a place where she had gone for paraffin, and managed to lure her to a forest area where he physically overpowered her and had sexual intercourse with her. In his defence he is recorded to have stated as follows:-

“She is my lover (but was annoyed because I had to marry her elder sister). But this ended and our love continued. So this day I met her. We had our affairs. As I know we were friends and this matter is because she feels she owes a grudge”

The appellant was not denying to have had sexual intercourse with the complainant. His defence is that she had been his lover over a long period. I need not belabour the defence as it may not be necessary to the outcome of this appeal. Section 145(1) of the Penal Code provides as follows:-

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

It follows that in a case where the police were made aware right from the initial stage that the girl in question was only 13 years, (see the P3 form) and where her obvious appearance or physical stature warranted the learned magistrate to treat her as a child of tender years as required by section 124 of the Evidence Act, a realization should have dawned on each of them that a rape charge where lack of consent on the part of prosecutrix is a crucial element to the charge was inappropriate and inapplicable to the disclosed or known facts of the case. It is relevant to point out to the learned magistrate that for a defilement charge the essential ingredient to be proved against an accused person are mainly:-

1. That the age of the girl who was defiled is less than 14 years (the girl in the instant case was 13 years).
2. That it matters not that she consented to proven sexual intercourse with an accused. By virtue of her tender age she is legally considered incapable and improper for her to consent to a sexual intercourse.

The learned magistrate thus misdirected himself in law when he conducted a trial of the appellant on a charge which was misconceived, inappropriate and unsuitable to the given facts. As soon as the age of the girl appeared to be under 14 years the learned magistrate should have realized that the charge of rape was a wrong one as a conviction on it would only be recorded after it was established that she had not consented the alleged sexual intercourse.

For the foregoing reasons I quash conviction and set aside the sentence. I direct that there be held a retrial of the appellant on the charge under Section 145(1) of the Penal Code. It is ordered accordingly.