REPUBLIC OF KENYA

Karamja v Republic

Court of Appeal, at Nakuru March 11, 1985

Madan, Hancox & Nyarangi, JJA

Criminal Appeal No 161 of 1984

(Appeal from the High Court at Nakuru, Masime J)

March 11, 1985, Madan, Hancox & Nyarangi, JJA delivered the following Judgment.
The appellant on this second appeal was convicted by the resident magistrate Nyahururu, of the offence of defilement contrary to section 145(1) Penal Code and sentenced to five years imprisonment and seven strokes corporal punishment.

The charge, as substituted, was one of rape with an alternative one of indecent assault. This was preferred during the course of the hearing and substituted for the original of attempted rape. Accordingly, it was not in law open for the magistrate with one another, for section 179(1) of the offence of which it is proposed to convict the cognate with the offence charged.

There is a further difficulty. Having obtained an admission to the original charge of attempted rape, the magistrate then proceeded to hear the case, which, as we said, became one of the rape and indecent assault. That meant that he embarked upon the trial knowing that the appellant had admitted, at the least, an attempt to rape the complainant. He was, we think, then disqualified from hearing the case and should have transferred it to another magistrate of competent jurisdiction. Moreover, on a charge of defilement there is a possible defence, under the provision to section 145, Penal Code, that the accused person reasonably believed that the girl was above the age of 14 years. The aspect was never put to the appellant, neither did he have any opportunity to dealing with it because the offence of defilement was not under consideration at the hearing. Finally, on this aspect of the case, the age of the girl was not satisfactorily established. She said she was 15, born in 1968. The P3 form said she was 13, but in court the medical officer said she was “about 13 years”. That is simply not good enough to establish an essential of the offence, and may, indeed, provide the reason why the prosecution elected to proceed on a charge of rape.

None of these matters were apparently noticed by the learned first appellate judge, who saw fit to dismiss the appealsummarily under section 352(2) Criminal Procedure Code, giving a further example of the indiscriminate use of this sub- section.
Learned principal state counsel does not support the conviction and in the circumstances we allow the appeal, quash the conviction and set aside the sentence passed on the appellant. He shall be set at liberty unless otherwise lawfully in custody.