JMA v Republic (Criminal Appeal 348 of 2007)
[2009] KECA 415 (KLR) (6 November 2009) (Judgment)

J.M.A v Republic [2009] eKLR

Neutral citation: [2009] KECA 415 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 348 OF 2007

RSC OMOLO, SEO BOSIRE & JG NYAMU, JJA

NOVEMBER 6, 2009

BETWEEN

JMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nyeri (Kasango, J) dated 28th September, 2007 in HCCRA No 96 of 2004)

Imposition of a sentence of 15 years for the offence of indecent assault is not legal

The appeal was against the decision of the superior court which held that the conviction of the appellant on the main charge was wrongful as the charge was fatally defective. The appellant had been charged with a main count of defilement of a girl aged under fourteen years with an alternative charge of indecent assault on a female. The court noted that it was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. The court further noted that the charge of indecent assault under section 144(1) of the Penal Code, before it was amended by Act No 5 of 2003, carried a sentence of 5 years imprisonment with hard labour with or without corporal punishment. The superior court imposed a term of 15 years imprisonment which was three times the maximum sentence then prescribed for the offence thus that sentence was not legal.

Reported by Kakai Toili

Criminal Law *- sentencing - sexual offence - indecent assault on a female - sentence of 15 years - where the law prescribed a sentence that did not exceed 5 years imprisonment - whether the imposition of a sentence of 15 years for the offence of indecent assault was illegal - Penal Code (cap 63), section 144(1).*

Criminal Practice and Procedure *- charge sheet - statement of offence - charge sheet for the offence of defilement failing to state that the accused's carnal knowledge of the complainant was "unlawful" - whether the omission of the term "unlawful" was a curable defect.*

Brief facts

The appeal was against the decision of the superior court, which while relying on the decision of the court in the case of *Achoki v Republic* (2000) 2 EA 283, held that the conviction of the appellant on the main charge was wrongful as the charge was fatally defective. The appellant had been charged with a main count of defilement of a girl aged under fourteen years contrary to section 145(1) of the Penal Code with an alternative charge of indecent assault on a female contrary to section 144(1) of the Penal Code.

The particulars of the two counts had been drawn on the basis of the law as it stood before Act No 5 of 2003 was enacted. The particulars in the charge did not allege that the act of having carnal knowledge was "unlawful". For that reason, the superior court quashed the appellant's conviction on the main count of defilement of a girl under fourteen years of age and set aside the sentence of life imprisonment which had been imposed on him by the trial court.

The court, however, held that the evidence supported the alternative count of indecent assault on a female which also failed to include the term "unlawful" and convicted on the same. It was noted that both the main and alternative counts were defective to the extent that both failed to include in their particulars the term "unlawful". It was further noted that the attention of the superior court had not been drawn to the provisions of section 382 of the Criminal Procedure Code.

Issues

i. Whether the omission of the term "unlawful" when referring to an offence of indecent assault on a female in a charge sheet was a curable defect.
ii. Whether the imposition of a sentence of 15 years for the offence of indecent assault was illegal.

Held

1. The omission of the term 'unlawful' in both counts was not raised by both the prosecution and the defence. The superior court raised it on its own motion in the course of writing its judgment. It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code, was meant to cure such irregularities where prejudice to the appellant was not discernible.

2. The case of *Achoki vRepublic* (2002) EA 283, which involved a charge of attempted rape under the then section 141 of the Penal Code. Rape was an offence which involved adults who were able to consent, unlike a situation where a child was involved, and the issue of consent or lack of it was wholly irrelevant. For a child of the age of the complainant there was no sexual act which could be regarded as lawful. That was a case in which the superior court should have invoked the provisions of section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of the matter was minor.

3. As regards the sentence, the charge of indecent assault under section 144 (1) of the Penal Code, before it was amended by Act No 5 of 2003, carried a sentence of 5 years imprisonment with hard labour with or without corporal punishment. The superior court imposed a term of 15 years imprisonment which was three times the maximum sentence then prescribed for the offence. Obviously, that sentence was not legal. It was not considered appropriate to impose corporal punishment, as that was discretionary and the two courts below did not see it fit to exercise that discretion.

Appeal succeeded in part.

Citations

Cases

Kenya

Achoki v Republic Criminal Appeal 6 of 2000; [2000] KECA 143 (KLR); [2000] 2 EA 283 - (Explained)

Statutes

Kenya

1. Criminal Procedure Code (cap 75) section 382 - (Interpreted)
2. Evidence Act (cap 80) In general- (Cited)

3. Penal Code (cap 63) sections 144(1); 145(1) - (Interpreted)

JUDGMENT

1. The appellant, JMA, was on June 3, 2003, presented before the Senior Resident Magistrate's Court, at Nanyuki with a charge sheet charging him with the main count of defilement of a girl aged under fourteen years contrary to section 145 (1) of the *Penal Code*, the particulars of which read as follows:

> JMA: On the May 27, 2003 in Meru Central District of the Eastern Province, had carnal knowledge of KNR a girl under the age of fourteen years."

2. The appellant faced an alternative count of indecent assault on a female contrary to section 144(1) of the *Penal Code*, and the particulars thereof read as follows:

> JMA: On the May 27, 2003 in Meru Central District of Eastern Province, indecently assaulted KNR a girl under the age of fourteen years by touching her private parts."

3. It should be noted that the particulars of the two counts were to be drawn on the basis of the law as it stood before Act No 5 of 2003 was enacted. That Act made several changes to the *Criminal Procedure Code* and the *Evidence Act* in relation to criminal matters and came into force after the offence was committed.

4. During the appellant's trial, evidence was adduced by the complainant herself who after being affirmed, testified that she was aged seven years and a pupil at K Primary School. She knew the appellant as he was an employee of her parents, and that he was provided with a house where he was sleeping. On a day she could not say, she returned from school and found only the appellant at home. The appellant called her into his house that he had something to show her. When she went there he caught hold of her, removed her underpants, as well as his own trousers and innerwear and lay over her. He had sexual intercourse with her. She said she felt a lot of pain, and bled. She screamed. The appellant then abandoned her on his bed and went outside. She picked her underpants and went back to their house. She later reported the matter to her mother who in turn informed her father. They reported the matter to the police. The appellant was later arrested and charged as earlier on stated.

5. Dr Walter Kiyaywa, a Senior Medical Officer of Health, medically examined the complainant. Upon examination he found that she had bruises in the labia, she was bleeding from her vagina, and there was also a discharge with pus cells from her vagina. He concluded that there was sexual penetration which showed that the complainant had been defiled.

6. The trial magistrate believed her and after warning himself as to the dangers of relying on the evidence of a child, he looked for and found corroboration in the testimony of the doctor and the circumstances surrounding the offence. He rejected the appellant's defence that the charge was framed against him by the complainant's parents to avoid paying him salary which they had withheld. He however admitted that on the material day he was at home alone, when the complainant returned from school, he called her to his house with a view to sending her to buy cigarettes for him, and that when he sent her there were other children who witnessed it. The trial magistrate eventually convicted him and sentenced him to life imprisonment on the main charge.

7. On first appeal, the superior court, relying on the decision of this court in the case of *Achoki v Republic* [2000] 2 EA 283, held that the conviction of the appellant on the main charge was wrongful as

the charge was fatally defective as the particulars in the charge did not allege that the act of having carnal knowledge was unlawful. For that reason that court quashed the appellant's conviction on the main count of defilement of a girl under fourteen years of age and set aside the sentence of life imprisonment which had been imposed on him by the trial court. The court, however, held that the evidence supported the alternative count of indecent assault on a female contrary to section 144 (1) of the *Penal Code*. Accordingly it entered a conviction against the appellant for that offence, and thereafter sentenced him to a term of 15 years imprisonment with hard labour. The sentence was ordered to run from the date the appellant was convicted of the defilement charge.

8. It is noteworthy that the particulars of the alternative count did not, also, include the term "unlawful". Section 144(1) of the *Penal Code* as it then stood provided as follows:

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

9. Clearly both the main and alternative counts were defective to the extent that in both of them the term "unlawful" was not included in the particulars of the respective counts. Apparently the defect in the alternative count escaped the attention of the superior court. In view of the holding by the superior court that the main count could not stand in view of that omission, does it follow that the alternative count has to suffer the same fate?

10. We note that the attention of the superior court was not drawn to the provisions of section 382 of the *Criminal Procedure Code*, which provides thus:

> 382. Subject to the provisions herein before 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, omissions 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 obj ection could and should have been raised at an earlier stage in the proceedings."

11. The omission of the term 'unlawful' in both counts was not raised by both the prosecution and the defence. The superior court raised it on its own motion in the course of writing its judgment. We do not know what the respective parties would have said about the defect in the charge had the issue been pointed out to them. In our view, it is not in all cases in which a defect detected in the charge on appeal will render a conviction invalid. Section 382 of the *Criminal Procedure Code*, is meant to cure such irregularities where prejudice to the appellant is not discernible.

12. In the appeal before us we have looked at both the alternative and the main counts as drawn on the charge sheet. As we stated earlier the prosecution called evidence to prove that the complainant was defiled. Defilement is a charge which relates to having sexual intercourse with a girl who is under the age of 14 years. It is immaterial that the girl consented to the sexual act provided that it is shown that the girl was aged under 14 years. The only defence available to an accused facing such a charge is contained

in the proviso to section 145 of the *Penal Code*, before it was amended by Act No 5 of 2003. The proviso, stated as follows:

> 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 in fact believe that the girl was of or above the age of fourteen years or was his wife."

13. In this case the complainant was a girl aged 7 years, a fact the appellant did not challenge. The trial court accepted medical evidence on this aspect and held that the complainant was 7 years of age. This is not a case in which the appellant could have successfully raised the defence under the proviso, above. It was obvious that the complainant was a child of tender age. The appellant knew her well as they lived together in the same homestead although in separate houses. He cross-examined the child, and other witnesses, and it is clear to us that he understood the charge he faced, asked relevant questions on it, and put up a spirited defence against it. The omission of the term "unlawful" from both the main and alternative counts did not in any way whatsoever prejudice him in putting forward his defence. It is our view that, for a child of the age of the complainant there would be no sexual act which would be regarded as lawful. The case of *Achoki v Republic* which we cited earlier involved a charge of attempted rape under the then section 141 of the *Penal Code*. Rape is an offence which involves adults who are able to consent, unlike in the present position where a child was involved, and the issue of consent or lack of it is wholly irrelevant. This is a case in which the superior court should have invoked the provisions of section 382 of the *Criminal Procedure Code* to cure the irregularity which on the facts and circumstances of this matter was minor. Are we able to cure this irregularity and restore the conviction and sentence on the main count?

14. At the hearing of this appeal, this issue was not discussed. We did not call upon either the appellant or the state counsel to comment on the matter. Had we done so we might have been prepared to restore the conviction on the main count. However, having not done so, the issue which falls for consideration is whether the conviction on the alternative count should be sustained.

15. As we stated earlier the alternative count is also defective as the particulars of the charge thereof omit the term "unlawful". However considering that the charge is a minor cognate offence to the charge of defilement, the same reasoning as set out above applies. The irregularity in that charge is curable under section 382, *CPC.* Accordingly, notwithstanding the defect, the conviction of the appellant on it by the High Court should be and it is hereby affirmed.

16. As regards sentence, the charge of indecent assault under section 144(1) of the *Penal Code*, before it was amended by Act No 5 of 2003, carried a sentence of 5 years imprisonment with hard labour with or without corporal punishment. The superior court imposed a term of 15 years imprisonment which was three times the maximum sentence then prescribed for the offence. Obviously, that sentence was not legal. Consequently we are forced to interfere with it. We accordingly set it aside and in place thereof substitute a sentence of 5 years imprisonment with hard labour to run from the date of conviction. We do not consider it appropriate to impose corporal punishment, as that was discretionary and the two courts below did not see it fit to exercise that discretion.

17. In the result the appellant's appeal succeeds to the extent indicated above. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF NOVEMBER, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR