



**CMK v Republic (Criminal Appeal 290 of 2005)  
[2007] KECA 462 (KLR) (16 March 2007) (Judgment)**

*CHRISTOPHER MWANGANGI KATUMO v REPUBLIC [2007] eKLR*

Neutral citation: [2007] KECA 462 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 290 OF 2005  
EO O'KUBASU, JWO OTIENO & WS DEVERELL, JJA**

**MARCH 16, 2007**

**BETWEEN**

**CMK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from an order of the High Court of Kenya at Nairobi (Lady Justice Lesiit) dated 6th April, 2005 in H.C.CR.REV. NO. 19 OF 2005)*

**Prior to the commencement of the Criminal Law (Amendment) Act No. 5 of 2003 on July 25, 2003, no person could be lawfully charged of defilement of a girl above the age of 14 years.**

*The appellant challenged his sentence and conviction by the trial on the ground he could not be charged of the offence of defiling a girl under the age of 16 years. While finding that the charge sheet was defective, the instant court held that prior to the commencement of Criminal Law (Amendment) Act No. 5 of 2003 it was incorrect to say that the appellant or any other person could be charged with defilement of a girl under the age of 16 years. That was because the law in force was section 145(1) of the Penal Code which talked of 'a girl under the age of fourteen years'.*

Reported by Moses Rotich

***Criminal Law – sexual offence – defilement – indecent assault – defilement of a girl under the age of 16 – indecent assault on a female – victim/complainant being a girl aged 14 years at the time of the offence – accused convicted and placed on probation for three years – High Court calling for the case and issuing an order imposing a sentence of imprisonment for 15 years – accused/appellant not given an opportunity to be heard before the High Court – whether the order of the High Court was proper – whether the charge was defective - Penal Code (cap 63) section 145(1),144(1) – Criminal Procedure Code section 364(2)***



## **Brief facts**

On September 18, 2003, the appellant was arraigned before the Thika Chief Magistrate's Court on a charge alleging one count of defilement of a girl under the age of 16 years and an alternative count of indecent assault on a female contrary to sections 145(1) and 144(1) of the Penal Code (cap 63) respectively. The particulars of the offence in respect of the first count stated that the offence had taken place 'on diverse dates between December, 2002 and August, 2003.'

As at December 2002, section 145(1) of the Penal Code provided that any person who unlawfully and carnally knew any girl under the age of fourteen years was guilty of a felony and was liable to imprisonment with hard labour for 14 years together with corporal punishment. However, by virtue of the Criminal Law (Amendment) Act 2003 (Act No 5 of 2003), which came into force on July 25, 2003, the section was amended to provide: 'Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.'

The appellant was tried and convicted on the charge of defilement and on March 7, 2005, a probation officer's report was presented to the trial court. The court later placed the appellant on probation for three years.

On May 15, 2005, the High Court (Lesiit J) issued a warrant of arrest against the appellant and on April 6, 2005, he was arraigned before the Court. The record of the proceedings only showed that the Court thereafter issued an 'order on revision' ostensibly under sections 362 and 364 of the Criminal Procedure Code (cap 75). By that order, the sentence of probation for three years imposed on the appellant was set aside and substituted with a sentence of imprisonment for 15 years.

The appellant appealed against the decision

## **Issues**

Whether prior to the commencement of the Criminal Law (Amendment) Act No. 5 of 2003 on July 25, 2003, a person could be lawfully charged with defilement of a girl under the age of 16 years.

## **Relevant provisions of the Law**

### **Criminal Law (Amendment) Act 2003 Act No. 5 of 2003**

#### ***Section 145 (1)***

*Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.*

## **Held**

1. Section 364 (2) of the Criminal Procedure Code provided that an order under that section should not be made to the prejudice of an accused person unless he has had an opportunity of being heard in his own defence. As he had not been given an opportunity to address the High Court, the appellant had been prejudiced.
2. From the evidence, it was clear that when the appellant had sexual intercourse with the young complainant, the law talked of 'a girl under the age of fourteen years' so that in framing the charge, it was incorrect to say that the appellant or any other person could be charged with defilement of a girl under the age of 16 years prior to July 25, 2003. The charge as laid was therefore defective.

*Appeal allowed.*

## **Orders**

- i. *High Court's order on revision set aside;*
- ii. *Appellant's conviction and order of probation set aside;*
- iii. *Appellant to be released from prison.*

## **Citations**

### **Statutes**

1. Criminal Law (Amendment) Act (repealed) — Interpreted
2. Criminal Procedure Code (cap 75) — section 364(2) — Interpreted



3. Penal Code (cap 63) — section 144(1); 145(1) — Interpreted

**Advocates**

None mentioned

**JUDGMENT**

1. The record of the trial court shows that on September 18, 2003, the appellant herein, Christopher Mwangangi Katumo, was arraigned before the Chief Magistrate’s Court at Thika where he was charged with the following offences:-

Count I

Defilement of a girl under the age of 16 years contrary to section 145(1) of the *Penal Code*.

Count II

Indecent assault on a female contrary to section 144(1) of the *Penal Code*.

2. The particulars of the offence in respect of count I were as follows:-

“1. Christopher Mwangangi Katumo: On diverse dates between December, 2002 and August, 2003 at [particulars withheld] Estate in Thika District within the central Province had carnal knowledge of [particulars withheld] a girl under the age of 16 years.”

3. And the particulars of the offence in respect of count II were as follows:-

“2. Christopher Mwangangi Katumo: On the March 18, 2003 at [Particulars withheld ] Estate in Thika District within the Central Province unlawfully and indecently assaulted [Particulars withheld] by touching her private parts”.

4. The appellant pleaded “not guilty” and after several adjournments the hearing commenced on May 7, 2004 before the learned Resident Magistrate (L Wachira). From the record, it would appear that what we have set out above as the second count was actually an alternative charge to the main charge in the first count. The complainant, SNW (PW1) was a young girl. She stated that as at the date of the trial (May 7, 2004) she was 15 years old and that when the incident of defilement occurred she was 14 years old. She narrated to the trial court how the appellant had been having sexual intercourse with her over a period of time. There was then the evidence of George Msuingi (PW2) of Thika District Hospital who produced a P3 form in respect of the young girl SNW. The P3 had been filled on May 12, 2004 and it showed that the young girl was 7 months pregnant. That evidence was followed by that of JN (PW3) who was the complainant’s aunt. This witness testified how she discovered that the complainant was looking rather weak. On questioning her she mentioned the appellant as the culprit. She reported the matter to the police and as a result PC Jane Mumo (PW4) arrested the appellant leading to his being arraigned in court.

5. When put to his defence the appellant denied having defiled the young girl SNW. The trial court considered all that had been placed before it by way of evidence and came to the conclusion that the appellant was guilty on the main count. In convicting the appellant, the learned trial magistrate stated:-

“I hereby disregard the accused defence as a mere denial. This court finds that the accused person has been proved fully guilty as charged for the act of defilement of a minor contrary to section 145(1) Penal Code and convicts him accordingly as by law provided.”



6. Pursuant to that conviction, the appellant was subsequently placed on probation for a period of three years. In the Probation Officer's report, it was stated:-

“Recommendation:

Your Honour before court is a man of 31 years and a first offender. He admits committing the said offence and regrets having had an affair with the complainant who was a juvenile aged 14 years (sic). He admits the affair was a secretive one and only came into open when the complainant got pregnant. He pleads with the court for leniency saying he is a father of two children. He states his willingness to take up parental responsibilities of the said child and he had talked to the complainant's mother and a sister agreed they would remain with the child and later in life would release it to him. Offender's wife also expressed her willingness to live with the said child if it was given to the offender. They all pleaded for non-custodial sentence so that he can be able to provide for all of them. Your Honour, offender also pleads for a non-custodial sentence saying he is repentant.”

From the foregoing, it is clear that as a result of the said defilement the young SNW delivered a child and the appellant agreed to take care of the said child.

7. The record shows that the probation officer's report was presented to the trial magistrate's court on March 7, 2005, and that appears to have concluded the proceedings in the Trial Magistrate's Court. From there we move to the proceedings in the superior court. The record shows that on May 15, 2005 and apparently, without any prompting, Lesiit J. issued a warrant of arrest in respect of the appellant and on April 6, 2005 the appellant was brought before Lesiit, J. The record is silent as to what happened except an order by the learned Judge. That order was as follows:-

“Order on revision:

Under section 364 of the Criminal Procedure Code as read with section 362 of Criminal Procedure Code the sentence imposed against the accused herein of a probation term of 3 years is hereby set aside. In substitution the accused is sentenced to 15 years imprisonment.”

8. It is that sentence of 15 years imprisonment that triggered this appeal. When the appeal came up for hearing before us on March 7, 2007, the appellant appeared in person while Mrs. Murungi, the learned principal state counsel, appeared for the State. In conceding the appeal, Mrs. Murungi pointed out that the appellant was not heard when his matter was before the superior court. We agree with Mrs. Murungi that the appellant was not heard. In our view, the appellant was not given an opportunity to address the court. He was therefore prejudiced. Indeed section 364(2) of the *Criminal Procedure Code* provides:-

“No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.”

9. This appeal could be allowed in view of what we have stated so far but there are other aspects of the trial that need to be considered. At the commencement of this judgment we reproduced the particulars of the offence in respect of the first count which were to the effect that the offence took place “on diverse



dates between December, 2002 and August, 2003”. As at December, 2002 (and up to July 24, 2003), section 145(1) of the Penal Code provided:-

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

10. It was by virtue of the *Criminal Law (Amendment) Act 2003 Act No 5 of 2003* that section 145(1) of the Penal Code was amended to read as follows:-

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

11. The date of commencement of that Act No. 5 was July 25, 2003. In her evidence SNW while saying she had intercourse with the appellant on several occasions, specifically remembered the appellant having sexual intercourse with her on March 18, 2003.
12. From the foregoing, it is clear that when the appellant had sexual intercourse with the young SNW the relevant provision of the law talked of “a girl under the age of fourteen years.” So that the way the charge was laid it was incorrect to say that the appellant or any other person could be charged of defilement of a girl under the age of 16 years prior to July 25, 2003. The charge as laid was therefore defective.
13. In view of the foregoing and as the learned principal state counsel has conceded the appeal, and in our view properly so, we have no alternative but to allow this appeal. We do so with the result that the order on revision by the superior court is set aside, the conviction of the appellant by the trial court quashed and the order of probation set aside. This will result into the appellant being released from prison forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH, 2007.**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR

