**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 370 OF 2010**

*(From Original Conviction and Sentence in Criminal Case No. 1345 of 2009 of the Principal Magistrate's Court at Kwale - Ogembo D.O. **– P. M.**)*

**JUMA BILALI............ ................ ...................... APPELLANT**

**-VERSUS-**

**REPUBLIC ..................................................... RESPONDENT**

**JUDGEMENT**

[1] The appellant in this case JUMA BILALI was charged with defilement of a girl contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006. The facts of the charge are that on the 19th day of September 2009 at ***[Particulars withheld]*** Village Waa location Kwale District within Coast Province defiled U B a girl aged 12 years.

The appellant was convicted on his own plea of guilty and sentenced to 15 years imprisonment. The appellant appealed against the conviction and sentence of 15 years.

[2] In his ground of appeal he contended that the charge was defective in that the charge did not include Sec 8 (1) which states that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. He further contends that there was no fair trial. That on 28th September 2009 when he was arraigned before the trial magistrate on 28th September, 2009 he pleaded **"it is not true"**. That on 26th October, 2009 when he asked for the charge to be read to him again he pleaded "**it is true".** That after this date the prosecutor went ahead to ask for a date of reading of the facts on 29th October, 2009. On this date the prosecutor did not have his file. The facts were read in court on 2nd November, 2009. The accused pleaded not guilty and the hearing was set for 6th November 2009. On that date the case did not proceed as the court had a long criminal case. The case was adjourned to 5th January, 2010 and to 19th February, 2010, when he was convicted. The appellant states he was not accorded a fair trial contrary to Article 25 (c) of the Constitution. He states that the age of the girl was not proved. Further he argues that there was no medical document to prove his age. He prayed for the appeal to be allowed.

[3] The State Counsel opposed this appeal. He argued that the plea was unequivocal. That it was read in Kiswahili. The State Counsel says the appellant pleaded not guilty, asked the court to retake the plea, he stated **"It is true"**. he later disputed the facts and a plea of not guilty was entered and on the third time a plea of guilty was entered when he said **"it is true"**. That the accused mitigated and the report said he was a adult. That 15 years was not harsh and it is lenient since the maximum is 20 years. The State Counsel urged the court to maintain the sentence.

[4] When an appellant pleads "**it is true"** is this an equivocal plea? This issue was considered in ***R v Yonasani Egalu 1942 9 E.A.C.A 65 at Page 67***

*"In any case in which a conviction is likely to proceed on a plea of guilty (in other words when an admission by the accused is to be allowed to take place in otherwise necessary strict proof of the charge beyond reasonable doubt by prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appeal court."*

In this case the facts were read to the accused when he was called to answer he stated ***"the facts are correct"*** This plea is an equivocal plea. In ***Kato v Republic [1971] 1 E.A 542 (CAD***) the court of appeal set out the way of taking the plea and in that case where plea was equivocal the court quashed the conviction and set aside the sentence. In that case the court said

*"The procedure relating to the calling upon the accused person to plead is governed by s.203 of the Criminal Procedure Code. In our view, if it can be clearly shown that an accused person has admitted all the ingredients which constitute the offence charged, it is then proper to enter a plea of guilty. The words "it is true" when used by an accused person may not amount to a plea of guilty, for example, in a case where there maybe a defence of self-defence or provocation. As was said by this court in the case of R v Yonasani Egalu (1942), 9 E.A.C.A. 65, at p. 67"*

[5] Another crucial thing in this trial was that there was no prove of the age of the complainant. We are only told she was 12 years, there was no prove at all. Age is an important element in sexual offences. *How would we know she was a minor without the slightest proof of age?* The appellant alleged he was 16. The probation Officer alleged he was 22 years. The Court ordered an age assessment in view of the two conflicting age assertions. On 2nd March, 2010 the prosecutor said he had no report of the accused. He then said he had it and that the accused is an adult. The Magistrate convicted him as an adult. No document was produced in court although it was alleged that there was a report from Kwale District Hospital. *What then did the Learned Magistrate base his finding on when he claimed the appellant was an adult?* The appellant clearly suffered a mistrial. The plea was equivocal, the ages of the complainant and the appellant were not established at all.

[6] I uphold the appeal of the appellant. I set aside the conviction of the appellant with the offence of defilement contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006. I equally quash the conviction of 15 years imposed by the Learned Magistrate.

I set the appellant free unless he is otherwise lawfully held.

**Dated and delivered in open court at Mombasa this 27th day of June, 2014.**

**S. MUKUNYA**

**JUDGE**

**27.6.2014**

In the presence of the

Appellant.