



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 178 OF 2011

(From Original Conviction and Sentence in Criminal Case No. 172 of 2008 of the Resident Magistrate's Court at Wundanyi: F.K. Munyi – R.M.)

WISDOM MWAKIDA MWANGOMBE PETITIONER

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant **WISDOM MWAKIDA MWANGOMBE** has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at Wundanyi Law Courts. The Appellant had been arraigned before the trial court on 22nd May 2008 facing a charge of **DEFILEMENT OF A GIRL**. The Appellant pleaded guilty to the charge after which the Appellant was convicted and sentenced to serve fifteen (15) years imprisonment. **MR. GEKONGE** Advocate argued the appeal on behalf of the Appellant whilst **MR. TANUI** who appeared for the Respondent State conceded the appeal.

Having myself carefully perused the record of the proceedings before the lower court I do quite understand the decision by the learned State counsel to concede this appeal. The charge sheet indicates that the Appellant was charged with the offence of Defilement of a girl contrary to Section 8(4) of the Sexual Offences Act. Section 8(4) of the said Act provides only for the penalty for an act of defilement on a girl aged between 16 – 18 years. This section does not define the offence at all. The offence of Defilement is created by Section 8(1) of the same Act. Thus this charge was improperly framed and as

such was defective. One cannot be charged with an offence unless that offence is properly defined. The proper charge ought to have read Defilement contrary to Section 8(1) **as read with** Section 8(4) of the Sexual Offences Act. This was not done thus the charge sheet was fatally defective. No application was made to amend the charge. Any proceedings based on this defective charge are null and void and as such the conviction of the accused based on this defective charge cannot be upheld.

If this were the only anomaly I would have considered ordering a retrial of the case. However as counsel for the Appellant has pointed out no medical evidence was adduced to corroborate the allegation of defilement. There was no P3 form produced and no evidence that the complainant ever attended a medical examination. All the prosecution produced was the complainant's ante-natal clinic card. All this proves is that she was pregnant. Pregnancy cannot be deemed to amount to proof of defilement. It is clear that this case was not properly investigated and to order a re-trial would be allowing the prosecution to rectify their mistakes. As such I do allow this appeal. The Appellant's conviction is hereby quashed and his subsequent 15 year sentence is also set aside. The Appellant is to be set at liberty unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 26th day of March 2012.

M. ODERO

JUDGE

In the presence of:

Appellant in person

Mr. Gioche for State