



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 97 OF 2008

JUMA ALI MWANYAMAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 373 of 2006 of the Principal Magistrate's Court - D.O. Ogembo – P.M)

RULING

JUMA ALI MWANJEMA herein after referred to as the Appellant, was charged with the offence of;

Defilement of a girl Contrary to Section 145 (1) of the Penal Code.

The particulars of the charge are;

On the 2nd day of February 2006, in Kwale District within Coast Province, had carnal knowledge of M.M. a girl under the age of 16 years”.

He was tried at the Senior Resident Magistrates Court, at Kwale, by Hon. Ogembo D.O, Principal Magistrate. He was convicted and sentenced to serve **TEN** years imprisonment. He has appealed against both the Conviction and the Sentence.

At the hearing of the Trial, the Appellant who was not represented, relied entirely on the written submission he filed to prosecute his appeal. Mr. Tanui, the Learned State Counsel appeared for the State. He told the court that he was conceding to the appeal on the ground that the charge sheet is defective as it makes reference to the age of the victim as under **“16 years”** and yet under Section 145 of the Penal Code the relevant age is under **“14 years”**.

As a result of the submissions by the state, I looked at the relevant provisions of Section 145 of the Penal Code (now repealed). I discovered the following. By a Gazette Notice No.5 of 2003 which received assent on 18th July, 2003 and commencement on 25th July, 2003. The provisions of Section 145 of the Penal Code were amended to read Section 145 (1)

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

Prior to the Gazette Notice No. 5 of 2003, the relevant age was under **fourteen years**. The charge sheet herein indicates the offence was committed on **2nd February, 2006** therefore the relevant age is “**under sixteen years**”.

It's note worthy that subsequently on the 21st July 2006, the Sexual Offences Act No. 3 of 2006 came into force replacing the provision of Section 145 of the penal code with section 8, thereof. I therefore find that, the submissions by the Learned State Counsel are misdirected and improper. I also realize also that, the sentence which was applicable was “**life imprisonment**”. However, in this matter the learned Magistrate sentenced the Appellant to **TEN (10)** years imprisonment.

This matter has not come before me on “**Revision**”. I therefore find that it would be in the interest of Justice to bring these issues to the attention of the Appellant and seek to his understanding of the same, before I can proceed to write my full Judgment in this matter.

Orders accordingly.

G.L. NZIOKA

JUDGE

5/3/2012

Dated delivered and signed in an open court at Mombasa

G.L. NZIOKA

JUDGE

In the presence of:-

Appellant in person
Tanui for the state

Matano the court clerk

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G.L. NZIOKA

JUDGE

5/3/2012

Appellant states in Kiswahili:-

I wish to inform the court that I am now not sure what will happen to me if the court proceeds with my appeal. I wish to be left to serve the sentence that I have been given. I don't wish to proceed with the appeal now.

G.L. NZIOKA

JUDGE

Mr. Tanui: I understand him to be saying, he wishes to abandon the appeal.

Appellant: yes, I don't wish to go on further.

Court: Ruling on the matter on 12th March, 2012.

G.L. NZIOKA
JUDGE
5/3/2012