



**KAZUNGU NGUMBAO GALO.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

### **JUDGEMENT**

The appellant, KAZUNGU NGUMBAO GALO was tried before the Chief Magistrates Court at Malindi for the offence of Defilement contrary to section 8(4) of the Sexual Offences Act, it being alleged that on diverse dates in the month of December 2008 and 31<sup>st</sup> March 2009, at Dongo Kundu he defiled MJ, a girl aged 16 years.

At the conclusion of the trial, the appellant was convicted and sentenced to 15 years imprisonment. He has appealed against both conviction and sentence. At the hearing of the appeal, he was represented by MR MOUKO who adopted the amended Grounds of appeal filed by the appellant.

In written submissions MR MOUKO argued all the grounds together as follows;-

- a. *The age of the victim was not proved.***
- b. *The appellant had a good defence in that he was led to believe the victim was of age.***
- c. *The trial resumed before a new Magistrate without compliance with section 200 Criminal Procedure Code which renders the proceedings a nullity.***

MR MOUKO orally added a final ground on 17/2/12 to the effect that no voire dire examination was inducted before the victim`s evidence was taken.

MR KEMO for the state opposed this ground and urged the court to disregard it as it was not in the grounds of appeal. I think the answer to this submission lies in the court`s duty on a first appeal to review afresh the trial evidence in order to draw own conclusions (**See OKENO VS R 1972 EA 32**).

MR KEMO reiterated the prosecution evidence and argued that the victim`s age was scientifically assessed and proved: that the appellant was aware that the victim was a minor, as per the defence he offered at the trial. Regarding the application of section 200 Criminal Procedure Code MR KEMO submitted that the case proceeded de novo. On 22/9/09 before the second trial magistrate.

MR MOUKO replied that the age assessment evidence was merely an estimation and not full proof. The prosecution evidence in lower court was straight forward and can be briefly restated.

MJ was 15 years old in December 2008. The appellant approached and befriended her. Soon the two became lovers and MJ became pregnant. She then went to live with the appellant early in 2009. Her parents were unhappy and reported to the area chief. They forcefully removed her from the appellant`s house in March 2009. She was confirmed to be pregnant. The appellant was arrested and charged. In his

unsworn defence statement, the appellant told the trial court that they pursued and courted him and eventually a love affair began. He tried to advise her to return to her parents as she followed him everyday.

The basic facts of this case are not in dispute at all. The appellant and MJ were neighbours and in the material period a love affair developed between them resulting in MJ's pregnancy. The appellant's defence in the lower court was that MJ literally threw herself on him and he was unable to resist her.

MR MOUKO has reiterated this line of defence in the appeal and urged the court to find the conduct misled the appellant to think that MJ was of age. With respect, that was for the appellant to say in his defence in the Lower Court. He did not. He said he asked MJ to go to her parents. Yet MJ told the court that the appellant never inquired into her age. Whether the appellant formed an impression from MJ's alleged conduct that she was not a minor is a matter of evidence and not assumption. In my considered view, it is too late to raise such a matter at this stage.

The prosecution called DR AREBA (Pw 4) a dentist who tendered evidence regarding MJ's age in 2008. His evidence was not challenged during cross-examination, and while it is true that such evidence amounts to an estimation, there is nothing to suggest that the same is not credible. MJ herself and her brother (Pw 3) confirmed the same. Age assessment as the term suggests is never a precise science. It is an estimation rather than a cut-and-dried fact as suggested by MR MOUKO and neither is there any contradiction between the doctor's evidence and that of MJ and her brother, PW 3. The latter when he gave evidence in December 2009 said that MJ was seventeen. Pw 4 said she was 16 in March 2009. That is not contradictory in light of the lapse of time. The statements by the appellant in mitigation that MJ's mother claimed she was 19 years old is hearsay and was not part of his defence.

The appellant was charged under the correct section of the law and I am unable to see how the legal authorities cited by MR MOUKO advance his arguments. Finally section 200 Criminal Procedure has not application to this case which started de novo on 22/9/09. As regards the final ground argued orally by MR MOUKO, the court was perfectly entitled to admit the evidence of MJ without voire dire examination.

She was hardly a child of tender years at the time she gave evidence. The record of her evidence does not show that a voire dire examination should have been carried out. The court must have satisfied itself accordingly, not that she was an adult as suggested by the defence but that she was competent to give sworn evidence. At any rate she gave her age in the second sentence of her testimony. I am satisfied that there was no prejudice occasioned to the appellant at all. Indeed MJ appeared bewildered that her love affair had been interrupted by the arrest of her lover after she had made up her mind to go stay at his home.

The upshot of the foregoing is that the appeal has no merit and is dismissed in its entirety.

**Delivered and signed at Malindi this 19<sup>th</sup> day of June, 2012 in the presence of Mr Naulikha – State, Appellant present, cc-Evans.**

**C.W.MEOLI**  
**JUDGE**