



**MWAGANDU MABUTI ..... APPELLANT**  
**=VERSUS=**

**REPUBLIC ..... RESPONDENT**

*(From Original Conviction and Sentence in Criminal Case No. 2645 of 2005 of the Senior Resident Magistrate's Court at Kwale: **D.M. Ochenja – S.R.M.***

### **JUDGEMENT**

The Appellant **MWAGANDU MABUTI** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The accused was arraigned before the lower court on 26<sup>th</sup> May 2005 facing a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(1) OF THE PENAL CODE**. The particulars of the charge were that:

***“On diverse dates between March 2005 and 27<sup>th</sup> July 2005 at unknown time at {particulars withheld} in Kwale District within the Coast Province had carnal knowledge of R.H. a girl aged 14 years”***

The Appellant also faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE**. The Appellant entered a plea of ‘**Not Guilty**’ to both charges and his trial commenced on 26<sup>th</sup> May 2005. The prosecution led by **INSPECTOR CHARO** called a total of four (4) witnesses in support of their case. The brief facts of the prosecution case are as follows.

The complainant **R.H.** a girl aged 14 years told the court that she was a student in class 4 at {*particulars withheld*}. She testified that in December 2004 she met the Appellant at her uncle's home. The Appellant seduced her and the two commenced a love affair. The Appellant persuaded the complainant to drop out of school claiming that he would marry her. The two began to cohabit in Mwereni. Shortly thereafter the complainant realized that she was pregnant. **PW2 H.H.** the complainant's mother reported the matter to the chief. The accused was arrested and charged.

At the close of the prosecution case the accused was ruled to have a case to answer and was placed onto his defence. He denied defiling the complainant and told the court that he did not even know her. On 27<sup>th</sup> March 2006 the trial magistrate delivered his judgement in which he convicted the Appellant and thereafter sentenced him to serve twenty (20) years imprisonment. Being aggrieved the Appellant filed this appeal. The Appellant was represented by **MS. FWAYA** Advocate during the hearing of this appeal. **MR. GIOCHE** State Counsel who represented the Respondent State conceded the appeal.

I have carefully perused the proceedings of the trial before the lower court and I note that this trial commenced before **HON. S.S. MAINDI** Resident Magistrate who heard a total of four (4) witnesses. The same magistrate also heard and recorded the defence of the accused. However the judgement was read out on 27<sup>th</sup> March 2006 by a different magistrate **HON. OCHENJA** Senior Resident Magistrate. No reason is given for this. It is not clear who prepared the judgement. The same is signed and dated by Hon Ochenja and **not** by Hon. Maindi who heard the case. This is very unprocedural. If for some reason the trial magistrate was unable to prepare the judgement then the reasons for this ought to have been recorded. If a new magistrate was taking over the case then Section 200 of the Criminal Procedure Code would have come into play. There is no evidence that Section 200 was complied with. If it was Hon. Maindi who prepared the judgement then he ought to have dated and signed it and Hon. Ochenja ought to have clearly indicated that he was reading out the judgement **on behalf** of his colleague. Failure to adhere to the procedural requirements upon a change of magistrate renders this trial null and void. The conviction therefore cannot stand and is hereby quashed. Similarly the 20 year sentence imposed on the

Appellant is set aside.

Mr. Gioche for the State requested that a re-trial be ordered. I note that the Appellant was convicted in March 2007. He has therefore already served five and a half years in prison. In my view a re-trial would be prejudicial to the Appellant and thus I decline to order one. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 14<sup>th</sup> day of September 2012.**

**M. ODERO**  
**JUDGE**

In the presence of:

Ms. Fwaya for Accused

Mr. Gioche for State