



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Appeal 258 of 2010**

**WATO NYUNDO .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(From the Original Conviction and Sentence in the Criminal Case No. 963 of 2008 of the Senior Resident Magistrate's Court at Kwale – Ogembo D.O. - PM)

**JUDGMENT**

The appellant was Convicted of the offence of defilement contrary to section 8(1) of the Sexual offences Act and was Sentenced to fifteen (15) years imprisonment.

The complainant was alleged to have been ten(10) years old at the time of the defilement.

No evidence of age assessment was produced before the Court, no documentary evidence eg. Birth certificate was produced to ascertain the age of the complainant, no parent or guardian of the complainant testified as to her age. The trial magistrate in his Judgment did note that the witness was a minor who does not go to school and who does not even know her exact age.

The second witness was also a minor who did not know his age. A perusal of the proceedings also show that the trial magistrate did not subject the two to Voire dire examination before taking their evidence which was unsworn and yet proceeded to have them cross-examined by the defence.

I find that this is a fit case for retrial. The finding of the trial magistrate is hereby reversed and it is ordered that the Accused be tried by a Court of competent jurisdiction under section 354(3) (a) (1) of the Criminal Procedure Code. Case to proceed to retrial.

Judgment dated and delivered this **23rd** day of **November, 2012**.

.....  
**M. MUYA**  
**JUDGE**

**In the Presence of:-**

Mr. Tanui for the State

Court clerk – Philip

Accused.