

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 179 OF 2008

ZACHARIAH OTIENO CHARLES.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(From original conviction and sentence by the Senior Principal Magistrate's court at Migori criminal case no. 220 of 2008)

The appellant was charged with the offence of defilement of a girl under the age of 18 years contrary to section 8(2) of the **Sexual Offences Act**. The particulars were that on 16th May, 2008 in Migori District within Nyanza Province, the appellant had carnal knowledge of a girl aged 11 years namely, **C.A.** He pleaded not guilty to the charge and he was thereafter tried. At the end of the trial, the appellant was convicted and sentenced to life imprisonment.

The appellant was aggrieved by the conviction and sentence imposed and hence preferred this appeal. In his home drawn petition of appeal, the appellant says that the learned magistrate erred in law and fact in convicting him on insufficient evidence and that there was a long standing grudge between the appellant and the parents of the complainant over land and that was the reason why they colluded to fix him.

When the appeal came up for hearing before me on 24th November, 2010, the appellant offered to canvass the same by way of written submissions. I have read and carefully considered them.

Mr. Gitonga, learned state counsel conceded to the appeal and rightly so in my view. He took the position that the charge as drawn was fatally defective since the section cited in the charge sheet was the penalty section and not the section creating the offence

The appellant was charged before the Senior Principal Magistrate's court at Migori with "**DEFILEMENT OF A GIRL UNDER THE AGE OF 18 YEARS CONTRARY TO SECTION 8(2) OF THE SEXUAL OFFENCES ACT OF 2006.....**". However section 8(2) of the **Sexual Offences Act** provides interalia:-

".....A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life....." From the foregoing it is clear that the appellant was charged with the penalty section of the offence of defilement under the **Sexual Offences Act**. He was not charged with the section creating the offence which is section 8(1) of the **Sexual Offences Act**. That section provides that "**A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.....**". Since the appellant was not charged in accordance with the section creating the offence, he pleaded and was tried on an a non-existent offence. I deally, he ought to have been charged under section 8(1) as read with section 8(2) of the **Sexual Offences Act**. Since he was charged for a non-existent offence, his trial was a nullity. Accordingly I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Ruling dated, signed and delivered at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA
JUDGE