



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 317 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 976 of 2008 of the Senior Resident Magistrate's Court

at Voi: P.N. Ndwiga – S.R.M.)

HAMISI ZUMA

NGOME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein **HAMISI ZUMA NGOME**, has filed this appeal challenging his conviction by the learned Senior Resident Magistrate Voi Law Courts, on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH S.8(3) OF THE SEXUAL OFFENCES ACT 2006**. **MR. JUMBALE** Advocate appeared and argued the appeal on behalf of the Appellant whilst **MR. ONSERIO** learned State Counsel appeared for the Respondent State and opposed the appeal.

The Appellant was arraigned before the lower court on 27th October 2008, and he entered a plea of guilty to the charge. Mr. Jumbale submits that the plea was not unequivocal and ought not to have been entered. He further argues that the language used was not indicated. With respect I do not agree. At page 2 line 12 of the record it is clearly indicated as follows:-

“The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he understands [my emphasis]

The fact that the accused responded to the charge is clear proof that he did understand the language used. The record also makes it clear that on that day there was a court clerk on duty in the court whose name is given as **‘Dolphine’**. In the case of **STANLEY KAGO & ANOTHER –VS- REPUBLIC 2006 Eklr**, the Court of Appeal in dismissing a similar ground of appeal held:

“the record shows that the coram, including the court clerk (CC) was the same throughout the trial. It is the court clerk’s function, among other things, to interpret the language where necessary”

Likewise the presence of the court clerk in the Appellant’s trial is proof enough that both the charge and facts were interpreted to the Appellant. I therefore dismiss this ground of the Appeal and find that the language used in the lower court was one which the Appellant clearly understood.

Upon the charge being read out the Appellant responded by saying:

“It is true”

By so stating he pleaded guilty to the charge. As required by law the facts were thereafter read out by the court prosecutor to which the Appellant replied:

“The facts are true and correct”

Again nothing could be clearer than this. The Appellant in his own words accepted the correctness of the facts. Indeed the Appellant proceeds to reiterate his guilty plea when he states in mitigation:

“We had consent. We had an affair and she agreed that we have sexual intercourse. The devil made me to it”

This is a clear admission that the Appellant did engage in sexual intercourse with the 13 year complainant. His plea that she consented does not negate the charge since as the learned trial magistrate correctly pointed out in his comments before sentencing a minor cannot legally give consent to sexual intercourse. I therefore find that the plea as taken was proper and procedural. The Appellant entered a clear and unequivocal plea of guilty to the charge of Defilement. He was allowed an opportunity to mitigate which mitigation was duly considered by the trial court before sentence. The twenty (20) year sentence imposed was both lawful and appropriate given the young age of the complainant. I find no merit in this appeal and I do dismiss the same in its entirety. The conviction and sentence of the lower court is accordingly confirmed and upheld.

Dated and Delivered in Mombasa this 21st day of February 2011.

M. ODERO

JUDGE

Appellant in person
Mr. Muteti for State