



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 233 OF 2010**

*(From Original Conviction and Sentence in Criminal Case No. 254 of 2009 of the Principal Magistrate's Court at Kwale: A.M. Obura (Mrs.) – R.M.)*

**MANGALE MANONGO ..... APPELLANT  
VERSUS  
REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **MANGALE MANONGO** has filed this appeal to challenge his conviction and sentence on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(4) OF THE PENAL CODE**. The particulars of the offence were that:

*“On diverse dates between September 2<sup>nd</sup> 2008 and February 2009 at V[...] Msambweni district within Coast Province had unlawful carnal knowledge of M.M a girl aged 17 years knowing the said M.M to be a child.”*

The Appellant entered a plea of ‘**not guilty**’ to the charge and his trial commenced before **HON. MRS. ANN OBURA**, Resident Magistrate on 23<sup>rd</sup> July 2009. The complainant a 17 year old girl told the court that in September 2008 she left her home and got married to the Appellant. She lived with the Appellant for a period of six (6) months during which time they engaged in sexual intercourse on a regular basis. The complainant’s parents reported the matter to the local chief whereupon both the complainant and her ‘**husband**’ the Appellant were arrested and placed in cells. **PW4 STANLEY CHEPKIRWA**, a clinical officer attached to Diani Health Centre carried out a medical examination on the complainant on 11<sup>th</sup> February 2009. He found her to be two months pregnant. **PW4** filled and signed the P3 form which he produces in court as an exhibit **Pexb1**. The Appellant was then charged in court.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He exercised his discretion under S. 211 of the Criminal Procedure Code and elected to keep silent and not to proffer any defence. On 15<sup>th</sup> April 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the offence of Defilement and thereafter sentenced him to life imprisonment. It is against this conviction and sentence that the Appellant now appeals.

**MR. ONSERIO**, learned State Counsel who appeared for the Respondent State conceded this appeal. Having myself perused the charge sheet I am in agreement that the charge was indeed fatally defective. The Appellant was charged with the offence of “**Defilement of a Girl contrary to S. 8(4) of the Sexual Offences Act of 2006.**” S. 8(4) of the Act reads:

***“8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”***

S. 8(4) therefore provides **only** the penalty for the offence of Defilement. It does not define or create that offence. It is S. 8(1) which creates the offence of Defilement by stating –

***“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”***

The charge sheet must include both the offence as created and the penalty provided for upon conviction. Thus the charge as properly framed ought to have read ***“Defilement ..... contrary to S. 8(1) as read with S. 8(4) Sexual Offences Act.”*** Failure to include S. 8(1) renders the charge sheet defective as no offence is disclosed. This is a defect which is fatal and cannot be rectified by S. 382 of the Criminal Procedure Code. The subsequent trial conviction and sentence of the Appellant, being premised on a defective charge are null and void and cannot stand. For this reason alone, this appeal succeeds. The Appellant’s conviction is quashed and his sentence of life imprisonment is also set aside. I have considered the question of whether a retrial would be appropriate. In my view the evidence adduced was weak and notwithstanding the defective charge sheet, the conviction rendered was still unsafe. As such I decline to order a retrial in this matter. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 11<sup>th</sup> day of April 2011.**

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

In the presence of:  
Mr. Onserio for State  
Appellant in person