



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 271 OF 2009**

*(From Original Conviction and Sentence in Criminal Case No.782 of 2008 of the Principal Magistrate's Court at wale: A.M. Obura (Mrs.) – R.M.)*

**ANTONY SENGEZA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **ANTONY SENGEZA**, has filed this appeal to challenge his conviction on a charge of **DEFILEMENT CONTRARY TO SECTION 8(3) OF THE SEXUAL OFFENCES ACT 2006**. The learned trial magistrate after hearing the evidence proceeded to convict the Appellant on 1<sup>st</sup> December 2009 and thereafter sentenced him to serve fifteen (15) years imprisonment.

**MR. ONSERIO**, learned State Counsel has conceded the appeal on the basis that the charge sheet as framed was fatally defective. I have examined the said charges and I am inclined to agree with the learned State Counsel. The Appellant was charged with contravening S. (3) of the Sexual Offences Act. This section only provides for the sentence. The definitive section which creates the offence of Defilement is S. 8(1) which was not referred to at all in the charge sheet. To omit S. 8(1) does render the charge fatally defective. The charge as properly framed ought to have read ***“Defilement of a Girl contrary to S. 8(1) as read with S. 8(3) of the Sexual Offences Act”***. Failure to frame the charge in this manner renders the charge sheet fatally defective. A conviction and sentence flowing from a defective charge cannot stand. As such I find this conviction null and void and I do quash the same. The subsequent 15 year sentence is also set aside.

Mr. Onserio has asked the court to order a re-trial in the matter. The offence of Defilement is undoubtedly serious since it involves a young life. The prosecution did avail weighty evidence. The trial court failed to exercise due vigilance in accepting a defective charge. The Appellant has only served 1½ years of a 15 year term. A re-trial at this point will not cause undue prejudice. For all the above reasons I do order a retrial in this matter. The Appellant to be produced before the Resident Magistrate, Kwale Law Courts on 11<sup>th</sup> April 2011 for fresh plea to be taken.

**Dated and Delivered in Mombasa this 6<sup>th</sup> day of April 2011.**

**M. ODERO**

**JUDGE**

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