



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 282 OF 2008

(From Original Conviction and Sentence in Criminal Case No.1652 OF 2008 of the Chief Magistrate's Court at Mombasa: M.K. Mwangi – S.R.M.)

MUTINDA MWAI MUTANA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **MUTINDA MWAI MUTANA**, has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Mombasa Law Courts. The Appellant had been arraigned before the trial court on 4th June 2008 on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(3) OF THE SEXUAL OFFENCES ACT 2006**. In the alternative the Appellant was charged with **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT**. The Appellant pleaded not guilty to both charges. His trial commenced on 18th June 2008 and the prosecution called a total of five (5) witnesses in support of their case. On 14th October 2008 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the charge of Defilement and sentenced him to serve twenty (20) years imprisonment. It is against this conviction and sentence that the Appellant now appeals. **MR. ONSERIO**, learned State Counsel appearing for the Respondent State did concede this appeal on the grounds that the charge as framed was fatally defective. I have looked at the charge sheet. The Appellant was charged with the offence of Defilement of a girl Contrary to **Section 8(3)** of the Sexual Offences Act. S. 8(3) provides:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”

The charge sheet did not include any mention of S. 8(1) of the Act which defines the act of defilement thus:

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

This section therefore creates the offence. The proper procedure would be to have charged the Appellant with the offence of Defilement contrary to S. 8(1) **as read with** S. 8(3) of the Sexual Offences Act. To charge the Appellant with the contravening only penalty section of the Act is fallacious. I do therefore

agree that this charge is fatally defective. A trial, conviction and sentence flowing from a defective charge cannot stand. I therefore allow this appeal, quash the Appellant's conviction and set aside the twenty (20) year sentence. Mr. Onserio has asked for a retrial of the charge. **MR. SEWE**, counsel for the Appellant argues against a re-trial on the basis that the Appellant has already served part of the sentence. The offence of defilement is undoubtedly a very serious offence. It involves a young life. In my view the prosecution adduced weighty evidence. The Appellant being the complainant's teacher stood '*in loquo parentis*' to the child. It is in the interests of justice that a retrial be ordered. The Appellant has only served 2½ years of a 20 year term. In my view he will not suffer undue prejudice by a retrial. I do therefore direct that the Appellant be produced before the Chief Magistrate Mombasa on 8th April 2011 for fresh plea to be taken.

It is so ordered.

Dated and Delivered in Mombasa this 4th day of April 2011.

M. ODERO
JUDGE

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