



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 199 OF 2009**

***(From Original Conviction and Sentence in Criminal Case No. 558 of 2009 of the Resident Magistrate's Court at Wundanyi: F. Munyi – R.M.)***

**MUTUKU MAKAU ..... APPELLANT**  
**=VERSUS=**  
**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **MUTUKU MAKAU** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Wundanyi Law Courts. The Appellant had been arraigned before the trial court on 16<sup>th</sup> September 2009 on charge of **DEFILEMENT OF A GIRL CONTRARY TO S. 8(1) AS READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**. In addition the Appellant faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**. When the charges were read out the Appellant entered a plea of '**guilty**'. Thereafter the facts were read out as required by law and the Appellant responded by saying:

***"Ni kweli"***

thereby maintaining his plea of guilty. The trial magistrate then proceeded to convict the Appellant on his plea of guilty and after listening to his mitigation sentenced him to serve a term of twenty (20) years imprisonment. Being dissatisfied with both his conviction and sentence the Appellant filed this present appeal.

**MR. ONSERIO**, learned State Counsel conceded the appeal. I have myself carefully perused the proceedings and I am inclined to allow this appeal for the following reasons. Firstly the learned trial magistrate failed to adequately warn the Appellant of the mandatory life sentence provided for before recording the plea of guilty. Sexual offences are no doubt very serious offences the conviction for which would leave a permanent stain on ones character. Aside from this the mandatory sentences provided for by the Sexual Offences Act are lengthy by any terms. The trial court must, I feel, warn the accused of the consequences of a guilty plea including the fact that there is a lengthy mandatory sentence attached to a conviction of such offences. Only then can an accused be said to have made an informed decision to plead guilty. Failure by the trial magistrate to take this precaution negates this guilty plea.

Secondly the facts allege that the complainant was a child aged nine (9) years. The prosecution did not avail any evidence to prove the age of the complainant e.g. birth certificate, vaccination card, school records etc. The age of the complainant is of utmost importance in sexual offence. The prosecution is

required to prove the age of the victim. A mere statement that she is 9 years old will not suffice.

Thirdly and finally the trial magistrate erred in failing to conclusively establish the age of the Appellant before proceeding to take his plea. Upon his appearance before the court, I did take note of the Appellant's youthful looks and I did order that an age-assessment examination be conducted. This examination was conducted at Coast General Hospital, and the report dated 25<sup>th</sup> February 2011 gives the approximate age of the Appellant as 17 years. This being the case and in light of the provisions of the Children Act 2001, S. 184(1) gives to the Children's Court the jurisdiction to hear and determine all cases where a minor is the accused. There is no indication that the court trying this matter was gazetted to try children's matters. The Appellant was tried as an adult instead of as a child offender. This violated his rights to a fair trial. The age of the Appellant would also have great bearing on the sentence to be imposed. For all the reasons given above I find merit in this appeal and I do allow the same and quash the Appellant's conviction for defilement.

The State have asked that the court order a retrial in this matter. However I am not inclined to agree with this request. Several procedural rules were overlooked in the taking of this plea. Neither the trial magistrate nor the prosecution exercised due vigilance in the matter. The Appellant was sentenced in September 2009. He has already spent almost two (2) years behind bars based on an illegal plea. To order a re-trial would only serve to further prejudice the Appellant and would merely allow the prosecution a chance to plug the loop-holes in their case. Notwithstanding the seriousness of the charge and the alleged age of the complainant (which age was not proved) 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 4<sup>th</sup> day of April 2011.**

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

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