



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 446 OF 2010

(From the original Conviction and Sentence in the Criminal Case No. 3096 of 2008 of the Chief Magistrate's Court at Mombasa: R. Kirui – P.M.)

DAVID MOMANYI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **DAVID MOMANYI** has filed this appeal against his conviction and sentence by the learned Principal Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned before the trial court on 14th October 2008 charged with the offence of **DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(4) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that:

“On the 5th day of October 2008 in Mombasa District within the Coast Province, unlawfully and intentionally caused his penis to penetrate the vagina of J.M.M a girl aged 16 years”

In addition the Appellant faced an alternative charge of **INDECENT ACT CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The Appellant entered a plea of **‘not guilty’** to both charges. His trial commenced on 18th November 2008 at which trial the prosecution led by **CHIEF INSPECTOR KITUKU** called a total of five (5) witnesses in support of their case.

The complainant told the court that she was 16 years old. On the material day she had gone to visit her brother **‘K’** when she met the accused. Accused pulled her into his house, declared his love for her, then he removed her underpants and proceeded to defile her. The complainant left after the incident and returned home. She did not tell anyone what had happened. Instead she lied that she had been with a friend called **‘M’**. The complainant's father **PW2 JACOB MUTHANGYA NGUTHU** summoned the said **‘M’** who denied that she and **PW1** had been together. It is only when her father threatened her that **PW1** revealed that she had had sexual intercourse with the accused. The matter was reported to police. The accused was arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. On 11th June 2010 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the offence of defilement and sentenced him to serve fifteen (15) years imprisonment. Being dissatisfied with both his

conviction and sentence the Appellant filed this appeal. **MR. ONSERIO** learned State Counsel conceded the appeal.

I have considered the written submissions filed by the Appellant in this matter. Upon perusing the record of the trial in the lower court I note that one crucial ingredient of a charge of Defilement remained unproven. Under the Sexual Offences Act and more so under the provisions of S. 8 of said Act it is essential that the age of the victim be proved. The complainant told the court that she is 16 years old. **PW2** the complainant's father did not address the issue of her age at all in his evidence in chief. It is only under cross-examination by counsel that the **PW2** gave her age as 16 years. **PW3** the complainant's mother however gives the complainant's age as 15 years. Yet at page 6 line 22 **PW3** states:

"I cannot remember the year she was born"

If **PW3** cannot recall the year when her child was born, how then did she come to conclude that she was 15 years old as opposed to 14 years or even 16 years? No documentary proof has been provided of the age of the complainant. No birth certificate, medical cards or even school records have been availed to court. The P3 form which may have been relied upon to shed light on the matter makes the situation worse by giving the age of **PW1** merely as '**Juvenile**'. This only serves to confuse issues further. On the whole I find no proof of the age of the victim. In the absence of proof of such a crucial ingredient of this charge the conviction cannot be said to be sound. For this reason alone I do allow this present appeal. The Appellant's conviction is hereby quashed and his subsequent 15 year sentence is also set aside. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 24th day of June 2011.

M. ODERO
JUDGE

In the presence of:

Mr. Onserio for State

Mr. Okonji holding brief for Mr. Mouka