



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 161 OF 2008**

*(From the original Conviction and Sentence in the Criminal Case No. 804 of 2007 of the Principal Magistrate's Court at Kwale: **Ogembo D.O. – S.R.M.**)*

**TUNGWA ZUNGUMUZO ..... APPELLANT**  
**=VERSUS=**  
**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The appellant **TUNGWA ZUNGUMUZO** has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at Kwale Law Courts. The appellant had been charged with **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8 (1)(3) OF THE SEXUAL OFFENCEWS ACT**. The learned State Counsel **MR. ONSERIO** conceded this appeal. I have perused the record of the trial court before the lower court and I find I am quite in agreement with the decision of the State to concede this appeal.

The appellant has been charged with Defilement contrary to S. 8 (1) (3) of the Sexual Offences Act. The charge was not properly framed. It ought to have read Defilement contrary to S. 8(1) **as read with S. 8(3)** of the Sexual Offences Act.

The complainant's age was given in the particulars sheet as 15 years. The complainant herself being a mentally challenged person did not testify in court and did not state her age. The prosecution did not avail any tangible evidence by way of a birth certificate, baptism card, medical and/or school records or vaccination card to prove the age of the complainant. This court has held severally that in charges brought under the Sexual Offences Act the age of the complainant is a crucial matter in issue and must be proved beyond a reasonable doubt. Failure to prove the age is fatal to the prosecution case.

In my considered opinion this case merits a re-trial in view of the strength of the evidence adduced. Such a retrial will not prejudice the appellant as he has only served less than  $\frac{1}{3}$  of a 15 year sentence. I therefore direct that this file be placed before the Senior Resident Magistrate, Kwale Law Courts for the plea to be taken afresh.

It is so ordered.

**Dated and Delivered in Mombasa this 19<sup>th</sup> day of July 2011.**

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

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

Mention on 25<sup>th</sup> July 2011 before S.R.M. Kwale for fresh plea to be taken.