



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 527 OF 2010

(From the original Conviction and Sentence in the Criminal Case No. 313 of 2009 of the Senior Resident Magistrate's Court

at Kwale: A.M. Obura – S.R.M.)

KAGUNDI MUTHULI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant **KAGUNDI MUTHULI**, 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 the offence of **DEFILEMENT OF A GIRL** contrary to the provisions of the Sexual Offences Act. The particulars of the offence were that:

“Between the dates of 23rd November 2008 and 10th January 2009 at Shirikisho Village in lunga lunga location in Msambweni district within Coast Province unlawfully committed an act which caused his penis to penetrate the vagina of F.M. a girl aged 16 years.”

The appellant entered a plea of **‘not guilty’** to the charge. His trial commenced on 9th June 2009 at which trial the prosecution led by **INSPECTOR SIBUDA** called a total of six (6) witnesses in support of their case.

The complainant **F.M.** in her evidence told the court that the Appellant was her boyfriend with whom she had engaged in several acts of sexual intercourse – she later discovered that she was pregnant. The complainant’s father not surprisingly was not happy with this state of affairs. The matter was reported to police. The Appellant was arrested and charged.

On his part the Appellant gave a sworn defence by which he denied having defiled the complainant at

all. On 10th December 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the offence of defilement and sentenced him to serve fifteen (15) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

MR. MAGOLO Advocate acted for the Appellant. **MR. ONSERIO** who appeared for the Respondent State conceded the appeal. I have considered the record of the proceedings before the lower court and as was pointed out by the learned State Counsel the charge was fatally defective. The Appellant was charged with Defilement contrary to S. 8(3) of the Sexual Offences Act. S. 8(3) provides for the **penalty** for this offence but does not create the offence. The provision which creates the offence is S. 8(1) of the Act. Thus the charge sheet ought to have read S. 8(1) **as read with** Section 8(3) of the Sexual Offences act. It is a misnomer to charge a suspect and cite only the penalty for the offence. This is a defect which is fatal and renders the subsequent proceedings a nullity.

Even if the charge sheet were not defective, the prosecution failed to adduce evidence on the crucial element of the charge which is the age of the complainant. **PW1** told the court that she is 16 years old and is a student in class 7 at [particulars withheld] Primary School. However no evidence was adduced to prove the age of the complainant. No birth certificate, baptismal card, medical or school records were availed to show that the complainant was actually aged 16 years as she alleged. **PW2 M.K.M.** who is the complainant's father also told the court that his daughter was 16 years old. He too did not avail any proof of this fact. In offences under the Sexual Offences Act proof of the age of the victim is a crucial element as the age will determine the sentence to be imposed. To merely allege the complainant's age without any tangible proof of the same will not suffice. It is a well known tenet of law that the prosecution has the onus of proving all elements of a charge beyond reasonable doubt. They have failed to do this on this ground also the appeal must succeed. The upshot is that the appeal is found to have merit and is hereby allowed. The Appellant's conviction is quashed and his 15 year sentence of imprisonment is set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 11th day of July 2011.

M. ODERO

JUDGE

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