



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 166 OF 2009**

**STEPHEN MAKONDE MWATELA .....APPELLANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**

*(Being an appeal from the judgment and conviction of the Senior Resident Magistrate Andayi W.F dated 9<sup>th</sup> September 2009 in Criminal case No. 100 of 2008 at Kaloleni Law Courts.*

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**J U D G M E N T**

The appellant herein **STEPHEN MAKONDE MWATELA** has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Kaloleni Law Courts on charge of **DEFILEMENT CONTRY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT** 2006. The particulars of the charge were;

***On the night of 9<sup>th</sup> January 2008 in kaloleni district within Coast Province, unlawfully caused penetration with a genital organ namely Vagina of N.M a girl aged 10 years.*** In addition the appellant faced an alternative charge of **INDECENT ACT WITH A GIRL CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCE ACT 2006.**

The appellant denied the charges and his trial commenced on 21/7/2008 at which trial the prosecution led by **INSPECTOR NGOMO** called a total of five (5) witnesses in support of their case.

The complainant **N.M** a 10 year old child told the court that on 9/1/2008 at 7.00 p.m. she was on her way to the shops when the accused accosted her. He pulled her behind a house and defiled her. The accused's wife came and interrupted them. Then the accused ran away. The complainant reported the incident to her mother who took her to Mazeras clinic for treatment. Thereafter the appellant 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 opted to give a sworn defence in which he denied ever having defiled the complainant. On 9/9/2009 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of defilement and sentenced him to serve life imprisonment. Being aggrieved with both this conviction and sentence the appellant filed this appeal. **MR ONSERIO** learned state counsel who appeared for the respondent state opposed the appeal.

I have myself carefully perused the record of the trial before the subordinate court. The complainant testified that the appellant accosted her as she was going to the shops. He pulled her behind a house and

proceeded to defile her. The complainant also told the court that her mother took her to Mazeras Clinic for treatment. The fact that the complainant was a minor is not in any doubt. As age assessment report showed her to be 10 years old. However the prosecution failed to call as a witness the clinical officer who examined the child after the incident. As such no medical evidence was adduced to corroborate the complainant's evidence that she had been defiled. The essence of any charge of defilement is proof that penetration has occurred. The best and most persuasive method to prove such penetration would be by way of medical evidence. The Sexual Offences Act 2006 provides for extremely stringent and lengthy sentences upon conviction. The prosecution **must** mount an overwhelming case in order to secure such a conviction. This was not done in the present case.

Secondly, I note that although the complainant at 10 years could properly describe as a 'child of tender years' the learned trial magistrate did not conduct a 'voire dire' examination before taking her evidence. S. 19(1) of the oaths and statutory declarations Act Cap 15 provides

***“10(1) where, in any proceedings before any court a person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath. If in the opinion of the court or such person he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth...”***

The trial magistrate did not conduct any such examination on **PW1** and therefore had no basis upon which to decide whether or not she understood the nature of an oath. All the trial magistrate did was to make an arbitrary decision to affirm (not swear) **PW1**. No reason is given why this decision was taken. In the case of **JOSEPH OPONDO –VS- REPUBLIC CRIM APPEAL 91/1999**, the Court of Appeal clearly set out the mandatory procedure to be followed in conducting a 'voire dire' examination. As such I find that the evidence of the complainant was not taken in compliance with legal requirements. Finally I find the conviction of the appellant on the charge of defilement unsound. This appeal succeeds. I hereby quash the appellant's conviction by the lower court. The sentence of life imprisonment is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**DATED and delivered this 6<sup>th</sup> day of September 2011.**

**M. ODERO  
JUDGE**

**In the presence of**

Mr. onserio – for state  
Appellant in person

**M. ODERO  
JUDGE  
06/09/2011**