REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 333 & 335 of 2006

P O O …………................…. 1ST APPELLANT

M M W ……......................... 2ND APPELLANT

VERSUS

REPUBLIC.................................RESPONDENT

JUDGEMENT

The two appellants namely P O O (hereinafter referred to as appellant No. 1) and M M W (hereinafter referred to as the 2nd appellant) have both filed these appeals against their conviction and sentence by the learned Senior Resident Magistrate, Mombasa Law Courts in CMCC NO. 741 OF 2005. Both the 1st and 2nd appellants had been charged separately with the offence of DEFILEMENT OF A GIRL CONTRARY TO SECTION 145 (1) OF THE PENAL CODE and each appellant in addition faced an alternative charge of INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144 (1) OF THE PENAL CODE. The prosecution called a total of four (4) witnesses in support of their case. The brief facts of the case as narrated to the court by the complainant I K a child aged seven (7) years is that during the material period she was a student at St. K Academy in M in Mombasa. The 1st appellant was her class teacher whilst the 2nd appellant was also a teacher in the same school. On various dates between 26.1.2005 and 15.2.2005 the 1st appellant had recommended that the complainant attend tuition classes. She would thus return to school after lunch and remain there until the evening. The 1st appellant would then come and remove the complainant from her class to the baby class. The 2nd appellant would lock the door. 1st and 2nd appellant would spray her face and she would become dizzy and sleepy. They would then defile her in turns and sodomize her. The 1st and 2nd appellants warned the complainant not to tell anyone at home what was going on. This went on for some time until on one occasion PW.3 A K K the complainant’s mother was washing her child’s underwear and noticed it was blood-stained. She called the complainant and questioned her. The complainant revealed what had been happening in school. PW.3 reported the matter to the police. Both appellants were arrested and eventually charged with these offences.

At the close of the prosecution case the learned trial magistrate placed both appellants on their defence. Both gave sworn defences in which they denied the charges. On 30.11.2006 the learned trial magistrate delivered her judgment in which she convicted both appellants on the main count of defilement. After hearing their mitigation, she proceeded to sentence each to serve seven (7) years imprisonment. It is against this conviction and sentence that the appellants now appeal.

At the hearing of this appeal both appellants appeared in person and relied on their written submissions. MR. ONSERIO learned stated counsel appeared for the respondent state and conceded both appeals.

I have perused the grounds of appeal of both appellants and I note that they raised similar grounds. These include

(1) Failure by the trial magistrate to accord them an opportunity to cross-examine the complainant.

(2) Inconsistencies and contradictions in the prosecution case.

On this latter ground alleging contradictions in the prosecution case I have carefully perused the record of the lower court and I have been unable to detect any instances of such inconsistencies and contradictions. On the contrary I find the evidence of the prosecution witness to be clear, Precise, and consistent in all material respects. I find no merit in this ground of the appeal and I do hereby dismiss the same.

On failure to cross-examine the complainant I note that the complainant gave her evidence before the lower court on 26.10.2005. Since she was a minor the court did conclude a “ viva voire” investigation and ruled that the minor give unsworn testimony. The minor did give her

evidence as shown on pages 8-11 of the record and described in very graphic detail the ordeal she underwent. At the close of her testimony there is no record that the two appellants were accorded an opportunity to cross-examine her. To cross-check this point I did also carefully peruse the handwritten record and confirm that indeed the appellants were never invited to cross-examine the complainant on her evidence to court. Instead the trial magistrate proceeded to take the evidence of PW.3. This in my view is a fatal omission of procedure. It is a tenet of natural justice that an accused must be allowed to face his accuser. The only way a complainant's evidence can be tested is by cross-examination. The fact that the complainant was a minor and gave unsworn evidence does not mean that the appellants should be denied the opportunity to test her testimony by way of cross-examination. I find this to have been a fatal omission on the part of the trial magistrate. I do therefore allow this ground of appeal.

Lastly I do note that on each of count Nos. 162 of defilement the particulars read as follows

> "*On the diverse dates between 26th January 2005 and 15th February 2005 at St. K H Academy M C Location in Mombasa District of the Coast Province, had carnal knowledge of I K, a girl under the age of sixteen years"*

The particulars d not reflect that this carnal knowledge was "unlawful". In the case of NG'ENO – VS – REPUBLIC [2002] KLR 457], the Court of appeal held

> "*A charge under Section 145 (1) of the Penal Code must in its particulars include the word "unlawful". Failure to state in the particulars that the carnal knowledge was unlawful renders the charge fatally defective"*

The appellants had both been charged under S.145 (1) Penal Code. The particulars of the charge did not include the word "unlawful". As such the charges 1 and 2 were fatally defective. It is on these defective charges that the two appellants were convicted. It stands to reason that any conviction based on a fatally defective charge is a nullity and cannot be allowed to stand. This ground of appeal therefore succeeds.

I note that the appellants were both sentenced in November 2006 to serve seven (7) years imprison. As of now they have served roughly half of their prison terms. I do agree with the learned state counsel that to order a retrial at this point would be greatly prejudicial to the appellants. As such I will not order any retrial of this case.

The upshot is that this appeal succeeds. The conviction of both appellants is quashed and the attendant sentences are also set aside. Both appellants to be released forthwith unless they are otherwise lawfully held.

Dated and Delivered at Mombasa this 24th day of March 2010.

M. ODERO
JUDGE

Read in open court in the presence of:
Both appellants in person
Mr. Onserio for state

M. ODERO
JUDGE
24.3.2010