



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA Criminal Appeal 174 of 2006**

**S M.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

Before me is the appeal of S M (hereinafter referred to as the appellant) against the conviction and sentence imposed upon him by the learned Principal Magistrate, Mombasa Law Courts. The appellant had been charged with the offence of DEFILEMENT CONTRARY TO SECTION 145 (1) OF THE PENAL CODE. The appellant in addition faced an alternative charge of INDECENT ASSAULT OF A FEMALE CONTRARY TO SECTION 144 (1) OF THE PENAL CODE. The trial in the lower court commenced on 12.8.2004 where the prosecution led by CHIEF INSPECTOR MSHENGA called a total of four (4) witnesses in support of their case. The brief facts of the case as narrated by the complainant A A, a child of approximately 11 years was that she lived with her family at B Village and the accused who lived alone was their neighbour. The accused enticed the complainant to come to his house where he developed a habit of defiling her. This happened several times. On one occasion the accused told the complainant to pretend that she needed to go to the toilet at night but he would he would leave his door open to enable her to enter his house. The child did as he asked and they had sexual intercourse. However on this occasion as she left his house the complainant's father noticed. He became suspicious and questioned the complainant about why she was leaving the accused house during the night. The complainant confessed to her father what had been going on. The matter was reported to the police and the accused was arrested and later charged with the present offences. Upon the close of the prosecution case the trial court ruled that the accused had a case to answer and he was put to his defence. The accused elected to keep silent and did not offer any defence.

On 15.06.2006 the learned trial magistrate delivered her judgement in which she convicted the appellant on the main charge. She then sentenced him to serve ten (10) years imprisonment. It is against this conviction and sentence that the accused now appeals.

MR. ONSERIO, the learned state counsel did concede this appeal on the ground that the charge sheet was fatally defective. The particulars in the charge read as follows

*“On diverse dates between 1<sup>st</sup> December 2003 and 28<sup>th</sup> day of January 2004 at B Village in Mombasa District of the Coast Province, had carnal knowledge of A A a girl under the age of 16 years”*

In conceding the appeal Mr. Onserio cited the decision of the Court of Appeal in the case of NG'ENO – VS – REPUBLIC [2002] 2 KLR 457. At page 458 of this decision the court held

*“A charge under S.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”*

This holding is clear and unambiguous. In the present charge sheet the word “unlawful” was not inserted before “carnal”. As the Court of appeal explained, it is not each and every act of sexual intercourse with a girl under 16 years which constitutes the offence under S.145 (1). There do exist certain instances where such sexual intercourse would in fact be “lawful” e.g. where the girl is the accused wife etc. The position has now changed with the enactment of the Sexual Offences Act No. 3 of 2006. However in 2004 when this incident occurred, the offence was only chargeable under the Penal Code. The learned trial magistrate failed to notice this omission in the particulars of the charge. Neither did the prosecution seek to amend the charge to correct this anomaly. As such the charge sheet remains defective and fatally so. Any conviction based on this defective charge sheet is a nullity. For this reason alone I do hereby allow this appeal. The conviction rendered by the learned trial magistrate is hereby quashed and the ten (10) years sentence is set aside. I do find myself in agreement with the learned state counsel that having served more than half of his sentence, it would prejudice the appellant if a re-trial were to be ordered at this state. As such I will not order a retrial of the case. The appellant to be released forthwith unless he is otherwise lawfully held.

**Dated and Delivered at Mombasa this 24<sup>th</sup> day of March 2010.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Appellant in person

Mr. Onserio for state

**M. ODERO**

**JUDGE**

**24.3.2010**