(Appeal arising from BGM CM CR. NO.262 of 1999)

JOHN MANYONGE KIBABA ::::::::::::::::::::::
APPELLANT

~VRS~

REPUBLIC ::::::::::::::::::::::
RESPONDENT

JUDGMENT

The Appellant John Manyonge Kibaba was convicted by Bungoma Senior Principal Magistrate of the offence of defilement contrary to section 145 (1) of the Penal Code and sentenced for twenty (20) years imprisonment. He appeals against both conviction and sentence.

Mr. Makali argued the grounds of appeal which precisely raise four pertinent issues:

a) That the charge was defective;

b) That section 200 (3) of the Criminal Procedure Code was not complied with;

c) That there was no corroboration of the evidence of the victim;

d) The court shifted the burden of proof to the Appellant.

In his submissions, Mr. Makali referred the court to several

authorities in support of the grounds of appeal. The authorities are relevant to the issues and have made the work of this court easier than it would have been without them.

The Appellant was charged with defilement contrary to section 145 (1) of the Penal Code on the 22/06/2001, that is, before the Sexual Offences Act which repealed section 145 came into force. The section has a proviso and it stipulates:

> ***"Section 145 (1) Any person who unlawfully and carnally knows any girl under the age of fourteen (14) years is guilty of a felony and is liable to imprisonment with hard labour.***
>
> ***Provided that it shall be sufficient defence to any charge under this section if it is made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe that the girl was above the age of fourteen years or was his wife."***

The offence as stated is only committed when the accused unlawfully has carnal knowledge of a girl under the age of fourteen (14) years. The proviso consists of two defences either of which the accused may present during his trial where the situation so demands.

The charge reads:

> ***"On the 14th day of January 1999 at W Primary School, South Namwela, Sirisia Division of Bungoma District within Western Province had carnal knowledge of E N W a girl under the age of 14 years."***

The charge does not contain all the ingredients of the offence in that the word ***"unlawfully"*** is omitted. In the absence of the said word, the charge is defective for it does not disclose an offence. I entirely agree with the defence that the Appellant was convicted on a

defective charge. In the case of ***ODHIAMBO & ANOTHER –VRS- REPUBLIC [2005] K.L.R 176 AND NGENO –VRS- REPUBLIC [2002] KLR 605*** the Court of Appeal allowed the appeals on grounds that the charges omitted the word ***"unlawful"*** in an offence of rape contrary to section 139 and 140 of the Penal Code and defilement contrary to section 145 (1) of the same Act respectively. I am well guided by the said decisions as I declare that the charge in this case was defective. The conviction and sentence were founded on a defective charge rendering them null and void.

On the issue of non-compliance with section 200 (3) of the Criminal Procedure Code, the proceedings of 13/06/2006 show that Mrs. Shitubi SRM took over the case from Mr. Moitui SPM who had heard four (4) witnesses. The relevant proceedings read:

> ***"Accused present, Nanzushi for accused.***
> ***Court: Section 200 of the Criminal Procedure Code complied with."***

Although the accused was represented by a counsel, there is no indication that the mandatory provisions of section 200 (3) of the Criminal Procedure Code were explained to the accused. There is no indication whether the counsel agreed to proceed with the matter from where it had reached or not. After the court's remark that the section was complied with, the counsel applied that the case starts *de novo*. The prosecutor objected and the court agreed with the prosecution that the case should not start afresh. This is a clear case of non-compliance with the mandatory provisions of the section. The accused has a right

to recall or to re-examine witnesses. The succeeding magistrate denied him this right and later proceeded to convict the Appellant of the offence.

In the case of ***NJENGA –VRS- REPUBLIC K.L.R [1984] 605,*** it was held by the Court of Appeal, Nairobi that the accused had a reason to demand that any witness be resummoned and it enjoins the trial magistrate to inform him of that right. In the Court of Appeal case of ***ERIC OMONDI alias GOR –VRS- R. CRIMINAL APPEAL NO.15 OF 2007*** (unreported) the entire proceedings were declared null and void for non-compliance with section 200 of the Criminal Procedure Code.

I find that the Appellant was greatly prejudiced by the denial of his rights under the mandatory provisions of the section. The drafter of the section intended that the defence may wish to have the succeeding court assess the demenour of a witness by recalling him/her.

In this situation, I do not need to make a finding on the issues of corroboration and shifting of the burden of proof. With the charge having been defective and section 200 (3) not having been complied with, I hereby nullify the proceedings. The conviction and the sentence are hereby set aside.

The state did not apply for a retrial. The Appellant was charged on 22/06/2001 and convicted seven years later on 22/12/2008. He filed this appeal in 2008 and has waited for its disposal for three years. It is therefore not in the interests of justice to order a retrial. The Appellant is therefore set at liberty unless otherwise lawfully held.

F. N. MUCHEMI
JUDGE

Judgment delivered and dated this 15th day of June 2010 in the presence of the Appellant his counsel Mr Makali and the state counsel Mr Ogoti

F. N. MUCHEMI
JUDGE