



(From Original Conviction and Sentence in Criminal Case No. 499 of 2007 of the Chief Magistrate's Court at Kaloleni: **ANDAYI - Ag.S.R.M.**)

ISSA MAHAMMED KARISA..... APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGMENT

The Appellant herein **ISSA MOHAMED KARISA** has filed this appeal as against his conviction and sentence tendered by Hon. Andayi the Ag. Senior Resident Magistrate sitting at Kaloleni Law Courts. The Appellant had been arraigned before the lower court on 29/10/2007 and charged with the offence of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) AS READ WITH SUB-SECTION 2 OF THE SEXUAL OFFENCES ACT, 2006**. In addition the Appellant faced a second charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The Appellant pleaded guilty to both counts. The facts were thereafter read out with section 207 of the Criminal Procedure Code. The Appellants maintained his plea of guilty and was duly convicted on both counts. After listening to his mitigation the learned trial magistrate sentenced the Appellant to serve a term of life imprisonment on the first count and to serve ten (10) years imprisonment on the second count. The appellant has now appealed against both his conviction and sentence.

MR. ONSERIO, the learned State Counsel conceded this appeal firstly on the basis that at the time of the Appellant's conviction, the P3 form in respect of the complainant had not been filled out.

In my view this is neither here nor there. The absence of a P3 form does not negate a plea of guilty. Appellant had the facts read out to him and he accepted them. As such a guilty plea was the correct and proper plea.

If this were the only anomaly in the trial, I would have no hesitation in dismissing this appeal. However, I have carefully perused the proceedings and note that the Appellants faced two counts- one of Defilements and the second of indecent Act with a child. In my view this amounted to a misfounder of charges. It was an error to charge the Appellant on both charges as two separate counts.

Once a suspect is charged with defilement it amounts to a duplication to again charge the same suspect with committing an indecent Act with the same complainant. Surely by the time one has defiled a complainant, he was also indecently assaulted here. Defilement encompasses the indecent. The correct procedure is that assault the charge of indecent Act ought to have been placed as an alternative to the main or principal charge and not as it was, as the second charge. This is a defect in the charge which is incurable and cannot be overlooked.

To convict the Appellants on a charge of defilement and then to convict and sentence him on a second count of indecent Act on child amount to double jeopardy. For this reason I find there to have been a mistrial in this matter and therefore allow this appeal and quash both the sentences and convictions against the Appellant.

In this matter I have taken into accounts the very serious nature of the offence and the weight of evidence available. In my view the interests of justice will be served best by ordering a retrial. I therefore order

that the Appellant be produced before the Magistrate In charge at Kaloleni Law Court for re-trial. Mention on 1/07/2010.

Dated and Delivered at Mombasa this 14th day of June 2010.

**Mr. Onserio for state
Appellant in person**

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M. ODERO

JUDGE -