



(From Original Conviction and Sentence in Criminal Case No. 664 of
Magistrate's Court at Kwale: **D.M. Ochenja - S.R.M.)**

2006 of the Senior Resident

JUMA HASSAN TUMBO APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **JUMA HASSAN TUMBO**, has filed his appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The Appellant had been charged with the offence of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(1) OF THE PENAL CODE**. He pleaded **'not guilty'** to the offence and his trial commenced on 26th May 2006. The prosecution called a total of four (4) witnesses in support of their case. At the end of the trial the learned trial magistrate convicted the Appellant and sentenced him to serve twenty (20) years in prison.

I have perused the written submissions filed by the Appellant. I have also considered the oral submissions made by **MR. MUTETI**, learned State Counsel opposing this appeal. I have looked at the charge sheet and I note that the particulars failed to include the term **"unlawful"** before the words **"carnal knowledge"**. Mr. Muteti submitted that this omission was not fatal to the prosecution case. However I do disagree. In the case of **NGENO -VS- REPUBLIC [2002] 1 KLR 457** the Court of Appeal 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"

The Appellant was charged under S. 145(1) of the Penal Code. As such it was imperative that the word **'unlawful'** be included in the charge sheet. The omission to include this word renders this charge fatally defective – a defect which is not curable under S. 382 of the Criminal Procedure Code. As such the conviction of the Appellant on the basis of this defective charge sheet is null and void. For this reason alone this appeal succeeds. The Appellant's conviction is hereby quashed and his twenty (20) year sentence is set aside. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 22nd day of July 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

M. ODERO
JUDGE
22/07/2010