



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 167 of 2009

THOMAS KWANYA DZOMBO APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGMENT

The Appellant **THOMAS KWANYA DZOMBO** has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting in Mombasa. The Appellant had been arraigned in court and charged with **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(4) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that

“On the 26th day of December 2007 in Kaloleni District within Coast Province committed an act which caused penetration of a genital organ namely penis into genital organ namely vagina of M.S.M. a child aged 16 years”

The Appellant denied the charges before the lower court. His trial commenced on 18th December 2008 and the prosecution called a total of four (4) witnesses in support of their case. At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied the charges. On 3rd June 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant and thereafter sentenced him to serve fifteen (15) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

MR. MUSHELLE, Advocate conducted this appeal on behalf of the Appellant. **MR. ONSERIO** learned State Counsel who appeared for the Respondent State conceded the appeal.

Being a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the prosecution evidence presented before the lower court. In the case of **OKENO –VS- REPUBLIC 1972 E.A.L.R. 32** it was held

“It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld”

S. 8(4) of the Sexual Offences Act under which the Appellant has been charged refers to a person who defiles a child between the ages of 16 and 19. In cases brought under the Sexual Offences Act it is crucial and indeed it is essential to establish the age of the complainant as this will determine the provision under which the charge is brought. In her evidence the complainant said she was 19 years old having been born in 1989. If she was born in 1989 then as at 26th December 2007 she was 18 years old not 19 as she said. The complainant’s mother **P.M.K** tells the court that her daughter is 16 years of age. **PW2 JACK NYONGESA WEKESA** an anaesthetist from

Kenyatta Hospital tells the court that he assessed the complainant's age to be 16 years. There appears therefore to be no certainty about the age of the complainant. No document was produced to prove her age. Whilst it is true not many Kenyans especially in rural areas have acquired birth certificates, the complainant was a school going child and it should not have been difficult to obtain a record of her age from the school. The failure to prove the complainant's age is a serious omission in the prosecution case. From her own evidence the complainant was a very willing participant in the sexual activity with the Appellant. Whilst consent cannot be a defence where a girl is 18 years or below it is certainly a factor if the girl is over 18. This is another reason why in this case it was crucial to prove the complainant's exact age. The guilt or innocence of the Appellant depended on this. In the circumstances I find it was prejudicial to convict the Appellant without establishing the true age of the complainant. On this ground alone I find this appeal has merit and it is hereby allowed. The Appellant's conviction is quashed and his fifteen (15) year sentence is set aside. Appellant to be released forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 20th day of July 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Mushelle for Appellant

Mr. Onserio for State

M. ODERO

JUDGE

20/07/2010