REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 177 & 178 of 2007

1. **ATHUMAN TSUMA ZUMA**
2. **SHABAAN TSUMA ZUMA ..... APPELLANTS**

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The two appellants namely **ATHUMAN TSUMA ZUMA** (hereinafter referred to as 'the 1st Appellant') and **SHABAAN TSUMA ZUMA** (hereinafter referred to as 'the 2nd Appellant') have both filed appeals contesting their conviction and sentence before the learned Senior Principal Magistrate sitting at Mombasa Law Courts. The 1st Appellant had been charged with the offence of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(1) OF THE PENAL CODE**. The particulars were that

"On diverse dates between November 2005 and 12th day of February 2006 within Mombasa District of the

Coast Province had carnal knowledge of Z.N.N a girl under the age of sixteen years"

In addition the 1st Appellant faced an alternative charge of **INDECENT ASSAULT CONTRARY TO SECTION 144 OF THE PENAL CODE**. On his part the 2nd Appellant faced a charge of **HOUSE HOLDER PERMITTING DEFILEMENT OF A GIRL CONTRARY TO SECTION 149 OF THE PENAL CODE.** The particulars of this charge were that

> ***"On diverse dates between November 2005 and 12th day of February 2006 within Mombasa District of the Coast Province being the occupier of a rental premises induced Z. N. N a girl under the age of sixteen years to be upon the said premises for the purpose of having unlawful sexual connection with ATHUMANI TSUMA ZUMA***

Both the 1st and 2nd Appellants were represented by **MR. MAGOLO** Advocate in this matter whilst **MR. ONSERIO**, learned State Counsel appeared for the

Respondent State. As a court of first appeal I am mindful of my obligation as laid down by the Court of Appeal in the case of **OKENO – VS- REPUBLIC [1972] EALR 32** as follows:-

> ***"It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"***

I will proceed to consider each Appellant's appeal on an individual basis as they each faced different charges. With respect to the 1st Appellant the State through Mr. Onserio has conceded the appeal. This is due to a defective charge sheet. I have perused the said charge sheet and I note that the word ***'unlawful'*** was not included before the words 'carnal knowledge' in the main count. It is very clear and has been stated severally that in charges brought under S. 145(1) of the Penal Code the charge sheet must include the term ***"unlawful carnal knowledge***". In the case of **NGENO –VS- REPUBLIC [2002] KLR 457** it was held

> ***"Section 145(1) of the Penal Code (Cap 63) provided that a person who "unlawfully and carnally knows any girl under the age of fourteen years is guilty of a felony ...". The section was clear that the offence created by it is committed if the act of carnal knowledge of a girl under the age of fourteen is unlawful [my emphasis]"***

This is the position for charges brought under the Penal Code. The position would be different if the charges were brought under the Sexual Offences Act 2006 which repealed S. 145 of the Penal code. However the charge against the 1st Appellant was brought under the Penal Code and thus the ruling in this **Ngeno case** is applicable. This is a fatal defect in the charge sheet and it is not curable under S. 382 of the Criminal Procedure Code. On this basis alone this appeal succeeds. I do therefore quash the conviction against the 1st Appellant. The attendant ten (10) year sentence is also set aside.

Mr. Onserio for the State has asked that I order a retrial in the matter citing the serious nature of the charges and the fact that the complainant (victim) was a minor. A re-trial would ordinarily be ordered where there was a procedural flaw in the lower court, or where a trial is rendered a nullity through no fault of the prosecution. This cannot be said to be the case here. The defect in the charge sheet can be blamed on nobody else but the prosecution who alone are responsible for framing charges. To order a retrial would amount to allowing the prosecution an opportunity to rectify their errors – to have a second bite at the cherry so to speak. In the earlier cited **Ngeno case** Hon. Lady Justice Sarah Ondeyo (now retired) held

> ***"A retrial can only be ordered if the proceedings themselves are defective. In the present case, there was no charge before the court which could have formed the basis of the proceedings. A retrial would enable the prosecution to amend the charge and that would subject the appellant to double jeopardy"***

This was a case on all fours with the present case. There was no defect in procedure. The charge disclosed no offence known to law and thus cannot be rectified through a retrial. I am mindful of the serious nature of the charges as well as the young age of the complainant but I find myself with no real alternative but to deny this request for a retrial. The error made by the prosecution in drafting the charge cannot be cured by way of a retrial. Therefore I find that the 1st Appellant's appeal succeeds. His conviction which was unlawful is quashed and his sentence is also set aside. The 1st Appellant is free to go unless he is otherwise lawfully held.

With respect to the 2nd Appellant the charge sheet cannot be held to be defective as the word ***'unlawful'*** was included in the particulars. The complainant in her evidence testified that it was the 2nd Appellant who came and called her to his house to wash utensils as his wife was in hospital. The complainant who knew the 2nd Appellant well as a neighbour willingly agreed. **PW2 L.N** thea complainant's mother confirms that the 2nd Appellant was their neighbour and further confirms that the complainant often used to go to his house to assist with household chores. However on the material date the 2nd Appellant called the complainant to his house where the 1st Appellant was waiting for her. The 2nd Appellant then left the two inside together and locked the door. At page 12 line 18 **PW1** states

"I was left in the house with Athuman [1st Appellant]. Shaban [the 2nd Appellant] locked the outside. I know the door was locked or bolted from outside because I tried to open the door just then but the door would not open"

The complainant went on to testify that this was the trend on many subsequent occasions. At page 13 line 25 she states

"Another day Shaban [the 2nd Appellant] invited me to his work place in Bondeni area; where he works in some residence. I was escorted to that place by Shaban's uncle. Shaban then telephoned Athuman [the 1st Appellant] who came and joined us in Bondeni .."

It is manifestly clear that it was the 2nd Appellant who acted as the go-between for the couple and he availed his house for their lovers tyrsts. **PW2** the complainant's mother confirmed that her daughter confirmed to her that the 2nd Appellant would allow her to meet her lover inside his house. I have no doubt that the 2nd Appellant was fully aware that the 1st Appellant and the complainant were engaging in sexual intercourse inside his house. **PW5 CHAKA BORA** confirms that the 2nd Appellant was his tenant in the house in question. The 2nd Appellant was well known to both **PW1** and **PW2** as he was their neighbour. **PW1** often used to go to her house to help with household chores. There is no possibility of mistaken identify. I am convinced that the 2nd Appellant was fully aware that **PW1** being a school girl was a minor yet he went ahead to avail his residence for the 1st Appellant to defile her. The fact that **PW1** was a willing participant in this lover affair is not a defence as the law forbids any act of sexual intercourse with a minor. S. 149 of the Penal Code under which the 2nd Appellant has been charged provides

"149 Any person who, being the owner or occupier of premises or having or acting or assisting in the management or control thereof induces or knowingly suffers any boy or girl under the age of sixteen years to resort to be upon those premises for the purpose of having unlawful sexual connection with any person whether the sexual connection is intended to be with any particular person or generally is guilty of a felony and is liable to imprisonment for life"

I am satisfied that all the ingredients of this charge have been proven as against the 2nd Appellant. His conviction was based on sound law and fact thus I do hereby uphold the same.

The learned trial magistrate sentenced the 2nd Appellant to serve ten (10) years imprisonment. Mr. Onserio learned State Counsel submitted that this sentence was unlawful. I have myself looked at S. 149 of the Penal Code. I note that it provides for a maximum sentence of five (5) years on conviction. I do find that the ten (10) year sentence was in the circumstances unlawful. I have considered the serious nature of the offence. The complainant was a minor. With the active participation and encouragement of the 2nd Appellant, she was being regularly defiled in premises which he provided for that specific purpose. In my view he deserves a stiff sentence to deter other would be offenders. I do hereby set aside the ten (10) year sentence imposed by the lower court and substitute a five (5) year term of imprisonment.

Dated and Delivered in

Mombasa this 19th day of July 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Magolo for Appellants

Mr. Onserio for State

M. ODERO

JUDGE

19/7/2010