



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 80 of 2009

*(From Original Conviction and Sentence in Criminal Case No. 723 of 2009 the Principal Magistrate's Court at Kwale: **A.M. Obura – R.M.**)*

TUMAINI MASAI MWANYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant herein has appealed against his conviction and sentence on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT 2006**. The Appellant was arraigned before the Senior Resident Magistrate sitting at Kwale Law Courts on 19th May 2009. The charges were read out to him and the Appellant entered a plea of guilty saying “*kweli*” i.e. “*it is true*”. Thereafter the facts were read out by the prosecutor as required by law. The Appellant maintained his guilty plea saying “*The facts are correct*”. I have perused the record and note that the proceedings were translated into Kiswahili a language which the Appellant well understood. In his mitigation the Appellant reiterates his guilty plea saying

“I love the girl. I knew she was school going but we loved one another”

There can be no doubt therefore that the Appellant was fully aware that the complainant was a minor – he was fully aware that she was of school-going age. I have no doubt that the Appellant’s plea of guilty was unequivocal. The learned trial magistrate did follow the correct procedure in recording the Appellant’s plea.

In his written submissions the Appellant basically pleads for leniency on the basis that he loved the complainant and that he did not know it was an offence to engage in sexual intercourse with her. Firstly, no matter how much he loved the complainant, he was an adult and ought to have behaved responsibly towards her. Love is no defence. Further, the Appellant cannot plead ignorance as ignorance of the law is not a defence. The Appellant by his own admission engaged in sexual intercourse with the complainant knowing fully well that she was a minor. The elements of the offence of Defilement have been proved. The guilty plea was unequivocal and clear. I find his conviction to have been proper and I do uphold the same.

The age of the complainant was given as 17 years making this incident an offence under S. 8(1)(4) of the Sexual Offences Act. The trial court imposed a sentence of 10 years. However, the law provides for a minimum sentence of 15 years. I do hereby substitute the ten (10) year sentence with the lawful minimum sentence of fifteen (15) years in accordance with the Sexual Offences Act.

Dated and Delivered in Mombasa this 14th day of September 2010.

M. ODERO

JUDGE