



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 43 of 2009

(From Original Conviction and Sentence in Criminal Case No.1345 of 2006 of the Principal Magistrate's Court at Kwale: S.S. Maindi – R.M.)

KWAJIRWA MASUDI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **KWAJIRWA MASUDI** has filed this appeal against his conviction and sentence on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(1) OF THE PENAL CODE**. The Appellant faced a second count of **SEXUAL EXPLOITATION CONTRARY TO SECTION 15 AS READ WITH SECTION 20 OF THE CHILDREN ACT 2001**. When the charges were read out to the Appellant on 17th August 2006 he entered a plea of **'guilty'**. The learned trial magistrate proceeded to convict the Appellant and sentenced him to serve ten (10) years imprisonment.

I have carefully perused the proceedings from the lower court. The trial magistrate indicated that the second count was an alternative to the main charge which was not the correct position. Nowhere in the charge sheet was this second count indicated as an alternative charge. It was an independent charge on its own. The trial erred in not taking the Appellant's plea on this second count. The proceedings were therefore defective as no plea was recorded on the second count. For this reason I do quash the Appellant's conviction and set aside his ten (10) year sentence.

I take note of the fact that the complainant in this case was a young child. The offence was serious. The procedural defect was not the fault of the prosecution. For these reasons I do feel that a retrial should be ordered and I hereby do so. The case to be mentioned before the Senior Resident Magistrate at Kwale Law Courts on 30th September 2010 for a fresh plea to be taken.

Dated and Delivered at Mombasa this 9th day of September 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

M. ODERO

JUDGE

9.9.2010