



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPEAL NO. 148 OF 2009

*(From Original Conviction and Sentence in Criminal Case No. 664 of 2009 of the Senior Resident Magistrate's Court at Voi: **P.N. Ndwiga – S.R.M.**)*

MWINYI KOMBE NZAI APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **MWINYI KOMBE NZAI** had been arraigned before the lower court Voi and charged with the offence of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(3) OF THE SEXUAL OFFENCES ACT**. The particulars of the offence were that

“On diverse dates between May 2008 and July 2008 in Kwale District within Coast Province, unlawfully had carnal knowledge of M. F. W a girl aged 12 years”

The Appellant pleaded guilty to the charge on 5th August 2009. The facts were duly read out to him as required by law and he maintained his guilty plea. The learned trial magistrate then proceeded to convict the Appellant on his own plea of guilty and sentenced him to serve twenty (20) years imprisonment. Appellant has now appealed against both this conviction and sentence. **MR. GAKUHI**, Advocate appeared and argued the appeal on behalf of the appellant, whilst **MR. ONSERIO** who appeared for the respondent State conceded to the appeal.

I have carefully perused the proceedings from the lower court. At the outset I note that the Appellant's guilty plea cannot be said to have been totally unequivocal. For a guilty plea to be termed unequivocal an accused must concede to **each** and **every** aspect of the facts as read out to him. In this case the facts as read out by the prosecutor **INSPECTOR MWANGI** indicate that the Appellant went into hiding after the defilement and only reappeared in June 2009. Whilst the Appellant did accept the facts as correct he later stated in mitigation

“I had not gone into hiding. I was threatened with death by the complainant's father. He later told me he had pardoned me. When I returned to my work yesterday he came with police and arrested me”

From this statement in mitigation, it is clear that the Appellant did not plead to **each** and **every** aspect of the facts as read out to him. He challenged the allegation that he had gone into hiding. This is a crucial element of the charge because by alleging that the Appellant went into hiding the prosecution were trying to show evidence of his guilty mind. The learned trial magistrate therefore erred in convicting the Appellant in these circumstances. He ought to have set aside the guilty plea and substituted a plea of **‘not guilty’**. Failure to do this renders the conviction unsafe as plea was clearly not unequivocal. Secondly and more importantly whereas the facts as read out by the prosecutor indicated that the Appellant was 19 years old as Mr. Onserio stated this was not quite correct. Counsel for the Appellant has availed his medical clinic card which indicates that he was born on 9th September 1990. Therefore in May 2008 when the offences are alleged to have been committed the Appellant was a minor. It was therefore a

requirement that he be tried as a juvenile under the Children Act 2001 yet he was actually tried and sentenced as an adult. Such a trial is null and void. For the above reasons I do hereby quash the Appellant's conviction and set aside the 20 year sentence imposed upon him. Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 8th day of November 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Magolo holding brief for Mr. Gakuhi
Appellant in court
Mr. Onserio for State

M. ODERO
JUDGE
8/11/2010