



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 172 OF 2008**

*(From Original Conviction and Sentence in Criminal Case No. 446 of 2005 of the Senior Resident Magistrate's Court at Kwale: **D.O. Ogembo – S.R.M.**)*

**MICHAEL KILONZO BENJAMIN ..... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant herein **MICHAEL KILONZO BENJAMIN** had been arraigned before the subordinate court on 31<sup>st</sup> May 2005 on a charge of **DEFILEMENT OF A GIRL UNDER THE AGE OF 16 YEARS CONTRARY TO SECTION 145(1) OF THE PENAL CODE**. In addition the Appellant faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE**. The appellant entered a plea of *'not guilty'* to both charges and his trial commenced on 19<sup>th</sup> September 2005, at which trial the prosecution led by **INSPECTOR CHARO**, called a total of four (4) witnesses in support of their case. On 11<sup>th</sup> October 2007 the learned trial magistrate delivered his judgement in which he convicted the Appellant on the main charge of Defilement and sentenced him to serve fifteen (15) years imprisonment. It is against this decision that the Appellant now appeals.

**MR. OPULLU**, Advocate appeared and argued the appeal on behalf of the Appellant whilst **MR. ONSERIO** appeared for the State. The State did concede to this appeal and having myself carefully perused the proceedings I am not at all surprised by their decision. The record indicates that the trial was conducted by three (3) different magistrates. **HON. MAINDI**, Resident Magistrate, commenced the hearing on 19<sup>th</sup> September 2005 and heard two witnesses. On 6<sup>th</sup> March 2007 **HON. OCHENJA** Senior Resident Magistrate took over the case. He did properly comply with S. 200 of the Criminal Procedure Code which entitles the accused to seek a *'de novo'* hearing. This question was put to the Appellant who replied

***"The matter may proceed from where the trial court reached"***

Thereafter on 11<sup>th</sup> June 2007 the third magistrate **HON. OGEMBO**, Senior Resident Magistrate took over the case. Unfortunately this magistrate failed and/or omitted to comply with the provisions of S. 200(3) of the Criminal Procedure Code. Instead at page 13 line 12 the prosecutor merely stated

***"Prosecutor: This was a part-heard. An order had been made that the case proceeds on. We cannot trace our remaining witness. I wish to close the prosecution case"***

The learned trial magistrate erred in not enquiring from the Appellant at this stage whether he wanted the case to begin *'de novo'*. The fact that such an enquiry was made by Hon. Ochenja did not absolve Hon. Ogembo from making a similar enquiry. S. 200(3) specifically gives to an accused person, whose trial is taken over by a different magistrate the right to demand that any witnesses who had already testified be re-called. This right was not accorded to the Appellant on 11<sup>th</sup> June 2007. It matters not that no witness

testified before Hon. Ochenja. A coram was recorded and he did record proceedings on 6<sup>th</sup> March 2007. These proceedings form part of the trial. In view of this omission, which I find to have been fatal to the prosecution case I am constrained to allow this present appeal which I hereby do. The conviction of the Appellant by the lower court is quashed and his sentence is hereby set aside.

Mr. Onserio has asked the court to order a retrial in this matter a request which Mr. Opullu has strenuously opposed. I note that the Appellant having been sentenced on 11<sup>th</sup> October 2007 has now served about three (3) years of a fifteen year sentence. This is less than one-third of the sentence. I am also mindful of the fact that this was a sexual offence in which the victim was a minor. The lapse in procedure cannot be blamed on the prosecution as it was caused by the court. The prosecution is therefore not seeking merely to plug gaps in its previous case. The State has assured this court that witnesses will be readily availed. For the above reasons I am persuaded that a re-trial would best serve the interests of justice. I do therefore order that Appellant be produced before the Senior Resident Magistrate, Kwale Law Courts for a fresh plea to be taken. Mention on 30<sup>th</sup> November 2010.

**Dated and Delivered at Mombasa this 8<sup>th</sup> day of November 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-

Mr. Opulu for Appellant

Mr. Onserio for State

**M. ODERO**  
**JUDGE**  
**8/11/2010**