

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 232 OF 2010

[From Original Conviction and Sentence in Criminal Case No. 1387 of 2009 of the Principal Magistrate's Court at Kwale: A.M. Obura – S.R.M.]

MOHAMED SHUGHULI MUSA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **MOHAMED SHUGHULI MUSA**, has filed this appeal to challenge his conviction and sentence by the learned Resident Magistrate sitting at **KWALE LAW COURTS**. The Appellant had been arraigned before the lower court on two counts of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(3) OF THE SEXUAL OFFENCES ACT 2006**. The particulars alleged that on various dates in the months of June and November 2009 at K village, Diani Location, Msambweni District within Coast Province the Appellant defiled one **M.O** girl aged 15 years. The Appellant entered a plea of **'not guilty'** to both counts. His trial commenced on 18th January 2010 at which trial the prosecution led by **INSPECTOR SIBUDA**, called a total of four (4) witnesses in support of their case. The complainant who was a student at M Primary School told the court that the Appellant was well known to her as he had approached her for friendship in 2005. She accepted his overtures and the two became friends and engaged in sexual relationships at the Appellant's house. In 2009 the complainant fell pregnant. Her mother noticed her condition and interrogated her. The complainant revealed her affair with the Appellant. The matter was then reported to police and the Appellant was arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied all the charges. On 16th April 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant on the first count of Defilement but acquitted him of the second count. Thereafter the trial court sentenced the Appellant to serve twenty (20) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who was unrepresented relied entirely upon his written submissions which had been duly filed before the court. **MR. ONSERIO** learned State Counsel made oral submissions in which he conceded the appeal on the basis of the defective charge sheet.

I have myself perused the charge sheet. I note that the Appellant was only charged with contravening S. 8(3) of the Sexual Offences Act. As Mr. Onserio has pointed out this is the penalty section. The charge sheet made no mention of S. 8(1) of the Act which defines and creates the offence of Defilement. This is a material defect. A charge sheet must state clearly and precisely what charges the accused faces.

This charge sheet failed to do so. One cannot be charged with contravening the penalty section alone. No application was made to amend the charge to correct this defect. This defect was fatal to the charge thus the ensuing proceedings were null and void. On this basis alone this appeal succeeds. I therefore quash the Appellant's conviction and set aside the 20 year sentence imposed upon him. Appellant to be set at liberty unless he is otherwise lawfully held.

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

M. ODERO

JUDGE