



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 207 OF 2009

*[From Original Conviction and Sentence in Criminal Case No. 1681 of 2007 of the Principal Magistrate's Court at Kwale: **Ogembo D.O. – P.M.**]*

RAMA MWERO

.....
..... **APPELLANT**
VERSUS

REPUBLIC

.....
RESPONDENT

JUDGEMENT

The Appellant **RAMA MWERO** has filed this appeal to challenge his conviction and sentence by the lower court. The Appellant had been arraigned before the learned Principal Magistrate sitting at Kwale Courts and charged on four counts as follows:-

COUNT NO. 1

DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) (1) OF THE SEXUAL OFFENCES ACT 2006

COUNT NO. 2

INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006

COUNT NO. 3

POSSESSION OF NARCOTIC DRUGS CONTRARY TO SECTION 3(1) (a) AS READ WITH S. 2(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT, 1994

COUNT NO. 4

ASSAULT IN RESISTING ARREST CONTRARY TO SECTION 253(b) OF THE PENAL CODE

The Appellant entered a plea of '**not guilty**' to all four counts. His trial commenced on 18th February 2008 at which trial the prosecution led by **INSPECTOR GITONGA** called a total of five (5) witnesses in support of their case. The complainant **ASHA ABDALLAH** was a minor aged about 4½ years. She testified that on the material night the Appellant whom she knew well as he was one of their workers came into their house, removed her underwear and defiled her. **PW1** reported the incident to her mother **M.A PW2** who took her for treatment and later reported the matter to the police. **PW4 PC CETRIC KIRAGU**, is the complainant in Count No. 4. He tells the court that on 25th August 2007 he went to Gwadu Village in order to arrest the Appellant. Upon sighting the police the Appellant took to his heels. The police gave chase and after a struggle in which Appellant engaged them in a fight they managed to overpower and subdue him. During this physical altercation **PW4** sustained injuries for which he was treated at Kinango Hospital. A roll of bhang which was recovered on the Appellant was also kept

by the police as an exhibit **Pexb3**. After completion of police investigations, the Appellant was charged with all four counts.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He opted to give an unsworn defence in which he denied any involvement in the offences charged. On 30th October 2009 the learned trial magistrate delivered his judgement in which he acquitted the Appellant on Count Nos. 2 and 3 but proceeded to convict him on Count No. 1 of Defilement and Count No. 4 of Assault. After hearing the Appellant's mitigation the trial court sentenced him to serve 15 years imprisonment on Count No. 1 and two (2) years imprisonment on Count No. 4. The court further directed that the sentences be served concurrently. Being dissatisfied with both convictions and sentence the Appellant filed this present appeal.

Being a court of first appeal I am under a duty to re-examine and re-evaluate the evidence adduced before the lower court [**OKENO –VS- REPUBLIC 1972 E.A.L.R. 81**]. The Appellant who appeared in person, chose to rely entirely upon his written submissions. **MR. ONDARI** learned State Counsel did inform the court of the State's intention to seek the enhancement of the sentence from 15 years to the lawful (and mandatory) sentence of life imprisonment upon conviction. The Appellant on being informed of this sought time to consider the matter. He returned to court two (2) weeks later on 27th September 2010 and indicated his intention to pursue his appeal notwithstanding the State's intention to push for an enhancement of sentence. However later on 1st November 2010 **MR. ONSERIO** learned State Counsel told the court that having re-considered the matter the State would be conceding the appeal for the reason that the charge as framed was incurably defective. I have anxiously examined the said charge sheet and I am inclined to agree with Mr. Onserio. The Appellant was charged with the offence of Defilement of a Girl contrary to S. (11) (1) of the Sexual Offences Act. S. 8(1) is purely a definitive provision and defines defilement by stating as follows

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”

The provisions which lay down the sentences available upon a conviction on Defilement are S. 8(2) to S. 8(4). Therefore the charge is not properly framed. The prosecution ought to have charged the Appellant with Defilement contrary to S. 8(1) **as read with** S. 8(2), S. 8(3) or S. 8(4) of the Act. To merely charge the Appellant with the definitive section of the Act alone does not suffice. This is indeed a defect which is fatal to the prosecution case and cannot be rectified. A conviction based on a defective charge is invalid and cannot be sustained. On this basis alone I do allow this appeal and quash the Appellant's conviction on the 1st count of Defilement. The subsequent 15 year sentence is also set aside.

Mr. Onserio argued for a re-trial on the basis that the offence was serious and the witnesses were readily available to testify. I too have considered the fact that the victim was a minor aged 4 years, the offence is serious and the Appellant having been sentenced on October 2009 has only served one (1) year of the 15 year sentence. It is my view that he will not be prejudiced by a re-trial. As such I do hereby order that this matter be re-tried in the lower court. Mention on 20th December 2010 before the Principal Magistrate Kwale for a fresh plea to be taken.

Dated and Delivered in Mombasa this 6th day of December 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Onserio for State
Appellant in person

M. ODERO
JUDGE

6/12/2010