



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 218 OF 2009**

*(From Original Conviction and Sentence in Criminal Case No.199 of 2008 of the Principal Magistrate's Court*

*at Kwale: A.M. Obura (Mrs.) – R.M.)*

**TSUMA MWAMBOE .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **TSUMA MWAMBOE**, has appealed against his conviction and sentence by the learned Resident Magistrate sitting at Kwale Law Courts. The Appellant had been arraigned before the lower court on 18<sup>th</sup> February 2008 on the charge of **DEFILEMENT CONTRARY TO SECTION 8 (1) (3) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were that

***“On the night of 12<sup>th</sup> January 2008 at around 6.00 p.m. in Kinango District of Coast Province, unlawfully had carnal knowledge of R. F.K a school girl aged 17 years”***

The Appellant denied the charge and his trial commenced on 29<sup>th</sup> May 2008. The prosecution lead by **INSPECTOR SIBUNDA** called a total of three (3) witnesses in support of their case. The complainant **R. F** a 17 year old student at Mtaa Primary School told the court that on the material day her mother sent her to Bunguri area to collect an item from her aunt. **PW1** left with a friend also called **‘R’** to her destination. On her way back home at 5.00 p.m. she came across the Appellant who was her school-mate and another. The Appellant pushed her to the ground and defiled her. After the act she went to the Appellant’s home and spent the night there. The two had sex a second time. The following morning the Appellant’s mother told the complainant to return to her home. **PW1** went home and reported the incident to her mother, who took her to Kinango Hospital for treatment. The matter was finally 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 elected to keep silent and proffered no defence. On 30<sup>th</sup> June 2009 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the charge of Defilement and sentenced him to serve fifteen (15) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who was unrepresented during the hearing of this appeal relied entirely upon his written submissions which had been filed in court. **MR. ONSERIO**, learned State Counsel made oral submissions in which he urged the court to uphold both the conviction and sentence rendered by the trial court.

The Appellant was charged with the offence of Defilement. Under the Sexual Offences Act, 2006 it is crucial that the age of the alleged victim be determined as this will inform firstly whether the offence of Defilement is proven to have been committed and will also inform the sentence to be imposed if the offence of defilement is found to have been committed. The offence of defilement can only be said to have been committed in circumstances where the victim is aged 18 years and below. In her own testimony the complainant said she was 17 years of age. **PW2 K. C** the complainant's father in his evidence at page 9 line 10 days with respect to the complainant's age

***“She is now 16 years old”***

This directly convicts the complainant's own evidence regarding her age. No proof in the form of a birth certificate, baptismal card, health card or some such other document was availed as proof of the complainant's age. The complainant said she is 17 years old in primary class six. I find that even in rural areas, it would be very unlikely to find a girl aged 17 years in primary school. The age of the complainant could have been satisfactorily proved by the P3 form. However despite the court having allowed several adjournments the doctor who examined the complainant did not testify in court. Thus although the P3 form was marked the same was not produced as an exhibit. It is therefore not evidence in this case. The learned trial magistrate did not in her judgement make any observations about the apparent age of the complainant. Doubt therefore remains concerning the age of the complainant at the time of the offence. She claims to have been 17 years old at the time of the incident but it could well be that she was actually 18 years in which case the offence of defilement cannot apply. The benefit of this doubt must be resolved in favour of the Appellant. For this reason alone I allow this appeal and quash the Appellant's conviction. The subsequent 15 year sentence is also set aside. The Appellant to be released forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 6<sup>th</sup> day of December 2010.**

**M. ODERO**

**JUDGE**

**6/12/2010**

In the presence of:-  
Appellant in person  
Mr. Onserio for State

**M. ODERO**

**JUDGE**

**6.12.2010**