



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 324 of 2006**

**SALIM SAID MLOFA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, SALIM SAID MLOFA, was charged with the offence of defilement of a girl contrary to Section 145 (1) of the Penal Code. The particulars of the offence were that the appellant on the 15<sup>th</sup> September 2004 at 6.00 p.m. at M[particulars withheld] village, Diani Location in Kwale District within Coast Province had carnal knowledge of MA a girl aged 14 years.

On 28<sup>th</sup> April 2005 the appellant appeared before B. T. Jaden, then a Principal Magistrate and when the charge was read over to the appellant, he is alleged to have stated, “true”. The prosecutor then narrated the following facts:

**“...the complainant is a girl aged 14 years. She is a standard three primary school pupil. On 15<sup>th</sup> September 2004 the accused person approached the complainant and seduced her and started a sexual relationship with the complainant. The accused gave the complainant some money after the act.**

**The parents of the complainant discovered the relationship between complainant and accused. The report was taken to the police. Investigations commenced. The complainant was taken to hospital for examination. It was confirmed that the complainant had been defiled.**

**The accused was looked for, arrested and charged with the present offence. I produce the P3 form as exhibit 1.”**

The record shows that after those facts had been stated, the appellant stated as follows:-

**“Facts are correct as per the charge sheet.”**

The prosecutor then informed the court that the appellant be treated as a first offender as he had no record. The record shows that the appellant then gave the following mitigating circumstances:

**“The girl went back to school. She was my girl-friend. I was going to marry her. Pregnancy was an accident. It is my parents who have not formalized the marriage arrangements.”**

The Learned Senior Principal Magistrate, after taking into account the appellant’s mitigation, sentenced the appellant to ten (10) years imprisonment with hard labour.

The appellant was dissatisfied and has appealed to this court on the main grounds that his plea was not unequivocal; that the Learned Senior Principal Magistrate failed to explain to the appellant all the ingredients of the offence and that the conviction was unlawful under the circumstances of the case.

When the appeal came up for hearing before me on 8<sup>th</sup> September 2008, Mr. Onserio, Learned State Counsel, conceded the appeal on the ground that the Learned Senior Principal Magistrate did not record the conviction of the appellant and urged that I order a retrial. Mr. Kaburu, Learned counsel for the appellant contested the plea for a new trial arguing that such a course would prejudice the appellant who has already served more than three (3) years imprisonment.

I have considered the record of this case and I am satisfied that the plea of the appellant was not properly taken. First, the language in which the plea was taken is not indicated. Secondly, after the prosecutor had stated the facts of the charge the appellant did not respond to those facts but instead pleaded to those in the charge sheet. Thirdly, the record does not show that the Learned Senior Principal Magistrate entered a conviction of the appellant at all. The appellant's plea was therefore not unequivocal. The plea was not recorded in accordance with the procedure set out in Adan – v – Republic [1973] EA 445. In that case the court held that pleas of guilty should be recorded as follows:-

**“(i) the charge and all the essential ingredients of the offence**

**should be explained to the accused in his language or in a**

**language he understands (emphasis supplied).**

**(ii) the accused's own words should be recorded and if they are**

**an admission, a plea of guilty should be recorded; (emphasis**

**supplied)**

**(iii) the prosecutor should then immediately state the facts and the**

**accused should be given an opportunity to dispute or explain**

**the facts or to add any relevant facts;**

**(iv) if the accused does not agree with the facts or raises any**

**question of his guilt his reply must be recorded and change of**

**plea entered;**

**(v) if there is no change of plea a conviction should be recorded**

**and a statement of the facts relevant to sentence together with**

**the accused's reply should be recorded.”**

I set out the proceedings that took place before the Learned Senior Principal Magistrate at the beginning of this judgment. As can be gleaned therefrom, the Learned Magistrate substantially failed to follow the settled procedure and also failed to enter a conviction of the appellant.

This appeal must therefore be allowed. The Learned State Counsel has urged for a retrial. I have anxiously considered that plea, but have come to the conclusion that it is not in the interests of justice to order the same. The appellant has been in custody for 3 ½ years. The complainant may be pursuing her own interests in life including furthering her education. A retrial in my view may very well not be in her interests in view of what the appellant told the Senior Principal Magistrate in mitigation.

In the end, this appeal is allowed. The apparent conviction is hereby quashed and the sentence is set aside. The appellant should be released forthwith unless he is held for some other lawful cause.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 7<sup>TH</sup> DAY OF OCTOBER 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Kaburu for the Appellant and Onserio for the Republic.

**F. AZANGALALA**

JUDGE

7<sup>TH</sup> OCTOBER 2008