



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**H.C.CR. APPEAL NO.327 OF 2002**

**ABDULRAHAMAN HWAWAZI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.262 of 2002 of the Chief Magistrate's Court at Mombasa – J.S. Mushelle, SPM)

**Coram: Before Hon. Justice Mwera**  
**Miss Mwaniki for the State**  
**Appellant in person present**  
**Court clerk - Sango**

**JUDGEMENT**

In the lower court the appellant was charged under S.145 (1) Penal Code in that on 18-1-2002 at [particulars withheld] area Mombasa he had carnal knowledge of HA a girl under the age of 14 years. He was tried, found guilty, convicted and sentenced to serve 8 years imprisonment with hard labour plus 4 strokes of the cane.

The appellant appealed on 5 grounds, on 5-8-2002.

When the appeal came up for hearing on 6-9-2004, the learned State Counsel conceded it on the basis that at one point a Cpl. Mwamburi did lead the prosecution case contrary to the provisions of S.85 (2) Criminal Procedure Code in that he was not a competent public prosecutor, him not being of the rank of Assistant Inspector of Police thinks that concession was right.

The learned State Counsel however pressed for a retrial of the appellant saying that the offence was serious and the evidence in the lower court is such as can and should sustain a conviction. That the appellant has served only about 2 years of the sentence. That the witnesses who reside in Mombasa will be made available to testify once again, just as it was previously, and not with a view to seal loopholes in the prosecution case if any. That thus the appellant would not be prejudiced.

The appellant on his part pleaded that a retrial would prejudice him and that he has been in prison for long. He wanted the whole thing done with now.

It is not automatic that every case where a retrial is sought, it should be ordered as a matter of course. Each case is considered on its own and it is imperative to guard against any breach of the accused rights. There is also the issue of the potential evidence if it can or cannot secure a conviction. And if the evidence can be presented once again and so on and so forth.

The offence of defilement is serious. It was partly presented to the learned trial magistrate by a police corporal contrary to law. The appellant had nothing to do with this, of course. But having gone over the evidence of the complainant (PW.4), her mother S. (PW.2) plus neighbours and that of Dr Peter Mwamure (PW.6), this court is satisfied their evidence may lead to a conviction after a retrial.

In sum the appeal is allowed but a retrial is ordered. The appellant to be presented before a competent court within next 14 days. To remain in custody for now.

**Judgment delivered on 20th September, 2004.**

**J.W. MWERA**

**JUDGE**