



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 175 OF 1997

**(From Original Conviction and Sentence in Criminal Case No. 2605 of
1996 by the Principal Magistrate –G. ABURILI)**

MWALOLO POLEAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The appellant was charged with 2 counts before the Principal Magistrate’s Court. On count I he faced a charge of defilement of a girl under the age of 14 years contrary to section 145 (1) of the penal code and on count II he was charged with indecent assault of a female contrary to section 144 (2) of the penal code. He was convicted on count I and sentenced to serve 10 years imprisonment plus 4 strokes of the cane. He filed an appeal but at the hearing he opted not to proceed with the same on the grounds that he was now satisfied with the sentence passed.

The state counsel Mrs. Mwangi however said the conviction and sentence could not stand as the trial court failed to follow the laid down principals in the taking of evidence of a child of 12 years.

The complainant was aged 12 years and was sworn before the court had ascertained she was competent to give sworn evidence. The offence committed by the appellant is serious and he should be ashamed of himself.

He is married and has children of his own but choose to take advantage of the complainant. I hope the 5 years imprisonment he has served has rehabilitated him and he will be a better father. He is indeed a danger to his own children who I hope by now know why their father was send to jail.

In the circumstances the conviction and sentence are set aside and appellant is to be set free forthwith.

Dated this 20th day of September 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE