

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 94 OF 2000

**(From the original conviction and sentence in Criminal Case No. 60 of 2000
of the Principal Magistrate's Court at Malindi).**

SAFARI KOMBO NZAI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

J U D G E M E N T:

Appellant was charged with one count of defilement under Section 145(1) of the Penal Code and pleaded guilty to the charge. The particulars of the charge stated that he committed this offence between 5th May, and 13th October, 1999 but the facts as stated by the prosecution show that the appellant had carnal knowledge of the 13 year old herds girl by force on both dates but complaint was only as against the last one, the first one having been ignored by the grandmother who did not report it. The charge disclosed two offences and ought to have been charged separately. The charge was therefore duplex and the appellant could not have been certain which charge to meet and he was pleading guilty to. He pleaded guilty to two charges without same having been distinctively charged. The court ought to have noticed and acted under S.214 of Criminal Procedure Code. Is this a case curable under S.382 of the Criminal Procedure Code?

I do not think so; but as he has not only appealed against sentence. State does not support the corporal punishment. This Court on appeal can only interfere where the sentence was based on wrong Principle or the Magistrate took extraneous matters into consideration or left out relevant matters from consideration.

I do not think the Magistrate was faulted here but only if the charge was correct. Here the charge was duplex, so the suspicion is that she took into consideration facts of a different charge which was not before her. I think the best order is to quash the conviction set aside the sentence and Order that appellant be re-arrested and charged properly before a court of competent jurisdiction.

That be the order of the court.

Delivered at Mombasa this 8th Day of November, 2000.

A.I. HAYANGA

J U D G E

Delivered to: Miss Kwena – State Counsel.

Appellant in person.

A.I. HAYANGA

J U D G E