



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CORAM: D.S.MAJANJA J.**

**CRIMINAL APPEAL NO. 68 OF 2018**

**BETWEEN**

**STEPHENE CHUMBA.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against the original conviction and sentence of Hon. E. Kigen, RM dated 31<sup>st</sup> August 2018 at the Magistrates Court at Eldoret in Criminal Case SO No. 212 of 2017)*

**JUDGMENT**

1. The appellant **STEPHENE CHUMBA**, was convicted for the offence of sexual assault contrary to **section 5(1)(b)(2) of Sexual Offences Act** ("the **Act**"). It was alleged that on 6<sup>th</sup> November, 2017 at [particulars withheld] area in Eldoret West Sub-County within Uasin Gishu County he unlawfully manipulated his hand by touching the breast of one CJ, a girl aged 17 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to **section 11 (1)** of the **Act**.

2. The facts of the case as narrated by PW 1 were that on 6<sup>th</sup> November, 2011 the appellant came to her place carried her by force and as she screamed, he covered her mouth with his hand took her to his house, put her on his bed and removed her blouse, bra and touched her breasts. As she was screaming, people came as to see what was happening. The appellant's neighbour, PW 2, also heard screams and when she turned, she saw the appellant carrying PW 1 to his house as she was screaming.

3. PW 1's mother, PW 3, also heard screams and when she went to check what was happening, she was told that the appellant had carried PW 1 to his house. She went to the appellant's house which was not far and found PW 1 shaking outside the appellant's house with her blouse opened. She locked the house from outside but the crowd broke in and arrested the appellant.

4. In his defence, the appellant stated that it is PW 3 who called him and locked him in his house and called the police following a disagreement over their relationship.

5. I have looked at **section 5** of the **Act** and the facts do not support the offence for which he was convicted. It provides as follows:

*5(1) Any person who unlawfully—*

*(a) penetrates the genital organs of another person with—*

*(i) any part of the body of another or that person; or*

*(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;*

*(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.*

*(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life*

6. I am however satisfied that the appellant committed an indecent act by touching PW 1's breasts. An "indecent act" under **section 2(1)** of the **Act** is defined as an unlawful intentional act which causes, "(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration." **Section 11(1)** of the **Act** makes it an offence to commit an indecent act with a child and prescribes a mandatory minimum sentence of 10 years' imprisonment.

7. PW.1's evidence was well corroborated by the witnesses who saw the appellant carrying her and taking her to his house. PW 3 found her with her blouse opened outside the appellant's house. The totality of this evidence quashes his defence that he was framed. PW 1's birth certificate confirmed that she was born on 14<sup>th</sup> February 2000 hence she was below 18 years when the offence was committed.

8. I allow the appeal only to the extent that I quash the conviction and sentence on the principal count but I substitute the same with a conviction on the alternative count of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** and sentence the appellant to 10 years' imprisonment.

**DATED and DELIVERED at ELDORET this 25<sup>th</sup> day of APRIL 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Oduor, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.