**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 58 OF 2017**

**E K B.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. This is an appeal by E K B arising from the judgement of Hon. D.O. Onyango S.P.M. that was delivered on the 28th of May 2017.

2. At the request of Counsel for the Appellant and based on the allegation that the appellant was a minor at the time the alleged offence was committed and the fact the Appellant is a student the matter was fast tracked.

3. At the trial the appellant was faced with the main charge of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on diverse dates between 29th December 2014 and 4th January 2015 within Bungoma County he unlawfully defiled G.C. a minor then aged 14 years.

4. The appellant also faced an alternative charge of committing an indecent Act with a child contrary to Section 10(1) of the Sexual Offences Act No.3 of 2006.

The particulars thereof were that on diverse dates between the 29th of December 2014 and the 4th January 2015 within Bungoma County he unlawfully and intentionally touched the buttocks, breasts or vigina of G.C. a minor aged 14 years.

5. The Prosecution Evidence is that the Complainant and the appellant stayed together in the Appellant's home unknown to the Appellant's parents between the 29th of December, 2014 and 4th January 2015 and during that period the two engaged in sex.

6. On being placed on his defence at the close of the Prosecution case the appellant denied the allegations and raised an alibi to the effect that he and his mother were away from the 29th of December 2014 and only returned the day he was arrested. Both his parents gave evidence supporting the alibi.

7. As the first appellate Court I have considered the evidence afresh, analysed and evaluated the same in order to arrive at an independent opinion.

8. The appellant was convicted of the main charge and sentenced to 20 years imprisonment and as a result he preferred this appeal on the following grounds;

**i. The trial Court erred in Law and fact by convicting and sentencing the Appellant based on uncorroborated and contradictory evidence of the Prosecution witnesses.**

**ii. The Appellant was not examined by a doctor.**

**iii. The Prosecution failed to prove its case beyond all reasonable doubt.**

**iv. The Prosecution failed to supply the Appellant with witness statements leading to a violation of the appellant's Constitutional right.**

**v. The trial Court failed to take note and consider that the Case was not adequately investigated.**

The appellant sought to have the conviction quashed and the sentence set aside.

9. The issues for determination in this case are; (i) ***the age of the minor allegedly defiled*** (ii) ***the age of the appellant at the commission of the alleged offence*** (iii) ***whether there is evidence to the required standard linking the appellant to the offence*** (iv) ***if (iii) above is positive the appropriate sentence***.

10. Having considered the Prosecution evidence and more particularly the evidence of the minor PW1, her mother PW2 and the Clinician who assessed PW1's age, PW4, the age of the victim at the time of the commission of offence was 14 years.

No issue arose either at trial or the appeal in relation to the victim's age and I therefore find that as a matter of fact as at the 4th of January 2015 the Complainant PW1 was 14 years of age.

11. **PW1** informed PW2 and PW5 that while she had disappeared from home between the 29th December 2014 and 2nd of January 2015 she had stayed with the appellant during which time she had sex.

According to PW1 between the 2nd and 4th of January 2015 she hid in the tea bushes and returned home on the 4th of January when her mother and an aunt threatened her prompting her to report to the police. PW5 returned home with her when he learnt of the alleged offence and arrested the Appellant.

**PW2** in her evidence confirmed that her daughter disappeared from home between the 29th of December, 2014 and 4th January 2015 and that on being interrogated PW1 told them that she had been at the appellant's and had slept with him.

PW1 was taken to hospital and PW3 Dr. Edward Simiyu of Mt. Elgon hospital examined her and found a broken hymen.

12. There was no direct evidence from the other witnesses safe the evidence of PW1. I will turn to the proviso to Section 124 of the Evidence Act as I warn myself on reliance on the evidence of one witness. The Section permits the Court in cases of sexual offence for reasons to be recorded to rely on the Evidence of a victim and proceed to convict. Section 124 provides as in regard to Sexual offences

> ***"Provided that where in a Criminal Case involving a Sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceeding, the Court is satisfied the alleged victim is telling the truth".***

It is true that the trial Court did not express itself as to whether it was satisfied that the victim told the truth. However it was quite obvious, needless to say that in analyzing and evaluating the evidence this Court finds the victim to have been honest and truth and is satisfied with her evidence.

13. Like the trial Court this Court rejects the alibi which only surfaced at the defence evidence and appeared to have been a fabrication and an afterthought created by the Appellant and his parents and which failed to dislodge the Prosecution evidence.

14. The evidence of PW1 although sufficient to return a conviction was corroborated by that of PW2 and PW3. PW3 found a broken hymen, corroborating the sexual encounter.

15. It is not clear from the evidence whether statements of witnesses were issues or not, neither did the appellant ask or draw the Court's attention. The complainant is rather late in the day to complain as he ought to have raised the issue at trial.

16. From the evidence, I have formed the opinion that the Prosecution proved its case beyond reasonable doubt and I would therefore affirm the conviction.

17. The age of the Appellant at the time of the commission of the offence was raised at the submission level. In my view this ought not to be ignored as to do so will amount to injustice.

The State has equally conceded that taking into account the age that the sentence in the circumstances was harsh.

18. At the time of the commission of the trial two things ought to have been done to ensure justice on the part of the appellant the case ought to have been heard expeditiously and he ought to have been convicted under the Children's Act where appropriate sentences are provided for child offenders this did not happen. I do not fault the Court though as the appellant's age was not brought to its attention and I equally appreciate the fact that the appellant was not only a minor but also unrepresented and may not have appreciated the implication regarding his age.

In 2015 when the appellant was 17 and the case concluded the 28th of May in 2017 which placed him at 19 years then the relevant year is the date of commission of offence and not of conviction.

19. From the foregoing the appellant's rights as a child were violated at the time. He stayed in custody with adults from the date of his arrest the 4th of January, 2015 to 7th of January, 2015 and has been in Prison from 28th of May, 2017 to-date.

Due to the violation against the appellant's right as a child on the wrong side of the Law I will proceed to release him and deem the punishment he has so far undergone to be adequate.

He is however warned that having sex with any girl below 18 years is an offence punishable by severe sentence.

DATED and DELIVERED at BUNGOMA this 23rd day of November, 2017

**ALI ARONI**

**JUDGE**