



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 14 OF 2016**

**BKS.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the conviction and sentence in Bomet PM CR No. 14 of 2014 – Hon P. Achieng)***

**JUDGMENT**

The appellant was convicted and sentenced to 20 years imprisonment for the offence of defilement Contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on diverse dates in the month of November 2012 and March 2013 in Bomet county, he intentionally caused his penis to penetrate the vagina of FC a child aged 14 years.

This is the first appellate court. It has a duty of re-evaluating and considering the evidence on record so as to arrive at its own independent conclusion but bearing in mind that it did not have the opportunity of observing the demeanour of the witnesses.

The prosecution in this case called (4) witnesses. The defence called one.

In his defence the appellant told the court that he was a director of [particulars withheld] Academy Kimorwok and that he knew the complainant since birth, which was in the year 1995 and that at the time he was alleged that he had defiled her, she was aged 18 years and not 14 as alleged.

He further testified that his school was built from land bought from the complainant's grandfather.

He denied having defiled the complainant and places his woes squarely on one DKM a relative of the complainant who is a police officer and who was not happy when he bought that piece of land. During cross-examination the appellant did admit that he had an affair with the complainant around the time in question.

The defence case is that actual age of the complainant was not proved and further that the learned trial magistrate relied on a P3 form and a birth certificate which were issued after the complainant was found to be pregnant which was prejudicial to the defence case.

PW3 Mr. Joseph Nyagunda Kimani – a government analyst did receive blood sample from BK (the accused), blood sample from FC (complainant), blood sample from FK (child).

After subjecting them to examination he came to the conclusion that there were 99.99% chances that BK is the biological father of FK the son of FC. He produced a report to that effect.

The evidence of PW3 corroborates that of the complainant to the effect that she had sexual intercourse with the appellant on several occasions culminating into pregnancy.

The main issue in this case is that of age assessment.

The complainant herself testified to have been born in the year 1999. She conceded that the birth certificate was issued to her in the year 2013 after she became pregnant and after her school demanded for it.

The certificate of birth was produced as exhibit No. 2. It shows the date of birth as 6<sup>th</sup> September 1999. The reasons given for procuring the

birth certificate late are meritorious.

The defence contends that their case falls under S.8(5) of the Sexual Offences Act.

Which provides:- "it is a defence to a charge under this section if-

a. It is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence and

b. The accused reasonably believed that the child was over the age of eighteen years."

In the present case, the accused was a director of a school constructed on land bought from complainants grandfather.

He concedes to have known her form birth. Which means he was considerably older than her by many years. At the time of the defilement she was a standard seven pupil and dropped out of school because of pregnancy. The accused knew the complainant and her parents, he must be taken to have known that she was still a primary school pupil.

S.8 (6) of the Sexual Offences Act provides: The believe referred to in subsection 5(b) of the Act is to be determined having regard to all circumstances, including any steps the accused took to ascertain the age of the complainant."

The accused in the present case alleges that the complainant was born in the year 1995. Although the onus of proof was on the prosecution, it is taken that he who alleges a fact ought to prove it.

The accused has not at least shown how he came to that assessment of the age of the complainant. The accused is an educationist, married man and a father of five children.

He must be taken to have known that the standard seven girl he was having sexual affairs with was a minor.

I am satisfied that the prosecution and lawful respectively.

They are upheld. Appeal dismissed.

Judgment delivered dated and signed this

In the presence of learned counsel for the prosecution Mr. Mutai

Learned counsel for the defence Mr. Motanya

Court Assistant Wambany

**M. MUYA**

**JUDGE**

**21/11/17**

**Court-** Certified copies of proceedings and judgment to be furnished to the prosecution and defence.

**M. MUYA**

**JUDGE**

**21/11/17**