



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**  
**CRIMINAL APPEAL NO. 93 OF 2012**

*(Being an appeal arising from Kitale Senior Resident Magistrate J.A. Owiti*

*delivered on 31st July 2012 in Criminal Case No. 965 of 2011)*

**WYCLIFFE SHIKUKU MULONGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....STATE**

**J U D G M E N T**

1. The appellant, **WYCLIFFE SHIKUKU MULONGO** was charged with the offence of Defilement of a child contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are that on the 22nd day of February 2011, at Machewa Sub-Location in Trans -Nzoia County, intentionally caused his penis to penetrate the vagina of **L N S** a child aged 17 years.

2. When the appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full hearing.

3. The prosecution called four witnesses in support of their case. The case for the prosecution was that on the material day, the complainant, **PW1 L N** and the appellant who was her boyfriend spent the night together. That night they had sex four times. They had also previously had other sexual encounters. The complainant missed her monthly periods during the month of March 2011. The complainant informed the appellant about the turn of events.

The appellant accepted to take responsibility. The complainant ran away from home and went to stay with the appellant. When the appellant failed to set up a home for the complainant, she reported the matter to her aunt, **PW2 J N**.

4. The aunt in turn informed the complainant's father about the situation. The matter was discussed with the village elder and the appellant's family. The appellant however denied responsibility for the pregnancy. The matter was reported to the police. The complainant was issued with a P3 form and examined at Kitale District Hospital by a clinical officer, **PW3 CHRISANTUS MASINDE**. The complainant was found to be pregnant.

5. The investigating officer, **PW4 PC WILLIAM MAIYO** referred the complainant for age

assessment. The assessment report confirmed that complainant's age was 17 years. The appellant was arrested and subsequently charged with the offence herein.

6. In his defence the appellant gave sworn evidence and called two witnesses. The case for the defence was that when the appellant was asked by the village elder and his team if he had a love affair with the complainant who was pregnant. The appellant denied the allegations. That the complainant and her father were to investigate the issue of the paternity of the baby. The appellant was however arrested later and escorted to Kitale police station. He ended up in court where he denied the charge. The appellant stated that a DNA test should be carried out to confirm the issue of paternity.

7. The appellant was convicted and sentenced to fifteen (15) years imprisonment. The appellant was dissatisfied with both the conviction and sentence and appealed in this court on grounds that can be summarized as follows:-

**(a) That the offence was not proved**

**(b) That crucial prosecution witnesses were not called to testify.**

**(c) That the complainant's age was not ascertained.**

**(d) That the defence case was not considered.**

8. During the hearing of the appeal, the appellant relied on his written submissions. The learned counsel for the state submitted orally. I have considered the said submissions.

9. This being the 1<sup>st</sup> appellate court, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences [See *Okeno –vs- Republic (1972) EA 32*].

10. The complainant's (PW1) evidence is that she had a sexual relationship with the appellant. The complainant specifically pointed out the material date as one of the days that they had sex. The complainant's evidence is that of recognition. There is no possibility of error in the identification of the appellant as the parties knew each other and were intimate. The complainant informed the aunt (PW2) soon after she discovered that she was expectant that the appellant was the one responsible for the pregnancy. The evidence of the clinical officer (PW3) confirmed that the complainant was pregnant.

11. The appellant's defence was on the arrest and arraignment in court. The same applies to the evidence of **DW2 S S** the father to the appellant and **DW3 G W** the village elder. Their evidence was of no probative value as the sexual encounters were not carried out in the open. In the same breath, not even the calling of more witnesses by the prosecution would have touched on the sexual acts.

12. Although the DNA tests could have proved the issue of paternity, there is no requirement under the law that the offence of defilement be proved by use of forensic evidence.

13. The complainant's evidence if believed by the court is sufficient proof of defilement. As stated in the proviso to section 124 of the evidence Act;

***“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 proceedings, the court is satisfied that the alleged victim is telling the truth.”***

14. The complainant gave her age as 17 years at the material time. The aunt (pw2) also testified that the complainant was 17 years old. The clinical officer (pw3) also estimated the complainant's age as 17 years.

The complainant herein is a borderline case whose age has been given as 17 years old at the material

time. This being a borderline case, care ought to have been taken to allay any fears that the complainant was not yet eighteen (18) years old. The doctor who carried out the age assessment or the clinical officer who testified ought to have given details on how the complainant's exact age was arrived at especially taking into account that both complainant and the aunt did not state the date or year of birth if it was known.

15. On account of the issue of lack of ascertainment of the complainant's age, I give the benefit of doubt to the appellant. The appeal has merits and is allowed. The appellant is at liberty unless otherwise lawfully held.

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**B. THURANIRA JADEN**

**JUDGE**

**COURT:** Judgment dated and delivered this 17th March 2016.

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**B. THURANIRA JADEN**

**JUDGE**