



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 81 OF 2013**

**GILBERT ODUORI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from conviction and sentence of Busia Chief Magistrate's Criminal Case No. 2134 of 2012 dated 28<sup>th</sup> October 2013 by Hon. T.I. Maisiba Principal Magistrate)*

**JUDGMENT**

1. Gilbert Oduori (The Appellant) is serving a sentence of 15 years with effect from 28<sup>th</sup> October 2013 having been convicted of the offence of Defilement of a Girl Contrary to section 8(1)(4) of the Sexual offences act No. 3 of 2005. It had been alleged that on 18<sup>th</sup> November 2012 at Butula Township he intentionally and unlawfully caused his penis to penetrate into the vagina of FC D a girl aged 17 years.
2. Whilst his homemade appeal was against sentence only, the State was of the view that the conviction itself needed to be reviewed as it may have been unsafe
3. In the Charge Sheet, the Appellant was accused of allegedly defiling his victim on 18<sup>th</sup> November 2012. It was on this day that the Complainant says she was confronted by the Appellant when she took shelter from the heavy rain in an incomplete house. That the Appellant made the shelter insecure by caressing her breasts and private parts and later defiling her. That on the same day, the two of them were seen together by her uncle.
4. On that same day at about 8.00 p.m. Collins Omondi Ojiambo (PW4) met the Complainant with the accused person. The Complainant used to live at the home of PW4 but was away on the material day, ostensibly to visit her mother. When the Complainant saw PW4, she ran away and was later found at the Appellant's house.
5. The evidence of PW4 seemed to suggest that the complainant was in the company of the Appellant on her own accord. It is for this reason that the following statement by Cornelius Sambasi(PW3) who examined the Complainant may be true,

**“I saw a client called FC on 27<sup>th</sup> November 2012. She was accompanied by her father that her daughter 17 years had disappeared from home on 18.11.2012 and was allegedly staying with a suspect.”**

That there was a sexual relationship between the Complainant and the Accused may have been unwittingly confirmed by the Complainant when she testified that she had had sex with the Accused on

previous occasions. That this happened on 4.11.12 and 13.11.2013 (perhaps 13.11.12). On both these occasions the Complainant did not lodge a formal complaint or in the least complain informally.

6. The result of the Clinical test carried out by PW3 was indeed telling about the sexual activity of the Complainant. PW3 examined the Complainant on 27.11.2012. On that day she was 7 weeks pregnant and would therefore have conceived in early October 2012. The Complainant was, no doubt, sexually active.

7. The Complainant was just 5 months shy of the age of majority at the time of the alleged defilement. The Certificate of Birth produced as Prosecution evidence showed that she was born on 14.4.1995.

8. The Sexual activity and age of the Complainant, for a moment, swayed this Court to think that the conviction was unsafe as the Trial Court had not inquired whether a Defence under section 8(5) of The Sexual Offences Act was available to the Accused. Section 8(5) of the Act 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 of the alleged commission of the offence; and**
- b. **The accused reasonably believed that the child was over the age of eighteen years.**

9. However, what the Appellant said in cross-examination took away that Defence. In Cross examination, the Accused said;

**I work with Hayer Bishan I know the Complainant. I know PW3. I didn't met him on 18.11.13. I had no grudge with the Complainant. She goes to the same school as my child. I am not a photographer. I have no document to show I work with Hayer Bisham. (my emphasis)**

The Appellant knew the Complainant well enough to know that she went to the same school as his own child. The Appellant does not say that the Complainant deceived him into believing that she was of the age of majority at the time of the alleged commission. And if she had deceived him, the Appellant would have had to explain why he would reasonably believe the Complainant to be over 18 years when he was well aware that she attended school with his own child.

10. After reviewing the evidence, I reach the conclusion that the conviction was safe. It is little wonder that it was not challenged by the Appellant.

11. Sentence. The sentence is lawful and the minimum prescribed by law. This Court cannot fault it and will not interfere with it.

12. The Appeal is dismissed.

Dated and signed and delivered at Busia this 16<sup>th</sup> day of May 2016.

**F. TUIYOTT**

**JUDGE**

In the presence of :-

Orwasa - C/Assistant

Owiti- for State

Appellant in person