



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 43 OF 2015**

**HUMPHREY BARASA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against judgment of Hon. D.O. Ogolla, Chief Magistrate delivered on 1<sup>st</sup> July 2015 by Hon. H.N. Ndungu, Chief Magistrate in Busia CM Criminal Case No. 729 of 2014)*

**JUDGMENT**

1. Humphrey Barasa, the Appellant herein is currently serving fifteen years imprisonment having been convicted by the Chief Magistrate's Court at Busia in Criminal Case No. 729 of 2014 for the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act, 2006. He has appealed against conviction on the grounds that:

**“1) The Learned Magistrate erred in law and fact by convicting the appellant for the offence of defilement on the basis of the disclosed pregnancy without adequate disclosure and proof of a criminal transaction that would have ended in such conception.**

**2) The Learned Magistrate erred in law and fact by convicting the appellant on the charge of defilement based on a 9 months 3 weeks old pregnancy as at 7.4.2014 without considering that it was possibly procured outside the material period in the charge sheet.**

**3) The Learned Magistrate erred in law and fact by convicting the appellant on a charge of defilement that was never corroborated in material particulars by medical evidence and in circumstances that were not obvious as to disregard the support of opinion medical evidence.**

**4) The Learned Magistrate erred in law and fact by convicting the appellant on unspecified transactions in defilement accompanied by the alleged treatment and medical examinations done after 1/3/2014 when the complainant was already over 18 years of age.**

**5) The Learned Magistrate erred in law and fact in relying on the alleged agreement of admission to the offence and dated 7/4/2014 the date of the appellant's arrest effected by the person who was shown to have procured and presided over the said agreement.**

**6) The Learned Magistrate erred in law and fact by convicting the appellant on the**

**Children Officer's agreement exercising powers of arrest but contrary to the Judges rules and without administering any cautionary statement as required by law.**

**7) The Learned Magistrate erred in law and fact by convicting the appellant without proof beyond reasonable doubt that the agreement founding the conviction had been signed by the appellant.**

**8) The Learned Magistrate erred in law and fact by failing to find that the pregnancy complained of could have been the result of the complainant's illicit associations.**

**9) The Learned Magistrate erred in law and fact by convicting the appellant in the absence of any medical evidence connecting the appellant to the complainant's pregnancy.**

**10) The Learned Magistrate erred in law and fact by requiring the appellant to prove his innocence.**

**11) The sentence handed down to the accused was harsh and excessive."**

2. Mr. Owiti for the State conceded the appeal stating that the medical evidence showing that the victim's hymen was not intact did not corroborate the prosecution evidence. According to him, the hymen was broken in the process of giving birth and that cannot be used to corroborate evidence of sexual engagement.

3. Secondly, Mr. Owiti submitted that the conviction appeared to have been based on an agreement recorded before a Children's Officer. In his view, this kind of evidence could not be used to reach a conviction as it had not been recorded in the manner provided for recording confessions.

4. Mr. Wanyama for the Appellant urged the court to allow the appeal based on the State's concession.

5. In a situation where the appeal has been conceded, the court still has a duty to look at the evidence adduced before the trial court in order to reach a decision as to whether the conviction is unsupported as alleged by the Appellant and the State.

6. The evidence that was adduced before the trial Court can be summarized as hereunder. The complainant, E.L. testified as PW1 and told the Court that the Appellant was her boyfriend from 2011 until July 2013. Sometimes in July, 2013 she met the Appellant who took her to his sister's house in Uganda where they had sex. She told the court that the Appellant had also taken her to his home at Budokomi where they stayed overnight and had sex. She testified that earlier on, she had had sex with the Appellant at the house of the Appellant's friend at Mulipuko.

7. The complainant told the Court that when they came back from Uganda her mother was annoyed with her and chased her away. As a result, her father took her to stay with her aunt PW3 JB in [Particular Withheld]. While still with her aunt, she discovered that she was pregnant and she started attending antenatal clinic. In April 2014 she went with her mother to the Children's Office where she found the Appellant.

8. It is her evidence that a P3 form was filled for her at Busia District Hospital on 8<sup>th</sup> April, 2014. On 14<sup>th</sup> April, 2014 she gave birth but the child passed away.

9. PW2 FN, the mother of the complainant testified that E.L. was born on 1<sup>st</sup> March, 1996. She told the court that sometimes in July, 2013 her daughter went missing from home. She telephoned the father of the Appellant who is a relative and he informed her that his son was also not at home. He told her that the Appellant had taken E.L. to Uganda. PW2 went and reported the matter to the Children's Department at Busia where she was advised that they should discuss the matter at home as a family.

10. When her daughter later came she informed her that the Appellant had taken her to his sister's house in Uganda. The complainant was then sent to stay with PW3 so that she could be kept away from the Appellant. In December 2013 she heard the Appellant boasting that even though they had taken E.L. away she was already pregnant. She asked PW3 to find out if this was indeed true and PW3 confirmed that PW1 was indeed pregnant.

11. PW2 went back to the Children's Officer on 7<sup>th</sup> April, 2014. The Appellant appeared before the Children's Officer and admitted in writing that he was responsible for E.L.'s pregnancy. She then went and reported the matter at Busia Police Station and the Appellant was arrested and charged.

12. PW3 told the court that in August, 2013 E.L. started staying with her. In December, 2013 her sister (PW2) asked her to confirm if E.L. was indeed pregnant. She confronted E.L. who told her that she was indeed pregnant with the Appellant's child.

13. PW4 Boniface Odie, a Children's Officer told the court that in March, 2014, PW2 reported to him that her daughter had been impregnated by one Humphrey Baraza. He recorded the report and summoned the suspect. On 7<sup>th</sup> April, 2014 the Appellant appeared before him and recorded an agreement accepting responsibility for the pregnancy and promising to take care of the child once born. PW4 produced the agreement dated 7<sup>th</sup> April, 2014 as an exhibit.

14. PW5 Sammy Obuguma, a Clinical Officer, produced a P3 form filled on 8<sup>th</sup> April, 2014 confirming that E.L. had a 39 weeks pregnancy at the time of examination.

15. PW6 Corporal Mary Boke produced, among other documents, a certificate of birth showing that E.L. was born in March 1996 and hence seventeen years at the time she became pregnant in July, 2013.

16. In his defence the Appellant who testified as DW1 denied impregnating E.L. He told the court that he was summoned twice by the Children Officer and on both occasions he denied impregnating E.L. He stated that he never signed any agreement and he was taken to the police station where he was arrested and charged.

17. As the first appellate court, I am obligated to review the evidence adduced before the trial court and reach my own independent conclusion on the same. In doing so, I must bear in mind that I did not hear or see the witnesses testify-see **Okeno vs Republic (1972) EA 32**.

18. The Appellant was, upon trial, convicted on the main count which is defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006. It was alleged that on diverse dates between July, 2013 and 7<sup>th</sup> April, 2014 at Budokomi village, Mundika Sub location of Busia County he intentionally and unlawfully caused his penis to penetrate the vagina of E.L., a girl aged 17 years.

19. Section 8(1) of the Sexual Offences Act, 2006 defines the offence of defilement as follows:

**“A person who commits an act which causes penetration with a child is guilty of an act termed defilement.”**

20. Section 8(4) provides the punishment for having sex with a child aged between sixteen and eighteen years as follows:

**“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”**

21. Section 8 clearly outlaws sexual engagement with any human being under the age of eighteen years. The only defence availed for such sexual engagement is one found in Section 8(5) which states:

**“It is a defence to a charge under this section if-**

**(a) it is proved that such child, deceived the 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.”**

22. In a case of defilement therefore, there is no room for raising consent as a defence. What the prosecution only needs to prove is penetration and the age of the victim as this will determine the sentence to be imposed.

23. In the appeal before this court, the proceedings before the trial court clearly show that the Appellant never raised the defence provided by Section 8(5) cited above. His defence was a denial of any sexual engagement with E.L.

24. The question therefore is whether the prosecution proved that the Appellant penetrated E.L. and whether E.L. was 17 years at the time of the alleged penetration.

25. The evidence on penetration is that of E.L. alone. She told the court that the Appellant had sex with her in his home, the house of a friend and his sister's house in Uganda. Although E.L. claimed that she was forced into the sexual liaisons, the evidence adduced point to the fact that the sexual acts were consensual. She could not have been forced into the sexual acts several times without reporting the incidents to anybody. She admitted that the Appellant was her boyfriend since 2011.

26. Can her allegations of sexual intercourse with the Appellant be believed? The evidence of E.L. was supported by that of PW5, the medical officer who testified that E.L. was pregnant when he examined her. The pregnancy confirmed sexual engagement. Excluding the current developments in the medical field which allow a woman to conceive without coitus, ordinarily a pregnancy is a product of sexual engagement. However, the evidence of PW5 does not confirm that it is the Appellant who impregnated E.L.

27. PW2 and PW3 both testified that E.L. told them that the child she was carrying belonged to the Appellant. Their evidence therefore corroborated that of E.L. That evidence confirmed E.L.'s testimony that she had sexual intercourse with the Appellant. Their evidence was not shaken during cross-examination.

28. As for the evidence of PW4, I agree with the Appellant and the State that the said evidence could not have been used to establish the guilt of the Appellant. The alleged agreement was written for the purpose of obtaining evidence to be used to establish the Appellant's criminal liability. This can be seen from the fact that PW2 proceeded straight away to the Police Station immediately the Appellant signed the agreement. There was therefore need to comply with the rules for recording confessions to be used in criminal trials. The trial magistrate ought to have rejected this evidence.

29. Even disregarding the evidence of PW4, the evidence of E.L., PW2 and PW3 was sufficient to show that the Appellant penetrated E.L.

30. The remaining question is whether the Appellant was 17 years at the time of the alleged offence. The evidence that was adduced shows that E.L. was born on 1<sup>st</sup> March, 1996. She was therefore seventeen years and five months in July, 2013 when she had sex with the Appellant. E.L. was thus a child between sixteen and eighteen years at that time. Defilement as defined by Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006 was thus committed.

31. The Appellant's complaint that the sentence imposed was harsh in the circumstances of the case lacks merit as that is the minimum sentence provided by the law.

32. The summary of it is that the evidence adduced supported the main charge for which the Appellant was convicted. The prosecution's concession to the appeal was thus unfounded and unnecessary. I find no merit in this appeal and I dismiss the same. The Appellant will continue serving the sentence imposed

by the trial Court. The period in which the Appellant was on bond pending this appeal shall be excluded when computing the Appellant's sentence.

Dated, signed and delivered at Busia this 29<sup>th</sup> day of Sept., 2016.

**W.KORIR,**

**JUDGE OF THE HIGH COURT**