



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**APPELLATE SIDE**

**CRIMINAL APPEAL CASE NO. 226 OF 2011**

***(From the original conviction and sentence in Sexual Offences case no. 887 of 2010 of the Senior Principal Magistrate's Court at Mumias before Hon. E. K. Makori – RM)***

**J A W ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

The Appellant was charged with the offence of Defilement contrary to Section 8(1) (3) of the Sexual Offences Act. The particulars were that the Appellant on diverse dates of 29th June, 2010 and 6th September, 2010 in Mumias District of the Western Province unlawfully had carnal knowledge of S N N a girl aged 15 years and an alternative charge of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that on diverse dates of 29th June 2010 and 6th September 2010 at [Particulars Withheld] Estate, Township sublocation in Mumias district of the Western province did an act of indecency with S N N a child aged 15 years by touching her thighs, private parts namely vagina.

The Appellant was convicted and sentenced to serve 15 years imprisonment. The grounds of appeal are that the charge sheet was defective, the Complainant told the court that she was married to the Appellant, the Complainant testified under oath that she was over 18 years, the case was poorly conducted, that the defence was not considered and that Section 200 of the Criminal Procedure Act was not complied with. The Appellant filed supplementary grounds of appeal contending that the documents produced were manipulated, no school records were produced and the trial magistrate was biased. During the hearing of the appeal, the Appellant filed written submissions which simply expound on the supplementary grounds of appeal.

Mr. Oroni, State Counsel, opposed the appeal and submitted that the Complainant was under 18 years old and she could therefore, not give consent. The record of the trial court shows that four witnesses testified for the prosecution.

**PW1, S W N**, testified that she was 18 years old. She met the Appellant and they lived together at Sio-Port as husband and wife. Her parents went to the Appellant's house and took the two to Sio Port police station. They were later taken to Mumias Police Station. She was taken to Matungu District Hospital and found to be two (2) months pregnant. According to her, the Appellant is her husband. PW1 was recalled after the Appellant closed his case. She informed the court that she had delivered and wanted the Appellant to be released so that he could provide for the child. She informed the court that she was not defiled and that she was born in 1992. Her mother manipulated the birth certificate after her arrest.

**PW2 M S O** is the mother of PW1. She testified that PW1 was a class 7 student at [Particulars withheld] Primary School. PW1 pretended that she was attending school but was not going for classes. PW2's husband decided to take PW1 to Kitale to study there. PW2's husband went to the school and asked for a transfer letter. PW1 disappeared from home and they traced her at the Appellant's house. They reported the matter to the police and the Appellant was charged.

**PW3, ISAAC MUKWANA** is a clinical officer who was based at the Matungu subdistrict hospital. He attended to PW1 who was taken to the hospital on 8th September, 2010 on allegation of having been married. PW3 examined PW1 and found her sexual organs to be normal. Her hymen was missing and she was pregnant. PW3 assessed PW1's age to be under 18 years.

**PW4: PC. HELLEN CHEPCHUMBA** was based at the Mumias Police Station. She investigated the case. It is her evidence that a report was made on 7th September, 2010 by the Complainant's parents. PW1 was taken to hospital and the Appellant was charged.

The Appellant in his unsworn statement indicated that he met the Complainant. She told him that she was not a student and that she was 18 years old. He was satisfied and he took her home at Port Victoria on 6th September, 2010 at night. Police went to his home and arrested them. He was later charged with the offence.

The Prosecution evidence shows that PW1 was living with the Appellant as husband and wife. The main issue is whether PW1 was defiled. It is the evidence of PW1 that she was over 18 years old. The trial court ordered for her age to be assessed and she was found to be between 16 and 17 years. The trial court dwelt on the issue of whether the defence under Section 8(5) of the Sexual Offences Act applied and concluded that the Appellant did not do enough to find out whether PW1 was over 18 years old.

The entire evidence of PW1 is to the effect that she was not defiled. She pleaded with the court to have the Appellant released so that he could provide for their child. Section 8(5) of the Sexual Offences Act states as follows:

***“a) It is proved that such a child, deceived the accused person into believing that he or she was over/under the age of eighteen years at the time of the alleged commission of the offence; and***

***b) The accused really believed that the child was over the age of eighteen years***

***c) The believe referred to in Section (5) (60 is to be determined having regard to all circumstances, including any steps the accused person took to ascertain the age of the complaint.”***

It is clear from the above Section that where the Complainant makes the accused believe that she is over 18 years old and the accused believed that information that taking some steps into finding out if that is true, then that information shall provide a defence to the accused.

PW1 herself told the court that she was 18 years old. It is true that she could be under 18 years old. The defence under Section 8(5) is to enable the accused to benefit from situations whereby children under the age of 18 years take themselves as adults and therefore ready for sex or marriage. PW1 testified that she told the Appellant that she was not a student and that she was over 18 years old. It is also clear from the evidence that the two started living together way back in June, 2010 until 6th September, 2010 when they were arrested. It is clear that the parents were aware of the relationship. The Appellant contends that PW2 wanted her child to be married by someone else. No document was produced to show that PW1 was a student.

From the evidence on record, I am satisfied that PW1 made the Appellant believe that she was over 18 years old. PW1 herself told the court that she was over 18 years old and that the Appellant is her husband. There is no evidence that the Appellant manipulated PW1 to give such evidence. The two were arrested unexpectedly by the police.

PW1 took herself as an adult and even pleaded with the court to release the Appellant. It is therefore clear that PW1 was not complaining and wanted to live with the Appellant. Although PW1 could be under 18 years old, she believes that she is of age and ready for marriage. She would like her purported husband to be released.

I do find that the defence under Section 8(5) of the Sexual Offences Act No. 3 of 2006 applies. The Appellant was made to believe that PW1 was over 18 years old. The appeal is merited and is hereby allowed. The Appellant shall be set at liberty unless otherwise lawfully held.

Dated signed this **11th** day of **February, 2015**

**Said J. Chitembwe**

**JUDGE**

Dated, delivered and countersigned this **12<sup>th</sup>** day of **March 2015**

**Ruth Sitati**

**JUDGE**