



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 188 OF 2011

R M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(From original Conviction and Sentence in Criminal Case No. 331 of 2009 of the
Senior Resident Magistrate's Court at Mariakani – Hon. Machage - SRM)**

JUDGMENT

The Appellant was convicted and sentenced to fifteen (15) years imprisonment for the offence of defilement of a child contrary to section 8(4) of the Sexual Offences Act No. 3 of 2006.

The particulars being that:-

“On diverse dates between the month of October, and December, 2009 at [Particulars withheld] Village Kasemeni Location in Kwale County he unlawfully and intentionally committed an act which caused penetration of his male organ namely penis into a female genital organ namely vagina of M R M a child aged sixteen (16) years and thereby impregnating her”.

Being aggrieved by the conviction and sentence the appellant lodged an appeal whose main grounds are;

- 1. There was no Voire dire Examination of the Complainant.**
- 2. There was no age assessment done on the Complainant.**
- 3. There was compliance with section 36(1)(2) of the Sexual Offences Act.**

Being the first appellate Court it is my duty to evaluate the evidence on record so as to come to my own conclusion but bearing in mind that I did not have the opportunity to observe the demeanor of the Witnesses.

At the time the Complainant was testifying on 31st March, 2011 she was eighteen (18) years old (if we have to go by her evidence). She told the Court that she was born in the year 1993. She further testified to have had sexual intercourse with the appellant from December, 2008 till September 2009 when she got pregnant. That they used to sleep at mama Moses's house from 7:00 p.m. till morning up to the time her Aunt one C informed her father and the matter was reported to police. She further told the Court that she

later got married to another man. Her father R M did testify that at the time her daughter was found to be pregnant she was in standard eight and was aged sixteen (16) years old.

Voire dire examination.

At the time the Complainant was testifying before the learned trial magistrate she was aged 18 years and therefore not a child of tender years.

As such there was no need of Voire dire examination.

Age assessment.

The Complainant herself testified to have been born in the year 1993. The defilement took place between December, 2008 to October, 2009 which places her age at the time of defilement at sixteen (16) years. Her father (PW 2) had testified to the effect that his daughter was aged sixteen (16) years at the time of defilement. The appellant was staying in the homestead of the complainants father. He was related to the complainant as she was her cousin on the maternal side. He must have known she was a primary school student and hence not an adult. It is not disputed that she was pregnant at the time the matter was reported to police.

The appellant conceded that the complainant was his cousin and that he used stay at her family's home but he later relocated elsewhere he denied having had sexual intercourse with her.

The learned trial magisterial observed that there was no bad blood between the complainant and the Accused and there was no reason to tell lies.

This Court observes that when the Accused was arraigned in Court the complainant went missing from 26th January, 2010 till a warrant of arrest was issued for her on 31st March, 2011 and the Court was informed that she had been traced and arrested. This must have been an attempt on her part to aid her cousin who is the Accused/Appellant in this case.

The Appellant was convicted and sentenced to fifteen (15) years imprisonment which is the minimum Sentence.

I find no good reason to interfere with the Conviction and Sentence. Both are upheld. The appeal is dismissed.

Judgment delivered dated and signed in open Court this **29th** day of **April, 2015**.

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M. MUYA

JUDGE

29TH APRIL, 2015

In the presence of:-

Learned Counsel for the prosecution Mr. Masila

Court Assistant Mr. Musundi

Appellant in person.

M. MUYA – JUDGE

29/4/2015