**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**Criminal Appeal No.59 Of 2013**

**SIMON CHERUIYOT NGENO..............................APPEELLANT**

**Versus**

**REPUBLIC..........................................................RESPONDENT**

*(Being an Appeal against the Conviction and Sentence by the Senior Principal Magistrate Hon. W. Kaberia at Kericho dated 5th December, 2013.)*

**JUDGMENT**

1. **SIMON CHERUIYOT NGENO** (appellant) was charged with the following offences;

(i)Defilement of a girl aged sixteen (16) years contrary to Section 8 (1) as read with Section 8 (4) of Sexual Offences Act No.3 of 2006.

The particulars being that on the 29th day December, 2010 at [particulars withheld] Centre in Kericho District within Riftvalley Province, intentionally and unlawfully caused your penis to penetrate the vagina of **J C**, a girl of sixteen (16) years.

(ii) Alternative Count

Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006.

The particulars being that on the 29th day of December, 2010 at [particulars withheld] Centre in Kericho District within Riftvalley province, intentionally and unlawfully caused your penis to come into contact with vagina of **J C.**

2. He pleaded not guilty to the charges and the matter proceeded to full hearing with the prosecution calling five (5) witnesses, and the defence three (3) witnesses. The appellant was convicted of the Principal and sentenced to fifteen (15) years imprisonment.

3. The Appellant was aggrieved with the judgment and filed this appeal against conviction and sentence. He raised the following grounds

*a. That the learned Magistrate erred in law and in fact in that he erroneously admitted as evidence hearsay evidence. This prejudiced the appellant seriously and particularly as the learned Magistrate relied on the same inadmissible evidence in his judgment thereby convicting the Appellant on inadmissible evidence.*

b. *That the learned Magistrate erred in law and in fact in that he did not consider the fact that the appellant innocently believed that the complainant was an adult person and not a teenager since she looked like an adult person at the time he entered into a relationship with her.*

c. *That the learned Magistrate erred in law and in fact in that he failed to consider the fact that the appellant and the complainant were planning to get married after she cleared high school and that the appellant had been paying school fees for her and more so he had been maintaining her son.*

d. *That the learned Magistrate erred in law and in fact in that he failed to consider the fact that the appellant pleaded not guilty.*

e. *That the learned Magistrate erred in law and in fact in failing to consider the mitigating circumstances of the case.*

f. *That the learned Magistrate erred in law and in fact in that he shifted the burden of proof in seeking the defense to challenge the prosecution's case in several instances.*

g. *That the accused person did not have the benefit of a legal counsel.*

h. *That the learned Magistrate erred in that he imposed a sentence which is manifestly harsh and excessive considering all the circumstances of the case.*

i. *That the sentence imposed against the appellant is unconstitutional and the same ought to be quashed.*

4. The brief facts of the prosecution case are that PW1 who was aged sixteen (16) years and in Form 3 at [particulars withheld] Secondary School met the appellant on 5th November, 2010 as he carried her in public transport motor vehicle he was driving. She was going to school. He asked her for her name. She was among other passengers in the motor vehicle. He gave her his mobile number and he asked her to call him when going back home.

5. On 29th November, 2010 when she closed school, she borrowed the watchman's mobile phone and called the Appellant. They finally met on that day and he gave her Kshs. 500 for her use as she waited for him. He later came and he dropped her at Kapsaos and she went home.

6. Three days later she went to Kapsabet for a holiday with her brothers. While there she called the appellant who suggested she returns to Kericho. The appellant sent her Kshs. 500 by mpesa on 18th December 2010, and on 27th December, 2010 she returned to Kericho.

7. She met with the appellant who went with her to Kapsaos trading centre to his house. She was with him on 27th and 28th December, 2010. They engaged in unprotected sexual intercourse. On 29th December, 2010 he brought her to town and gave her Kshs.500 with which she bought herself a skirt (Kshs.300) and shoes (Kshs.200).

8. She left for home at 4.00pm. When asked probably by her parents why she was home earlier than expected she explained that she wanted to prepare for school.

9. She went back to school on 4th January 2011, but continued communicating with the appellant on the watchman's phone. While in school he brought her a Nokia 1110 phone, tissue paper and bread.

10. Meanwhile her periods did not appear and she informed him. His reaction was positive. However, in April 2011 when she reminded him of the missing period he asked her to abort since he was a married man with children.

11. She then informed a neighbour who informed her parents about the pregnancy and she dropped out of school. She delivered prematurely on 19th July, 2011. She produced her baptismal card (EXB1) and birth certificate (EXB2) to confirm her age.

12. As this was going on, the parents of PW1, the appellant and the O.C.S were negotiating over the matter. In fact PW1's mother, (PW2) said she had given off her daughter (PW1) to the appellant to marry and educate. When she testified on 11th December, 2012 she stated that the appellant was living with PW1 as his wife and she was going to school.

13. A D.N.A was carried out by Mr. H.K. Sang who found that the appellant was the biological father of PW1's son LK. The report was produced by PW3 (No.8011 PC. Gideon Mwatha) the investigating officer.

14. A P3 form confirming PW1's pregnancy was produced by PW4 (Misoi Isaac) on behalf of Koros Gideon who had died before the production of the said P3 form (EXB3). PW5 (No.8817 PC. James Rina Ochuka) was the arresting officer.

15. The appellant gave a sworn defence and called two (2) witnesses. He stated that PW1 was his wife and a student at [particulars withheld] Secondary School in Form 4. He admitted being the father of the baby L K. He denied knowledge that she was a student at the time he impregnated her.

16. In cross-examination he said he had no reason to doubt that she was an adult because she was big. He denied ever seeing her in uniform. He further stated that he was waiting for her to complete school before she joined him as his wife.

17. His witnesses DW1 and DW2 confirmed that PW1 and the Appellant were friends and the appellant was supporting the child born by PW1.

18. When appeal came for hearing Mr. Motanya for the appellant relied on grounds 2,3&5 which he argued together. He submitted that though the birth certificate (EXB2) showed that PW1 was sixteen (16) years at the time of the offence the appellant believed her to be an adult. This was raised in his defence.

19. He further referred the court to the judgment and the evidence at pg 7,8,13&14, saying the complainant gave the impression that she was an adult.

20. He also submitted that being in school alone is not sufficient to show that one is a minor. He referred this court to the judgment by the learned trial Magistrate.

21. He also referred the court to **Section 8 (5) (a) & (b)** of the **Sexual Offences Act** and asked the Court to re-evaluate the whole evidence and find that the appellant believed that the complainant was an adult.

22. M/s Kivali for the state opposed the appeal. She submitted that the appellant had failed to demonstrate that he believed that PW1 was an adult. This was because PW1 was going to school when they first met and he knew she was a student.

23. She further submitted that ground 5 was no reason for allowing the appeal as the appellant's mitigation was considered by the trial court.

24. This is a first appeal. In the case of **Kiilu & Another V R (2005)1 KLR 174** which followed **Okeno V R (1972) EA 32** it was held thus;

> *1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision*

*on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*

*2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions;it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.*

25. I have in line with the above holding by the Court of Appeal reconsidered the evidence on record together with the grounds of appeal, while bearing in mind that I did not see or hear the witnesses. I have equally considered the submissions by both counsels.

26. The appellant raised a total of nine (9) grounds of appeal. Mr. Motanya chose to only argue grounds 2,3, & 5. Its assumed he abandoned the rest of the grounds. To be certain I have gone through grounds 1,4,6-9 and find none of them to be supported by the evidence on record or the law. They are dismissed.

27. For grounds 3&5 I would simply state that where a minimum sentence has been set by statute it would be unlawful for a Court to pass a sentence that is below the minimum. It does not matter how convincing the mitigation is. In this case the learned trial Magistrate seriously considered the appellant's mitigation and gave him the minimum sentence.

I therefore find no merit in grounds 3&5 which I dismiss. The only ground that I am now going to deal with is ground 2 of the appeal which states;

*“That the learned Magistrate erred in law and in fact in that he did not consider the fact that the appellant innocently believed that the complainant was an adult person and not a teenager since she looked like an adult person at the time he entered into a relationship with her”.*

28. The undisputed facts are that the appellant and PW1 met on 5th November, 2010 and became friends. By then PW1 was a Form III student at [particulars withheld] Secondary School. While in school she continued to communicate with the appellant vide the mobile phone of the school watchman, and he also visited her in school. This must have been with the assistance of the watchman.

29. PW1 finally went with the appellant to his house on 27th December, 2010 and left on 29th December, 2010. This was without her parents authority and/or knowledge. This visit gave them an opportunity to engage in sex which resulted in a pregnancy and she gave birth to a baby boy on 19th July, 2011 prematurely.

The paternity of the baby boy is not in dispute.

30. As the learned trial Magistrate correctly put it in his judgment the issue that needed determination was whether the appellant believed that PW1 was above the age of eighteen (18) years at the time of penetration.

31. I wish to make an observation from what is on record before I deal with the issue in the paragraph immediately above. This incident occurred between 27th December – 29th December, 2010. The appellant was only arrested on 27th August, 2011. It was not until 21st May, 2012 that the evidence of the 1st witness who is the complainant was taken. This witness identified two crucial documents Baptismal Card (PEXB1) and Birth Certificate (PEXB2) which were later produced by the Investigating Officer (PW3).

32. The birth certificate (PEXB2) was issued on 16th May, 2012 long after the incident and start of the case against the appellant.

The baptismal card which must have been the supporting evidence in the application for the birth certificate was very crucial evidence. Though allegedly produced as (PEXB1) the baptismal card (PEXB1) is not one of the exhibits in this record. What is in the original file and shown as PEXB1 (in its original form) is a patient/client appointment card for CJ.

33. The patient/client appointment card and the baptismal card are two different, and distinct documents used for totally different purposes. If indeed the baptismal card was produced before the lower court where did it go to? One would not stop imagining that the birth certificate (PEXB2) issued on 16th May, 2012 was specifically prepared to support this case.

34. In determining the issue set out above the learned trial Magistrate based his finding on the fact that PW1 was a student at [particulars withheld] Secondary School. And further that being a student she was a child/minor. This is what he stated at page 24 lines 20-28 of the record.

> *"The issue that needs determination is whether the accused believed the complainant was above 18 at the time of penetration. The evidence by the complainant which is unchallenged is that at the time she first met accused, she was going back to school at [particulars withheld] Girls Secondary School and actually dropped her there. She also told the court that she communicated with the accused several times while in school and that accused visited her to deliver presents.*
>
> *In view of the foregoing the court does not believe that the accused did not know the complainant was a student and therefore a child. I find that he knew that she was a minor".*

35. I find this to be a very dangerous and misleading finding. What the learned trial Magistrate meant was that all students are minors. This is not the reality in life. Not all students are minors!

36. Besides being a student was there anything else that would have made the appellant sense that PW1 was not an adult? The court heard from PW1 herself how she and the appellant had been conducting themselves. The record reveals the following:

(i) PW1 was a girl that would hang around town waiting for the appellant for so many hours. On 5th November, 2010 her friend D N went home and left her in town waiting for the appellant.

(ii) PW1 had the audacity to frequently use the school watchman's mobile phone to call the appellant. Had she not been calling him, the appellant would have found it so difficult to reach her while in school.

(iii) The worst bit was when she was in Kapsabet with her brothers she is the one who called the appellant and she willingly left her brothers in Kapsabet to come to be with the appellant for three days! From her evidence her parents were all along under the mistaken belief that PW1 was in Kapsabet from 27th December to 29th December, 2010 when she arrived home.

37. From the above would anyone let alone the appellant suspect that PW1 at that time, was a minor and not in a position to know what she was doing?

38. **Section 8 (5)** of the **Sexual Offences Act** provides;

*(5) 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 time of the alleged commission of the offence; and*
>
> *(b) the accused reasonably believed that the child was over the age of eighteen years*

39. The appellant in his defence denied having known that the complainant was a student. This was not supported by the evidence on record, as it was shown that the appellant even visited PW1 at [particulars withheld] Secondary School. In cross-examination the appellant stated that he had no reason to doubt that PW1 was an adult as she was big.

40. This court did not have the opportunity of seeing PW1. The learned trial Magistrate had the opportunity of seeing her and hearing her testify. What was his observation and impression of her?

It is nowhere indicated in the record yet this court could have benefited from such an observation.

41. The defence that the impression that PW1 was an adult from her appearance has not effectively been rebutted by the production of the birth certificate (EXB12).

42. The conduct of PW1 as stated at paragraph 36 of this judgment would not be, that of an underage even if she was. This could have been cured if the learned trial Magistrate had clearly stated in the record and/or judgment what her appearance was and his impression in terms of what the appellant's defence was.

43. My finding therefore is that the appellant's defence was not properly handled by the trial court and was therefore not dislodged. The result is that the appeal succeeds and is allowed. The conviction is quashed and the sentence set aside. I wish to add that the allowing of the appeal does not in any way absolve the appellant's responsibility as the father of the product of his intimate relationship with PW1. He remains the father and PW1 is at liberty to pursue him under the relevant law in case he abdicates his responsibility.

44. For now he may be released unless otherwise held under a separate warrant.

**Dated, signed and delivered in open court this 23rd day of April, 2015.**

**H.I.ONG'UDI**

**JUDGE**

**In the presence of**

M/s Mwangi for State

Mr. Motanya for Appellant – present

Appellant – present

Lagat- court assistant

Interpreted- English/Kipsigis