



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRA NO.36 OF 2013**

*(Appeal from conviction by Hon. N. Shiundu in Malindi Cr. No.18 of 2010)*

**S K M.....APPELLANT**

**VRS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of defilement of a girl contrary to section 8(4) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on diverse dates between August and December 2009 within Magarini District of the Coast intentionally and unlawfully caused your male genital organ to penetrate into the female genital organ of one K K a girl aged 17 years.

The appellant was convicted and sentenced to serve 15 years imprisonment. The grounds of appeal is that the trial court did not properly consider the evidence on record, that the medical evidence including the D.N.A results created doubt on the prosecution case, the evidence was insufficient and did not prove the case beyond reasonable doubt and that his defence was unfairly dismissed. The appellant filed written submissions and entirely relied on them. It is submitted that, the D.N.A results were not clear and the appellant called for a second test that was not done. It is also submitted that the complainant also mentioned another person by the name Kahindi Kazungu with whom she had sex at a wedding. It is the appellant's contention that there was a grudge between him and the complainant's mother which led to the criminal case.

The State opposed the appeal. Ms Mathangani, prosecution counsel submitted that the complainant became pregnant as a result of defilement. She knew the appellant very well and mentioned the appellant as the one responsible for her pregnancy. The D. N. A results confirmed that the appellant was the father of the child.

Before the trial court, PW1 was the complainant. She testified that she was 17 years old in August 2009. the appellant went to her home and informed her that he loved her. She was with his two siblings. She then went to his house when the appellant's wife was not there and they had sex. They continued with the relationship and had sex regularly. In February 2010, she discovered that she was pregnant. She informed her mother and the matter was reported to the area chief. The appellant promised to take her to a tailoring school. It is her evidence that they had the relationship for two years. She told the appellant that she loved him. Part of her evidence during cross-examination is that she was given time by her mother to look for one Kahindi Kazungu with whom she had sex at a wedding in Buranga but she did not see him. It is her evidence that the appellant was responsible for her pregnancy.

PW2, H K is the mother of PW1. In March 2010, she discovered that PW1 was pregnant. The matter was reported to the area chief and later to the police. She knows the appellant as her nephew. PW3, Ibrahim Abdurahi is a medical officer who was based at the Malindi District Hospital. On 18/5/2010, he examined PW1 and filled a P3 form. PW1 informed him that she had willingly had sex with someone known to her for more than 10 times without condoms. Her hymen was broken and the rest of the examination was normal. PW4, Apc Daniel Nene Mungai was based at Marekebuni AP Post. On 13/5/2010, he was instructed by the area chief to go and arrest the appellant. They arrested him and took him to Malindi Police Station. PW5, K C M is an uncle to PW1. He learnt of her pregnancy in May 2010. The appellant is their neighbour and a relative. It is his evidence that PW1 was the appellant's

girlfriend from std 4 to std 6. He engaged her in sex knowing that she was in school.

PW6, Cprl Mwanachengoni Salim was based at the Malindi Police Station. The case was reported on 13/5/2010. She referred PW1 to the hospital and she was found to be pregnant. She caused the appellant to be charged with the offence. She also took blood samples for D.N.A test. PW7 Kiptoo Sang is a government analyst. On 17/3/2011, he conducted some tests and it was found that the appellant was 99.99% the father of the child delivered by PW1. The witness was recalled after having done a 2<sup>nd</sup> D.N.A test and the results were the same.

In his unsworn statement, the appellant denied committing the offence. He stated that on 29/12/2009 he went to work and he heard that someone was cultivating their farm. He went home and found that it was the complainant's father who was trespassing on their land. He reported the matter to the village elder. He was later arrested and charged with the offence. He denied committing the offence.

The main issue for determination is whether the appellant defiled PW1. It is clear from the evidence that PW1 and the appellant had a love relationship. It was an open relationship. The parents of PW1 were aware of it but thought that the two were not engaging in sex. It is the evidence of PW1 that she loved the appellant. They had sex regularly until when she became pregnant. Although the appellant denied having sex with PW1, it is clear that they actually had sex and PW1 became pregnant. The child delivered by PW1 is that of the appellant. The D.N.A results conclusively show that the appellant is the father of the child.

Although under the Sexual Offence Act PW1 could not have consented to sex as she was under 18 years old, it is clear that he entered into a love relationship with the appellant and she enjoyed the same. It is only when she became pregnant that problems started. She carried herself like an adult who was ready to enter into such relationship. The punishment for defilement is quite severe and the court must be convinced that the case at hand really involves a defiled complainant. In this case I do not find that PW1 was complaining. The intention of the law is to punish those who defile young children. However, where the children behave like adults, then the law comes to the rescue of the accused under section 8 (5) of the Sexual Offences Act. There is no evidence that the appellant lured PW1 into the relationship. It is PW1's evidence that she loved the appellant. It will be unjust to sentence the appellant to 15 years in jail yet PW1 was not complaining about the relationship. I do find that PW1 made the appellant believe that she was an adult and was ready for such relationship.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

**Dated, signed and delivered at Malindi this 22nd day of July, 2015.**

**SAID J. CHITEMBWE**

**JUDGE**