



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 38 OF 2012

VINCENT KIPKEMOI MITEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Resident magistrate at Sotik court (Hon. J.Kasam) in Sotik Principal Magistrate's court criminal (S.O) case No.29 of 2012 on 3/07/2012)

JUDGMENT

This Judgment is the outcome of the appeal by **VINCENT KIPKEMOI MITEI** (appellant) against the decision of Hon. J. Kasam learned Resident Magistrate delivered on 3rd July 2012 vide **Sotik S.R.M.C.Cr. Case No. 29 Of 2012, R=VS= Vincent Kipkemoi Mitei**. The record shows that the appellant was tried and convicted for the offence of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on diverse dates between 20th and 29th day of May 2012 [particulars withheld] in Sotik District within Bomet county, intentionally caused his penis to penetrate the vagina of M C K a child aged 14 years. At the end of the trial the appellant was sentenced to serve 20 years imprisonment. Being aggrieved, the appellant preferred this appeal. He put forward the following grounds through the firm of J.K.Rono & Co. Advocates

1. **The trial Magistrate had no jurisdiction to try the suit hence the conviction and sentence was a nullity.**
2. **The trial Magistrate erred in law and fact by failing to take into account the appellants defence that the girl deceived him (appellant) that she was a school drop out and that the girl was a school drop out and that the girl voluntarily went to the appellants house and mistakenly believe that the girl had the capacity to consent to the act or marriage union.**
3. **That in view of the contracting testimony of prosecution witnesses over the age of the girl the trial Magistrate ought to have ascertained the age of the girl before passing the sentence.**

Before delving deeper into the merits or otherwise of this appeal I wish to state in brief the case that was before the trial court. Seven witnesses testified in support of the prosecution's case. It is the evidence of M C K (P.W.1) that she and the appellant met at a neighbour's home on 20th May 2012. It is the evidence of PW1 that she spent the night with the appellant without having sex until the next day when the duo had sexual intercourse. P.W.1 claims the appellant had promised to marry her. The duo spent together until 26th May 2012 when PW1 left for her parents and came back to join the appellant on 29th May 2012 and that is when the appellant was arrested by police. R K K (P.W.2), P.W.1's father told the trial court that he was forced to come back home from Mombasa when he learnt that his daughter (P.W.1)

had gone missing from home on 20th May 2012. P.W.2 confirmed that P.W.1 also disappeared from home on 29th May 2012 prompting him to check with her school. P.W.2 and his wife (P.W.3) made inquiries and later discovered that their daughter (P.W.1) was cohabiting with the Appellant. The duo reported to the police who in turn arrested the appellant and thereafter preferred a charge of defilement against him.

The complainant was medically examined and was found to have been penetrated. When placed on his defence, the appellant admitted having sex with the complainant. He however stated that the complainant had told him that she had dropped out of school hence she was ready to marry him. The appellant further told the trial court that the elders had resolved the dispute. The trial magistrate took into account the evidence presented and came to the conclusion that there was conclusive evidence that the offence was proved beyond reasonable doubt.

On appeal, Mr. Rono learned advocate for the appellant, chose to argue one main ground, which is to the effect that the appellant's defence was not properly considered. It is Mr. Rono's argument that the victim had misled the appellant that she was a wife material having dropped out from school. Miss Magoma, learned prosecution state counsel conceded the appeal on the aforesaid ground. I have on my part, critically re-examined the evidence and I think the trial magistrate erred when she failed to consider the appellant's defence. The appellant had expressly stated that he thought the complainant was a school drop out who was mature enough to be married. He claimed he was in the process of making arrangements to seek her hand in marriage before he was arrested. The trial magistrate completely ignored the appellant's defence. Had the trial Magistrate considered the appellant's defence he would have discovered that the same is envisaged under **Section 8(5) of the Sexual Offences Act No. 3 of 2006**. It is also apparent from the evidence on record that there was no conclusive evidence as to the exact age of the complainant. It is curious to note that the complainant while testifying referred to the appellant as her husband. She admits that the appellant had promised to marry her. There is clear evidence that the appellant was introduced to the complainant as a woman whom he can marry. I am convinced the appellant was deceived by the complainant that she was of the age of majority hence competent to be married. I am satisfied that Miss. Magoma rightly conceded this appeal.

In the end, I allow the appeal by quashing the conviction and set aside the sentence. The appellant is hereby set free forthwith unless lawfully held.

Dated, signed and delivered this 8th day of November, 2013.

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J.K.SERGON

JUDGE

In open court in the presence of

Miss. Muthee- for the Office of Director of Public Prosecution

The Appellant in person

N/A for Mr. Rono for the Appellant