



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 22 OF 2012**

**COSMAS MWANZIA MUTINDA ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. J. Karanja Principal Magistrate delivered on 30/01/2012 in Makueni Principal Magistrate Criminal Case No. 121 of 2011)*

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*(Before Hon. B. Thurairaja J)*

**RULING**

1. The Appellant, **Cosmas Mwanzia Mutinda** was charged in count I with the offence of abduction contrary to **section 259** of the **Penal Code**.

“The particulars of the offence were that on the 2<sup>nd</sup> day of March 2011 at **Kiangine Sub-location** in **Kathonzweni District** within **Eastern Province** secretly and wrongly confined **H M A**”.

2. In count II, the Appellant was charged with the offence of defilement of a girl between the age of twelve and fifteen years contrary to **section 8 (3)** of **Sexual Offences Act No. 3 of 2006**.

“The particulars of the offence were that between 2<sup>nd</sup> day of March, 2011 and 8<sup>th</sup> day of March, 2011 at **Athi-River Sub-location** in **Athi River District**, unlawfully caused penetration with his male genital organs to **H M A** a girl between the age of 12 and 15 years”.

3. In the alternative charge the Appellant was charged with the offence of **indecent assault** of a girl contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

“The particulars of the offence were that between the 2<sup>nd</sup> day of March 2011 and 8<sup>th</sup> day of March, 2011 unlawfully indecently assaulted **H M A** by touching her private parts”.

4. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted in count II and sentenced to 20 years imprisonment.
5. The case for the prosecution was that on 2/3/2011, the complainant PW1 **H M A** a 14 year old standard 7 girl was home when the Appellant and the complainant went to his **Athi-River** residence where they started living as man and wife. On the sixth day the complainant was

- collected by her brother PW3 **J A** from the house of the Appellant. The complainant was given a beating by the brother and the matter reported to the police. The complainant was issued with a P3 form and examined by a Clinical Officer PW4 **Onesmus Mutua** who confirmed that the complainant had been defiled. The Appellant was subsequently charged with the offence herein.
6. In his defence the Appellant gave unsworn evidence. He called two witnesses. The Appellant stated that he was friends with the complainant and they used to exchange telephone calls and two days prior to the material date, the complainant telephoned him and told him they meet at **Syethe market**. They met at a club at about 8.00 p.m. where the complainant requested him to buy her drinks. The Appellant observed that the complainant was getting spoilt and the complainant told him that her mother was not taking her to school and he could go with her. Two days later the complainant and the Appellant left together for the complainant's **Athi-River** residence. They stayed in the complainant's house until the 8<sup>th</sup> when the Appellant found the complainant's clothes missing from his house together with his identity card and ATM card. When the accused went back to his rural home he found the complainant there. The matter ended up at the police station where the Appellant was locked in and subsequently taken to court.
  7. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
    - v. **That the charge sheet was defective as it failed to reflect the correct provision of the law.**
    - v. **That the defence case was not considered.**
    - v. **That the conviction was unsafe.**
    - v. **That there was no medical evidence that linked the Appellant to the offence.**
  8. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially expounded the grounds of appeal.
  9. The appeal was opposed by the State. The learned Counsel for the State submitted that the medical evidence confirmed that the complainant's age was 14 years and also confirmed that the complainant was defiled. It was further submitted that consent is not a defence in a case of defilement as PW1 had no capacity to give consent.
  10. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to our own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
  11. It is clear from the evidence of PW1 that she knew the Appellant as they were from the same neighbourhood. PW1's evidence is that she stayed with the Appellant for six days and during which period they engaged in sexual intercourse. The evidence of PW1 is corroborated by that of the Clinical Officer (PW4) who examined her female genitalia and confirmed the hymen was torn and noted presence of spermatozoa thereby confirming the sexual activity.

The evidence of PW3 who is a brother to the complainant further corroborates the evidence of PW1. The brother's (PW3) evidence confirmed that he was the one who went to fetch the complainant from the house of the Appellant in **Athi River**.

12. The Appellant in his defence admitted having stayed in his house with the complainant for the six days. Indeed the evidence of DW2 **Mwaluko Kitonga Muli** and DW3 **Nicholas Wambua Mutua** is that the Appellant had married the complainant. On the question of the complainant's age, the Appellant and his witnesses alluded to what they termed as the bad character of the complainant who they said was not going to school and had started taking alcohol.
13. The complainant was born on 14/9/1997 according to the mother's (PW2) evidence. The mother produced the complainant's immunization card which reflected the said date of birth. This places the complainant at 14 years old at the material time. The Clinical Officer (PW4) also approximated the complainant's age as 14 years. The complainant was a standard 7 pupil at the material time. The above evidence establishes that the complainant was a minor. The complainant had no capacity to consent to a sexual relationship with the Appellant. Under **section 8 (6) of the Sexual Offences Act**, if the Appellant believed that the complainant was over eighteen years of age, it was the Appellant's duty to take steps to ascertain the age of the complainant.
14. Having evaluated the evidence from both the prosecution and the defence, I am satisfied that the conviction was based on sound evidence. The sentence is within the law. The appeal has no

merits and is dismissed.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 18<sup>th</sup> day of February 2014.**

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**B. THURANIRA JADEN**

**JUDGE**