REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 223 OF 2010

ERICK MWENESI ……. APPELLANT

V E R S U S

REPUBLIC ……..…… RESPONDENT

(Appeal against conviction and sentence arising from the judgment of {R. NYAKUNDI, CM} in the Chief Magistrate's Court at Kakamega in Criminal Case No. 1229 of 2010)

J U D G M E N T

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1)** as read with **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 20th and 30th of June 2010 at [particulars withheld], in Kakamega East District, within Western Province, unlawfully and intentionally inserted his genital organ namely penis into genital organ namely vagina of **N M M** a girl aged 15 years.*

The appellant was also charged with an alternative count of indecent act with a child contrary to **section 11(1)** of the Sexual offences Act No.3 of 2006. He was convicted and sentenced to serve 15 years imprisonment. His grounds of appeal are that the prosecution case was not proved beyond reasonable doubt, the conviction is against the weight of the evidence on record, the charge sheet was defective, the age of the complainant was not proved, the burden of proof was shifted, and that the sentence is excessive.

Mr. Wekesa, counsel for the appellant, submitted that the medical officer who testified informed the court that the complainant had had sexual intercourse before the incident. She visited the hospital after four days and no spermatozoa was found. The evidence on arrest is also contradictory as well as the exact age of the complainant. It was only indicated that she was in class 8.

Miss Ngovi, State Counsel, opposed the appeal and submitted that the fact that the complainant had had sex previously cannot disprove the aspect of defilement. The appellant hid the complainant for three days and was using her sexually. The appellant was arrested with a panga as he tried to fight those who wanted to take the girl away. The charge sheet was proper and there was no shifting of the burden of proof. The complainant was 16 years old.

DR. BERNARD OBURA ORIKE, was **PW1**. He produced the P3 form on behalf of Dr. Nyikuli who was his colleague in respect of the complainant. No spermatozoa was seen and hymen was torn and the doctor was of the opinion that the complainant had experienced sexual intercourse prior to the date of examination and that she had had sex. The virginal penetration was without struggle. The doctor saw the Birth certificate and it indicated that the complainant was 16 years old. The examination was done four days after the incident.

PW2, N M M, was the complainant. She informed the court that she was 16 years old having been born in 1994. On the 21.6.2010 at about 1.00 p.m. she finished having a discussion with her friends. The appellant asked her to accompany him and he gave her Ksh.100/=. It was the first time she had met the appellant. She agreed and they went on a motorbike up to the appellant's house. The appellant locked the door and they had sex. She spent the night there. That was the first time she had sex with him but according to her evidence she was previously sexually active. She stayed in the appellant's house from

21st up to 23rd June 2010 when they were arrested. Her mother went there in the presence of other people. She further testified that she participated in sexual intercourse as a student while she was under 18 years. She went back to school.

PW3, G M, is the mother of **PW2**. Her evidence was that on the 20.6.2010 PW2 was attending a discussion group but did not return home. The following day she conducted a search with the help of boda boda operators but did not manage to trace the complainant. On 23.6.2010 they traced her at the appellant's place. The appellant came out with a panga and tried to chase them away and they called the police. They noticed the appellant was holding PW2's hand trying to run away and the police arrested him. The appellant's home is at Chepsonoi. The appellant was arrested and later charged.

PW4, PC JORAM ONYANGO, investigated the case. He got the report that a young girl had been abducted and went to the scene and arrested the appellant. He was based at the Kaimosi police station. He issued the P3 form to the complainant and produced the panga they recovered from the appellant.

The appellant was put on his defence. In his sworn testimony he stated that he comes from Chepsonoi. He found the complainant at the police station after he was arrested on 23.6.2010. He denied ever having sex with the complainant.

The main issue for determination is whether the appellant defiled the complainant. The prosecution evidence shows that the appellant took the complainant on 20.6.2010 and stayed with her until when they were arrested on the 23.6.2010. It is the evidence of PW1 that she had sex with the appellant during the period she stayed with him. There is evidence that the complainant used to be seen at the appellant's place and that is how PW3 got to know that the complainant was at the appellant's home.

Counsel for the appellant contends that the age of the complainant was not ascertained. According to PW1 the doctor who filled in the P3 form saw a copy of the Birth certificate and found that the complainant was 16 years old. That evidence is part of the record, and I do agree that the complainant was 16 years old. Under the Sexual Offences Act the complainant could not have lawfully consented to having sexual intercourse with the appellant. It is the evidence of PW2 that she was sexually active. She stayed with the appellant for 3 nights and they had sex together. The medical evidence is to the effect that there was no force used. Although the law prohibits sexual intercourse with a person under the age of 18, the courts' should carefully analyze the evidence on record before convicting the accused persons. In certain situations it is the girls who are under the age of 18 who willingly participate in sexual intercourse. It is not expected that before the two parties engage in such acts the man would first ask the age of the girl. In the current case the girl was already sexually active and that is what she told the court before having sex with the appellant. In such situations it is clear that even the underage girls would be having their own sexual urge as they have already experienced sexual intercourse. Courts should not apply the law mechanically and simply conclude that since the girl was under the age of 18 she could lawfully not have consented. It should always not be presumed that it is the man who lured the girl to the act. At times it is even the girls who lure the men to such acts. It is not clear to me as to how PW2 could have met the appellant who was a stranger to her, board a motorcycle together, enter the appellant's house and have sex, stay there for three days without complaining or running away until when they are arrested. To sentence the man to a 15 year jail term is to apply the law mechanically and ignore the real practice. The complainant did not tell the court that she was being held against her will.

It is clear to me that PW2 presented herself as an adult and went to have intercourse with the appellant. The complainant had already had sexual intercourse before that incident and if the law was to apply, then all those people she had sex with were guilty of defilement and she ought to have revealed who they were. It is true that even if one had had sexual intercourse before she can still be defiled. However, each case has to be determined on its own merit. In this particular case I do find that the appellant is protected by the provisions of **Section 8(5)** as he believed that the complainant was an adult. The appeal is merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

J U D G E