

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 157 OF 2012

MICHAEL KWEYU APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence arising from the judgment of [H. WANDERE, PM] in the Principal Magistrate's Court Mumias in Criminal Case No. 575 of 2009)

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **section 8(1)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant *on diverse dates between 29.11.2008 and 30.4.2009 at [particulars withheld], Mumias District within Kakamega County unlawfully and intentionally caused penetration of his genital organ namely penis into the genital organ namely vagina of a girl namely C N aged 16 years.*

The appellant was also charged with an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The appellant was convicted of both counts and sentenced to serve 15 years imprisonment. The grounds of appeal are that he pleaded not guilty to the charge, the charge was defective, the evidence is by a single witness and is not corroborated, the case was never investigated, the sentence is harsh and he stayed in custody for over 7 days. The appellant file written submissions. I have gone through the submissions which are hand written and they mainly refer to the above grounds of appeal with nothing new. The appellant relied on his grounds of appeal.

Miss Ngovi, State Counsel, opposed the appeal and submitted that the evidence of the complainant was credible. PW3 who is a clinical officer produced a P3 form which shows that the complainant was defiled. The appellant drugged the complainant with some substance before he defiled her. The complainant became pregnant.

The record of the trial court shows that three witnesses testified. **PW1, C N** was the complainant. Her evidence is that on the 29.11.2008 she went to her friend's place by the name M1 who was her neighbor. There was a memorial ceremony and she had to serve the visitors. The appellant told her that he had medicine that helps people to pass exam. PW1 was in Form II at that time. The appellant gave her a tablet which she put in her tea and took the tea believing that she will be a clever girl. She felt sleepy and told M1 that she was going to sleep. M1 took her to her room where she used to sleep. She slept and later woke up and saw the appellant was sleeping bedside her. The appellant had sex with her. PW1 screamed but the appellant held her mouth. PW1 saw blood on her pants. PW1 did not inform anyone and after sometime she realized that she did not get her periods. She talked to M1 who gave her the appellant's number and she called him. In January she went to school and in April when the school had closed she called the appellant and they met at [particulars withheld]. The appellant took her to his sister's place. Later the appellant told her that M1 who is also called M1 had notified PW1's parents and they were looking for her. The appellant then took her to another place where there was a room and told her that a doctor was going to visit her at the room and conduct an abortion. They stayed there and continued to have sex. While at that place she saw a relative by the name M2 and reported what the appellant was doing to her and that she was unwell. M2 went to report to her father and on the 29.5.2009 her father went to the place with M2 and two police officers. The appellant was arrested and she was taken to Matungu District Hospital. On the 20.8.2009 she gave birth to a baby girl at Kakamega Provincial General Hospital. The baby girl is called L and she was discharged on the 28.8.2009. After

delivery she went back to school and by the time she was testifying she was in Form III and she was to join Form IV the following year that is 2013. It is her further evidence that the appellant had rented a room at [particulars withheld] area where they were living. They stayed there for about a month.

PW2, ISAAC MUKHWANA, is a clinical officer who was based at the Matungu sub-district hospital. He filled in the P3 form for the complainant and the complainant was found to be pregnant. She was 17 years old. **PW3, S M K**, is the father of PW1. His evidence is that on the 30.4.2009 the appellant was in Form II and she disappeared from home during school holidays. He reported to the assistant chief and went to report at [particulars withheld] Secondary School where the complainant was schooling. He was given a letter at the school and took it to the police. He was suspecting the appellant as he used to see him at his home. At one time he saw the appellant digging a well at his neighbour's place. There was a lady by the name M1 who was the neighbour's daughter and she was a friend to PW1. He took the place to the neighbour's house and M1 took them to the appellant's place at Shianda in Mumias. The appellant saw them and he disappeared into a sugarcane plantation. Later on the 29.5.2009 he got information that the appellant had been seen at a place called Busomba and he took the police to a rental house at Busomba. The appellant was doing tailoring work. He was arrested and they went to a room where they found PW1.

The appellant was put on his defence. In his sworn testimony he testified that he was arrested on the 29.5.2009 for selling illicit brew. He was then taken to Mumias police station. He denied that he did not defile the complainant.

The main issue for determination is whether the complainant was defiled by the appellant. It is PW1's evidence that the appellant gave her a tablet which she put in her tea and she became sleepy. The appellant then defiled her. She later realized that she was pregnant and looked for the appellant. They agreed to have an abortion conducted but the appellant never took the doctor. The two stayed in a rental house and continued to have sex for about one month.

I have gone through the record of the trial court and noted that the proceedings started on the 23.9.2010. The complainant testified in camera and while being led by the prosecution during examination in chief she testified that when her father went to Busombi with three Administration Police officers they found the appellant with her. She told them that the appellant was her husband and that was not a lie. The prosecution did not like that and informed the court that they wanted to stand down the witness as the prosecutor had not had ample time for a pre-trial. The case was adjourned and the matter kept on being mentioned for several days. On the 3.1.2012, that is a period of over one year the charge was amended and the plea taken afresh. The court ordered that the case proceeds de novo. From the evidence on record, especially that of PW3, I am satisfied that PW1 and the appellant had a relationship which was known to PW1's parents. The contention that PW1 was drugged by the appellant and later defiled is highly doubtful. Although the complainant was below the age of consent the evidence shows that she was living with the appellant as her husband and she informed her father of that fact. Indeed when the complainant testified on the 4.1.2012 she informed the court that she was asking the court to assist her so that the appellant could take his child to hospital and also to feed her.

Given the evidence on record I do find that the appellant is entitled to benefit from the defence provided for under **section 8** of the Sexual Offences Act. The complainant was taking herself as a wife of the appellant and that being the case I do find that it will be unfair to have the appellant imprisoned for 15 years yet the complainant considers him to be her husband. I find that the prosecution case is doubtful. No investigating officer was called to testify. M1 who took the complainant to her room where the alleged incident took place and who also took PW3 to Busombi was not called to testify. I do find that the complainant was a friend to the appellant and the two were living as husband and wife. It is clear to me that for a period of one month the appellant would leave the house and the complainant never ran away or even called her parents to go for her rescue.

In the end, the appeal is merited and is allowed. The appellant is 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