



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 3 OF 2012**

**ERNEST MURULI WEBO ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the judgment of [P.N. ARERI, RM] in the Chief Magistrate’s Court at Kakamega in Criminal Case No. 1213 of 2011)***

**J U D G M E N T**

The appellant was charged with the offence of defilement contrary to **section 8(1)(4)** of the Sexual Offences Act No. 3 of 2006. He 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 particulars of the main count of defilement were that the appellant *on diverse dates between 16.5.2011 and 12.6.2011 between [particulars withheld] in Central Kakamega district and [particulars withheld] in Bungoma East district within Western Province, intentionally caused his penis to penetrate the vagina of E M S a child aged 16 years. The appellant was convicted of the main count and sentenced to serve 15 years imprisonment.*

The grounds of appeal as per his petition of appeal are that he pleaded not guilty to the charge, he was not supplied with witness statements, he asked for DNA test but it was not done, the prosecution case was not proved and that his alibi defence was not considered. The appellant filed written submission and contends that the complainant became pregnant and delivered a child. He asked for DNA test to confirm whether he was the father of the child but that was not done. The complainant allegedly stayed away with the appellant for a period of one month yet she was 7 months pregnant when she was examined. Other witnesses who were mentioned in the case were not called to testify.

Mr. Okoth, State Counsel, entirely relied on the record of the trial court.

**E M S**, testified as **PW1** and was the complainant. Her evidence was that she was born on the 12.5.1995 and was a pupil at [particulars withheld] Primary School. Her evidence was that she started sexual relationship with the appellant in September 2010 until May 2011. They had sex in the sugarcane and in her auntie’s house. The appellant is her neighbor. They had sex during the day. On the 16.5.2011 the appellant took her to Supa area and she was to be his second wife. She was then taken to Ronda area on 24.5.2011 and was later taken to the appellant’s sister by the name Florence. Later her auntie R M (PW2) went and took her away. The matter was reported to the police on 12.6.2011 and she was taken to Navakhalo sub-district hospital and found to be 7 months pregnant. She further testified that the appellant used to go to her auntie’s house together with her auntie’s husband and they would then have sex.

**R M M** was **PW2**. She is a teacher at [particulars withheld] School. On the 16.5.2011 she realized that PW1 was not at home. She got information that PW1 was at the appellant’s sister’s house in Webuye. She went with the village elder and found the complainant seated outside the appellant’s sister’s house. They took her to Navakholo sub-district hospital and she was found to be 7 months pregnant. The appellant was not at his sister’s place. **PW3 E M** is the village elder of [particulars withheld]. He went with PW2 to collect PW1 in Webuye. He reported the matter to the police at Navakholo police station.

**PW4 BOSIRE VINCENT** is a clinical officer at Navakholo sub-district hospital. His evidence is that when PW1 was taken for examination at the hospital she was found to be 7 months pregnant. **PW5 SGT AUGUSTINE MWAKIO** was based at the Navakholo police station. The matter was reported at the

station on the 22.6.2011 by PW2. Investigations were done and it was indicated that the appellant defiled the complainant on diverse dates between 16.5.2011 and 12.6.2011.

The appellant was put on his defence and he gave unsworn evidence. He testified that he was arrested because of CDF money totaling 1.8 million. According to him the complainant was impregnated by **Z S**, his uncle. He has six children and a wife. None of the witnesses saw him with the girl. He wanted a DNA test to be conducted on the child that was born and was to pay the cost of the test but the child was not given to him. He denied committing the offence. **DW1 D U** informed the court that he is a pastor of the Church of God [particulars withheld] Mission. He is also a School Committee member at [particulars withheld] Primary School. It is his evidence that the complainant was found to be pregnant and PW2 assaulted her. He found the complainant in sugarcane farm and told him that PW2 had assaulted her. PW1 informed him that at one time her uncle who is the husband of PW2 defiled her. On the 1.6.2011 the school headmaster called the committee and deliberated on the issue of pregnancy of school girls. The case of the complainant was also discussed and they recommended the arrest of three people who had impregnated school girls. It is his evidence that they recommended the arrest of **Z S M** for impregnating the complainant.

The evidence on record does establish that the complainant had sex and became pregnant. The main issue for determination is whether the appellant defiled her. It is the complainant's evidence that they had sex from September 2010 in several places. The complainant was going to marry him as his second wife. According to PW2 and PW3 the appellant took away the complainant to his sister. This was in May 2011. The complainant was found to be 7 months pregnant. According to the charge sheet the defilement occurred between 16.5.2011 and 16.6.2011. This is a period of about one month. The medical evidence shows that the complainant was taken to hospital on the 23.6.2011 and she was six months pregnant.

The defence evidence is that the complainant was defiled by her uncle. The questions raised during cross-examination were to the effect that it was the uncle who defiled the complainant and PW2 accused the complainant for breaking her marriage. It is the evidence of DW1 that the matter was known at the school and they recommended **Z S** to be charged with the offence of defiling the complainant. Given the evidence on record, it is clear that the complainant had a relationship with the appellant. It is not clear whether it is the appellant who impregnated the complainant. The appellant did inform the court that he wanted to undergo a DNA test and he was ready to pay the costs. The court granted that request but it is not clear why the DNA test was not done. The complainant was 16 years old and could not have legally given her consent for the sexual acts with the appellant. However, she informed the court that she was to be a second wife of the appellant whom she knew that he was married. I do find that the complainant made the appellant to believe that she was old enough to be a second wife. The evidence does not show that the complainant was lured into the relationship. She was a willing participant who was ready to be married. The essence of justice is to punish offenders. It will be unfair to punish the appellant when it is very clear that the complainant was ready to be married. According to the prosecution case as per the charge sheet the defilement occurred in May 2011 and the complainant was found to be 7 months pregnant by June 2011. The investigating officer informed the court that the defilement occurred in May 2011. That raises doubt as to whether there was defilement prior to May 2011 by the appellant. This also raises doubt as to the complainant's evidence that the relationship started in September 2010.

In the end, I do find that the appellant should benefit from the provisions of **Section 8(5)** of the Sexual Offences Act. It is likely that there was the feeling that the complainant was over 18 years old. There is no evidence from the prosecution witnesses as to why the complainant was not in school. I do find that the appellant is entitled to the benefit of doubt. The appeal is merited and is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

**Delivered, dated and signed at Kakamega this 17th day of February 2014**

**SAID J. CHITEMBWE**

**J U D G E**

