

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 53 OF 2014

F K APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the judgment of [P.N. ARERI, SRM] delivered on 27.2.2012 from the original Criminal Case No.1307 of 2011 in the Chief Magistrate's Court at Kakamega)

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that *on the 23.6.2011, he unlawfully and intentionally contacted his genital organ namely penis with the genital organ namely vagina of W A a girl aged 14 years.*

The appellant was found guilty of the alternative charge of indecent act with a child and sentenced to serve 10 years imprisonment. The grounds of appeal are that he pleaded not guilty to the charge, the age of the complainant was not assessed and that he had no reason to believe that the complainant was a child. The appellant filed grounds of appeal and expounded on the above grounds, no P3 form was produced and the investigating officer did not testify. Mr. Oroni, State Counsel opposed the appeal and submitted that the appellant was positively identified. The evidence of PW3 corroborates that of the complainant.

The record of the trial court shows that three witnesses testified. **PW1 W A** was the complainant. She testified that she was 14 years old and in standard Five at [particulars withheld] Primary School. On the 26.6.2011 at about 5.00 p.m. she was at their gate with her sister (PW3) when the appellant who was her boyfriend went there and she escorted him. They went together and she started living with him in his house as husband and wife. They had sexual intercourse during that period every night. On one Saturday her father went there and took her away. She was later taken to the police. She is related to the appellant. PW2 **V O O** is the father of PW1. He testified that he found PW1 missing on 23.6.2011 at about 6.00 p.m. He reported the matter to the police and to the area assistant chief. After eight days PW1 was traced at the appellant's home on the 1.7.2011. The appellant was arrested and later charged with the offence.

I A testified as **PW3**. She is the sister to PW1. Her evidence is that the appellant went with PW1 on the 23.6.2011 at about 6.00 p.m. PW1 did not return home. The following day she told her father that PW1 had left with the appellant and her father started to search for PW1.

The prosecution closed its case and the appellant was put on his defence. The appellant gave unsworn statement and stated that he is a farmer from [particulars withheld]. He was arrested on the 1.7.2011 and taken to the police station. He denied committing the offence.

The trial court acquitted the appellant on the main charge of defilement but convicted him on the alternative charge of indecent act contrary to **section 11(1)** of the Sexual Offences Act No. 3 of 2006. The evidence shows that no medical evidence was given and no police officer testified. That is why the trial magistrate acquitted the appellant on the main count. It is the evidence of PW1 that the appellant was her boyfriend and they started living together as if they were married. PW2 was informed the following day by PW3. It is not clear why it took eight days to know where PW1 was. Given the

evidence on record I do find that the complainant was a willing participant in the entire relationship. There was no document that was produced to show the age of the complainant. The fact that the complainant stated that she was 14 years old could not have conclusively made the court to believe that information. At least a P3 form could have given the estimated age of the complainant. It is not clear why the police officer who investigated the case did not testify. A criminal case has to be proved beyond reasonable doubt. It is doubtful that there was any indecent act done on the complainant. Even if that was the case, it is the evidence of PW1 that the appellant was her boyfriend. The intention of the law is to punish those who defile minors. Although the minors cannot give consent to sexual acts, it is a different thing when the minor informs the court that she had a boyfriend with whom they were living as a husband and a wife. It would be unfair to simply punish the man yet the woman was considering herself to be married to the man. I do find that the defence under **section 8(5)** of the Sexual Offences Act applies and should benefit the appellant.

The appeal is merited and the same is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 28th day of May 2014

SAID J. CHITEMBWE

J U D G E