



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 172 OF 2011**

**NYAMAWI NYAWA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(From original Conviction and Sentence in Criminal Case No. 382 of 2009 of the Principal Magistrate's Court at Voi – **Hon. Nyakundi - RM**)

**JUDGMENT**

The Appellant **NYAMAWI NYAWA** was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars being that:-

***“On the diverse dates between the 16th day of June and July, 2008 at [Particulars withheld] village Macknon Road Location Kwale County the Accused had unlawful knowledge of A M N A girl aged fifteen (15) years causing her to conceive”.***

The main ground in this case is that of a defective charge and failure to properly ascertain the age of the Complainant.

The brief facts of this case are that sometimes in the month of June, 2008 (dates are given by the Complainant as 16th June, 2008 and also 17th June, 2008) she had sexual intercourse with the Accused in the bush while looking after their cattle. Subsequently they had other sexual encounters with the Appellant about four in number culminating in pregnancy. In the month of August, 2008 she decided to inform her mother about her situation. Her father was informed and he in turn reported the matter to the school authorities.

Upon interrogation she mentioned the appellant as the one who had impregnated her. The matter was reported to police and she was taken to Hospital at Samburu where she was examined and a P3 form filled by a Doctor. Her age was assessed. The Appellant had disappeared after she had informed him about the pregnancy but was arrested later after he resurfaced.

The clinical officer (**PW6**) who examined the Complainant on 17th October, 2008 found that she was five months pregnant. Her age was assessed and found to be sixteen (16) years.

Still on the issue of age the Complainant herself had told the Court that at the time of the incident she was in standard five and was aged fifteen (15) years old but she was not sure when she was born.

The father of the Complainant **M N C ( PW 2 )** had told the Court that his daughter was aged around sixteen(16) years old.

The age given in the particulars of the charge is fifteen (15) years.

There indeed appears to be inconsistency as to the age of the Complainant.

It is trite law that in cases related to Sexual offences the regime of punishment is guided by the age of the Complainant. In the present case that age does not appear to have been properly ascertained.

The learned trial magistrate Sentenced the appellant to fifteen (15) years Imprisonment. In his Sentencing notes he did observe that the minimum Sentence was fifteen (15) years Imprisonment. That is not the correct position as it ought to be twenty (20) years imprisonment. The Sentence for fifteen (15) years is for a Complainant aged between sixteen (16) years to eighteen (18) years.

The charge sheet sets the age of the Complainant as fifteen (15) years. I find the Conviction for the offence of defilement to have been unsafe but the facts of the case are sufficient to find the appellant guilty of the lesser offence of Sexual assault which is not regimented by age differentials.

Sexual assault is defined under Section 5(1) of the Sexual offences Act thus,

***“ Any person who unlawfully (a) penetrates the genital organs of another with (i) Any part of the body of another or that person or (ii) An object manipulated by another or that person except where such manipulation is carried out for proper and professional hygienic or medical purposes.***

***(b) Manipulates any part of his body or the body of another person so as to cause penetration of the genital organ into or by any part of the other body is guilty of an offence termed Sexual assault.***

***(2) A person guilty of an offence under this Section is liable upon Conviction to imprisonment for a term of not less than ten years but which may be enhanced to life imprisonment”.***

Section 179 of the Criminal Procedure Code grants the Court powers to convict for offences other than those charged and provides as follows,

***“ When a person, is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was charged with it”.***

In the present case whereas the issue of age was not proved I find that there was sufficient evidence to the effect that the appellant did have sexual intercourse with the Complainant on several occasions which culminated in pregnancy. There must have been penetration as envisaged in the sexual offences act.

Accordingly, the Sentence of fifteen (15) years imprisonment is reduced to ten (10) years imprisonment from the time of his Conviction.

The appeal succeeds to that extent only.

Judgment delivered dated and signed this **14th** day of **May, 2014**.

.....

**M. MUYA**

**JUDGE**

**14TH MAY, 2014**

***In the presence of:-***

Learned Counsel for the State Mr. Mureithi

The Appellant present

The court clerk Musundi