

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.86 OF 2012

SAMUEL ASHONO NATIRI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the judgment of [S.N. ABUYA, SRM] delivered on 23.3.12 from the original Criminal Case No.211 of 2011 in the Senior Resident Magistrate's Court at Butali)

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **section 8(1)(3)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant *on the 23.6.2011 within Kakamega North District in Western Province unlawfully and willingly inserted his genital organ namely penis in the genital namely vagina of L M a girl aged 15 years.*

The appellant was convicted and sentenced to serve twenty years imprisonment. The grounds of appeal are that he pleaded not guilty to the charge, the complainant informed the court that she had two lovers and it is not clear who between them made her pregnant, there was no DNA test done, the evidence is that of a single witness, the sentence is harsh and that the case was not sufficiently investigated. The appellant filed written submissions and relied on them. I have gone through the written submissions and the same expound on the above grounds. The appellant also contends that the date of birth of the complainant is not clear. The complainant testified that she was born in 1994.

Mr. Oroni, State Counsel, opposed the appeal and relied on the evidence on record. Counsel submitted that the evidence of the complainant was corroborated by that of the other witnesses.

The record of the trial magistrate shows that four witnesses testified for the prosecution. **L M**, the complainant testified as PW1. She informed the court that she was born in 1994 and became pregnant in September 2010. She delivered on 30.6.2011. PW1 testified that she started friendship with the appellant on the 6.8.2010 and they used to make love. She later became pregnant and the matter was known at her [particulars withheld] Primary School. The appellant was informed but he denied. During cross-examination she stated that the appellant was a second boyfriend but he is the one who impregnated her.

PW2 M D N testified that PW1 is his granddaughter. He knew about the pregnancy of PW1 and informed the area assistant chief. The matter was reported to the police and the appellant was arrested. The appellant had leased cane from him. **PW3 CPL WILSON TIROP** was based at the Kabras police station. The matter was reported to the station and the complainant was taken to hospital where a P3 form was filled. The appellant was later charged with the offence. **PW4 BEDU JUDITH OHANGA** is a clinical officer based at Malava District Hospital. She examined the complainant and found that she was twenty two weeks pregnant. The complainant was taken to the hospital on the 1.3.2011.

The appellant was put on his defence and he opted to keep quiet.

The main issue for determination is whether the appellant defiled the complainant. It is the evidence of the complainant that she befriended the appellant. The appellant was her second boyfriend. The evidence shows that the complainant was born in 1994 and the incident occurred in 2010. She was about sixteen years when the incident occurred. From the evidence on record it is established that the complainant willfully had sex with the appellant. There is no evidence that it is the appellant who lured the

complainant into the sexual acts. The complainant seems to have been enjoying the relationship. Although under the Sexual Offences Act the complainant could not have given her consent as she is under 18 years old, I do find that the complainant made the appellant believe that she was over the age of 18 years. It is my finding that the appellant should benefit from the defence under section 8(5) of the Sexual Offences Act as he reasonably believed that the complainant was over 18 years old. It is also clear to me that the parents or guardians of the complainant were aware of the matter and did not complain about it. The letter from the school was written in February 2011 when the complainant was already pregnant. It is established that the complainant started relationship with the appellant from August 2010 and the same lasted until when the complainant became pregnant. In my view the current situation is not what was anticipated under the Sexual Offences Act for punishment.

In the end I do find 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 28th day of May 2014

SAID J, CHITEMBWE

J U D G E