

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 53 OF 2012

MOSES SHIKUKU APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal from the original Criminal Case No.455 of 2009 in the

Senior Resident Magistrate's Court at Butali arising from the

Judgment of – S. N. ABUYA, SRM)

J U D G M E N T

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act No.3 of 2006. The particulars were that the appellant *on the 10.5.2009 in Kakamega North district within Western Province unlawfully inserted your genital organ namely penis into the genital organ namely vagina of J M a girl aged 17 years old.*

The appellant was convicted and sentenced to serve 15 years imprisonment. His grounds of appeal were that the trial magistrate failed to evaluate the entire evidence before the court and that there was no DNA test conducted and no expert witnesses to confirm that it was the appellant who defiled the complainant. The appellant filed written submission and contends that the evidence of PW1 and PW2 did not corroborate each other. There was no proof of penetration as no medical officer testified to that effect. It was alleged that the complainant became pregnant and that could only have been proved by a medical officer. No DNA test was conducted to prove the fatherhood of the child. The age of the complainant was given as 17 years but it was not proved. His defence was totally ignored and therefore the case was not proved beyond reasonable doubt. Mr. Oroni, State Counsel, opposed the appeal and relied on the evidence of the four witnesses. Counsel supports the conviction.

Four witnesses testified for the prosecution. **PW1 J M** testified that she was 17 years old and a standard 8 pupil at [particulars withheld] Primary School. On the 10.5.2009 she was in their room with PW2 in the evening when the appellant went there and took her out. She went to the appellant's house and she accepted to sleep with him in his house. She removed her panty and they had sex four times. In the morning he escorted her back home. She told **PW2 S** what had happened and asked S to keep quiet. After sometime she realized that she was pregnant. She informed her father and the matter was reported to the police. She was tested for HIV but it was negative. She later did her exams. She further testified that she had not slept with anybody else before that date.

PW2 S M was 14 years old and class 7 student at the same school. She testified that on the 10.5.2009 at about 9.00 p.m. they were in their room at their grandmother's house when the appellant went and took PW1 at about 10.00 p.m. PW1 later came home under the escort of the appellant. The appellant gave her KShs.100/= so that she could keep quiet. They later realized that PW1 was pregnant. **PW3 W W** testified that he was called by the school and informed that PW1 was pregnant. PW1 informed him that it was the appellant who had impregnated her. He reported the matter to the village elder and also to the police. It is his further evidence that PW1 gave him a photograph of the appellant and told him that it was the appellant who had defiled her. **PW4 S I N** is the area village elder. On 31.7.2009 he was informed by PW3 that his child PW1 had been impregnated by the appellant. He informed the area assistant chief and on 1.8.2009 the appellant was arrested and taken to the police station.

The appellant was put on his defence and gave sworn evidence. He stated that he works at a hotel and on 10.5.2009 he just did his normal duties. On 1.8.2009 at about 5.00 a.m. he was asleep when the village elder informed him that the assistant chief was calling him. He went there and he was told that he had made PW1 pregnant. He denied the accusation and he was later taken to the police station and later charged in court. It is his evidence that his home is about two kilometers away from that of PW1.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence on record shows that PW1 and the appellant were friends. It can be deduced from the evidence that that incident was not the first one. PW3 was given a photograph of the appellant and informed that he was the one who had made her pregnant. The evidence also establishes that PW1 and PW2 used to sleep in the same room and PW1 used to sneak out and sleep at the appellant's house. The trial magistrate noted that no medical evidence was produced and the investigating officer also did not testify. It is therefore clear that even the issue of age was not proved beyond reasonable doubt. I am satisfied that the complainant behaved as if she was an adult and made the appellant believe that she was over the age of 18 years. **Section 8 (5) and (6)** of the Sexual Offences Act are to the effect that if the accused believed that the complainant was above 18 years old then that can offer a defence to the accused. That defence has to be analyzed given the circumstances of the case. There is no evidence that the complainant was bleeding after the incident or that she felt pain.

Given the evidence on record I do find that the age of the complainant was not properly established. The appellant testified that he was 21 years old. I believe the two had a relationship and the complainant's grandmother seemed to have been aware. It is the pregnancy which led to the charging of the appellant with the offence. I am satisfied that the defence under **section 8** of the Sexual Offences Act comes to the rescue of the appellant. Even if the complainant was under the age of 18 she behaved as if she was over 18 years old. The appeal is merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

DATED AT KAKAMEGA THIS 24TH DAY OF SEPTEMBER 2014

SAID J. CHITEMBWE

J U D G E