



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 263 OF 2012

WALLACE CHEGE WAIHIGA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 541 of 2010 of the Principal Magistrate's Court at Kwale – **Hon. Aminga - SRM**)

JUDGMENT

The Appellant herein above mentioned was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement contrary to section 8(1) as read with Section 8(4) of the Sexual offences Act No. 3 of 2006.

The particulars of the charge are that:-

“On the diverse dates between the 7th day of January, 2011 and 20th May, 2011 at Kwale County he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of MHS a child aged sixteen (16) years”.

In this case its not denied that the Appellant and the Complainant had cohabited as **“husband and wife”** for the period between 7th January, 2011 to 20th May, 2011. This marriage appears to have had the blessings of the complainants grandparents.

As a result of this cohabitation the complainant became pregnant and later gave birth to a daughter now called HWC.

A birth certificate for the complainant shows that she was born on 5th February, 1995. The offence was allegedly committed between 7th February, 2011 and 20th May, 2011.

This places her age at sixteen (16) years. This is the same age indicated In the charge sheet.

In his defence the appellant places blame on the complainant, whom he says had the urge to get married. He admitted to have had sex with her during the period leading to the pregnancy.

Section 8(1) of the Sexual offences Act provides,

“A person who commits an act which causes penetration with a child is guilty of an offence

termed defilement”.

Section 8(4) of the Act which is the punishment section provides,

“A person who commits an offence of defilement with a child between the age of sixteen(16) and eighteen(18) years is liable upon Conviction to imprisonment for a term of not less than fifteen (15) years”.

In his defence the Accused did not allege that the child had deceived him into believing that she was over the age of eighteen (18) years at the time of the alleged commission of the offence and neither was it alleged that he reasonably believed that she was over the age of eighteen (18) years.

During cross-examination however, she did concede that she had previously stayed with another young man between November 2009 and July, 2010 before she ran away but he was not arrested. She also conceded that her elder sister was previously the Accused girlfriend.

The fact that there was another man in the life of the complainant who had sexual intercourse with her before meeting the Accused is not a defence to a charge of defilement as it does not relate to her age but her promiscuity.

The appellants age was assessed as sixty nine (69) years by the clinical officer (PW 3). It was also alleged that he was a retired special branch officer. This is not the kind of a man who could have been befuddled (as he alleges) by a sixteen (16) year old, walking into his bedroom stark naked. He was quite aware of her age as he is the one who procured a child health card which was later produced by prosecution as exhibit and which showed the date of birth of the Complainant as 5th February, 1995. He therefore cannot be heard to state that he did not know her age at the time he was cohabiting with her.

Upon evaluating the evidence on record I am satisfied that the Conviction was safe and the Sentence legal. This appeal has no merit and its dismissed.

Judgment delivered dated and signed this **29th** day of **October, 2014**.

.....

M. MU YA

JUDGE

29TH OCTOBER, 2014

In the presence of:-

Learned Counsel for the prosecution Mr. Jami

The appellant present

Court clerk Musundi