



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Appeal 136 of 2011**

***(From Original Conviction and Sentence in Criminal Case No. 87 of 2010 of the Resident Magistrate's Court at Wundanyi – F. K. Munyi (RM))***

**MK..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant was convicted and sentenced to 20 years imprisonment for the offence of defilement of a girl contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on diverse dates between 11<sup>th</sup> November 2009 and 30<sup>th</sup> January 2010 at (Particulars Withheld) Village (Particulars withheld) Location of Taita-Taveta County he had carnal knowledge of BW a girl aged 14 years.

In his grounds of appeal the Appellant contends that the charge was defective in that it only consists of the punitive Section but did not include Section 8(1) of the Act.

Secondly, that the complainant gave unsworn evidence which the Magistrate should not have relied on without corroboration.

Thirdly, that the age of the complainant was not assessed by a doctor. The Appellant in this case was working as a farm worker in the home of the complainant who was a school going girl at the time.

The Appellant had been given sleeping quarters in the homestead he was working as a Herdsboy. He started seducing the complainant on the 11<sup>th</sup> day of November 2009 when he called her to his room and they proceeded to have sexual intercourse.

The second time he called her into his room and they proceeded to have sexual intercourse with her on his bed. On 30<sup>th</sup> January 2010 she eloped with the Appellant and they proceeded to his rural home and she was introduced to the parents of the Appellant as a wife. The Appellants parents made arrangements to meet those of the complainant.

A meeting was held but the complainant's parents were adamant that there would be no marriage ceremony as the complainant was still in school. The matter was reported to police and the Accused was arrested and later charged with this offence. The mother of the complainant testified that her daughter (the complainant) was born in the month of April 1996. The father of the Appellant explained in Court of how his son arrived home in the company of the complainant who he introduced as his wife. The following day he communicated with her parents to inform that they should not waste their time searching for the girl as she was in his homestead with his son. Arrangements were made to legalize the union under customary law but the complainant's parents refused.

It is noted that the Appellant was a farm hand at the complainant's home. He must have known that she was a school going child. He decided to seduce her and had sexual intercourse with her severally culminating to elopement. He did not seek the hand of her parents. She was aged 14 years at the time and she had no capacity to consent to a marriage.

The Doctor who examined her found that her hymen was broken. When she testified in Court she was in Form One and the trial Magistrate did conduct a *voire dire* examination on her and she was satisfied that she was possessed of sufficient intelligence to testify.

There is overwhelming evidence that the Appellant had eloped with her with the intention of marrying. After perusing the record of proceedings it's clear that the Appellant understood the charges facing him and pleaded guilty to them twice but the trial Magistrate did not enter a plea of guilty at the time. The facts were read to him and he admitted them but denied the happenings of November 2009. Its inconceivable how he could have eloped with her in January 2010 when there was no relationship with her prior to the incident.

I find that the conviction was safe. This unfortunately is a case of the clash between customary law and statutory law. The sentence however, meted out on the Appellant is the minimum allowable in law.

His appeal fails and its dismissed.

**Judgment read and delivered in open Court this 30<sup>th</sup> day of May, 2013.**

**M. MUYA**  
**JUDGE**

**In the presence of:-**

**Mr. Ayodo for the State**

**Appellant - present**

**Court clerk – Mr. Musundi**