

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 15 OF 2013

**(Being an Appeal Against the Original Conviction and Sentence by the Honourable J.R. Ndururi,
Principal Magistrate at Kericho in Criminal Case No. 36 of 2011 in the Judgment Delivered on
22.03.2013)**

DAVID KIPKEMOI BETT.....APPELLANT

REPUBLIC.....RESPONDENT

(Before Hon. Justice Byram Ongaya Thursday 24th October, 2013)

JUDGMENT

The appellant is David Kipkemoi Bett. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. He was convicted as charged and sentenced to 20 years imprisonment.

The appellant has appealed against the conviction and sentence. His main grounds of appeal include that:

- a. the conviction was based on the evidence of PW1 whose evidence could not be believed and referred to a friend called J C and who the prosecution failed to call as a crucial witness ;
- b. in his defence he mentioned D L whose evidence was not taken because on the due date the appellant's advocate was absent but despite that, in the judgment the trial court found that the affairs of the said D L and the complainant were known to the court;
- c. the appellant was arrested on 7.7.2011 and not 2.7.2011 as per PW4 and his arrest on 7.7.2011 was long before 8.7.201, the date PW2 the father of PW1 testified to have found the complainant PW1; and
- d. the appellant was given a chance to file submissions but the trial court proceeded to deliver the judgment before the submissions had been filed by the appellant.

The respondent's counsel submitted that from the trial court's record it was clear that PW1 narrated the sequence of events vividly and there was no any hearsay evidence. PW1 had testified that she had a relationship with the appellant. The trial court made judgment without the appellant's submissions because the appellant's counsel failed to file the submissions as ordered by the court. The complainant PW1 was a minor of 16 years old and was not of tender age and she could follow court process without any difficulty. Thus, the conviction and sentence should be upheld.

This court has considered the submissions made for the parties and examined the record and judgment by the honourable trial court. The following are two pertinent findings:

- a. PW1 stated in her evidence that she had sexual intercourse with the appellant on 12.02.2011 and 20.05.2011. On 2.07.2011 PW1 testified she spent the night in the appellant's house but they did not engage in any sexual intercourse. Thereafter she escaped from her home to be found at her grandmother's home and before then, she (PW1) testified that she had spent a night in a lodge at a place known as Kiptere. PW1 admitted cheating her mother on her whereabouts on the occasions she failed to go back home to her parents. She also decided not to use the money her mother had given her to visit her sick teacher as intended. I have carefully considered her evidence and find that she was not a credible witness; she was a deviant child with a habit of telling lies without shame and without regret. Accordingly, this court finds that it was unsafe for the trial court to have convicted the appellant as charged in absence of corroborative evidence. In the opinion of this

court, there was no adequate evidence before the trial court to sustain a conviction for the offence as charged.

- b. There is another reason why the appeal must succeed. The clinical officer PW3 testified that following his medical examination of PW1 he concluded that PW1 had vaginal penetration whereas his examination of the appellant did not yield evidence of sexual penetration. PW3 further testified that PW1 had reported to him at the medical examination held on 8.7.2011 that PW1 had been defiled by a known person on 2.07.2011. The court notes that PW1 in her testimony had denied indulging in sexual activity on 2.07.2011, evidence which obviously contradicted the expert and independent evidence of PW3. It is obvious that PW1 misled the trial court and her parents to believe her words that she had sexual intercourse with the appellant on the two occasions or on any other day. She further misled her parents and the trial court to believe that on 2.07.2011 and the time thereafter until she was retrieved from her grandmother's home she had not indulged in sex. On the other hand the court finds that there was nothing before the trial court to doubt the appellant's evidence that the appellant had not committed the offence as charged. In any event, throughout the trial, there was no evidence of penetration as against the appellant. PW 3's evidence confirms that PW1 defiantly indulged in sexual intercourse with persons not before the trial court and deliberately not disclosed by PW1. In that defiant behaviour, the court finds that PW1 carefully designed to cheat her parents and secretly involved her friend Jenifer to achieve her defiant goals. The court finds that the appellant's concern that the prosecution failed to call a crucial witness, J, is well founded. This court finds that the offence was not established against the appellant.

In the circumstances of this case, the court finds that the prosecution evidence suffered serious gaps to link the appellant to the offence as charged. The court finds that the offence was not established beyond reasonable doubt and the appellant should be exculpated from the offence.

Accordingly, the appeal is allowed, the conviction is quashed, the sentence is set aside and the appellant is set at liberty unless otherwise lawfully held in custody.

Signed, dated and delivered in court at **Kericho** this **Thursday, 24th October, 2013.**

BYRAM ONGAYA

JUDGE