(Appeal against conviction and sentence in the Senior Resident Magistrate's Court Criminal Case No.846 of 2010 arising from judgment of [E.K. MAKORI, PM] dated 27th October 2010)

SALIM OWINO CHITECHI …….....…… APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **Section 8(1)** of the **Sexual Offences Act Number 3** of **2006**. He was also charged with indecent act contrary to **Section 11(1)** of the **Sexual Offences Act No.3** of **2006**. The appellant was convicted of the main charge of defilement and sentenced to serve **15** years imprisonment.

In his petition of Appeal dated 9th November 2011 and supplementary grounds of appeal filed on 20th January 2012, the appellant lists the following grounds of appeal:-

1. *The conviction is against the weight of the evidence*

2. *The prosecution evidence lacked corroboration*

3. *The prosecution case was not proved beyond reasonable doubt*

4. *The sentence is harsh in the circumstances*

5. *The appellant's constitutional rights were trampled upon by failure to accord him an advocate as enshrined in Article 50(2) of the Constitution*

6. *The judgment does not indicate the points for determination contrary to the requirements of Section 169 (1) of the Criminal Procedure Code.*

7. *The complainant's mental status ought to have been examined*

8. *The medical evidence by the Doctor did not prove the offence.*

Mr. Ombaye, counsel for the appellant submitted that Article 50 of the Constitution was violated. When the appellant appeared in court at the first instance he was represented by counsel but later the case proceeded without his Advocate. Further, PW1, the complainant testified that the incident occurred on 10th July 2010 while the particulars of the charge gives dates of July and August 2010. There was no witness who saw the appellant defiling the complainant and the trial court was biased. The complainant testified that she usually see pictures and even wanted to commit suicide and these were good grounds to have her mentally examined and made her evidence as unreliable.

State counsel, Mr. Orinda opposed the appeal. He submitted that the issue of age was proved and the

appellant did not state that he had an Advocate. The complainant is not an imbecile and was seen by Doctors who examined her and thus there was no need for her to be mentally examined. It is the defilement that has affected her life.

Being the first appellate court I will have to evaluate the evidence adduced before the trial. **PW1, S.A** was the complainant. Here evidence is that the appellant defiled her in July 2010 when she went to a village called B. The appellant seduced and promised to marry her. She agreed and went to his place and stayed for two days where they had sex. PW1 further testified that her mother took her away from the appellant. She confirmed that she was five months pregnant and she was not forced to have sex with the appellant. She agreed to stay with the appellant and she returned to him several times after her parents had removed her. She tried to kill herself as her parents could not allow her marry the appellant. She gave her age as 15 years.

PW2, ISAAC MUKWANA, a clinical officer at Matungu District Hospital produced the P3 form for PW1. PW2 testified that PW1 was pregnant and assessed her age as over 15 years.

PW3, M.O is the mother of PW1. She produced PW1's birth certificate and testified that on the 17th of August 2010 she was informed that PW1 had gotten married to the appellant. She went to the appellant's home and took PW1. PW1 took poison trying to kill herself because her father had removed her from the appellant. According to PW3, PW1 did not want to leave the appellant. PW1 became pregnant and was living with the appellant as his wife.

PW4, J.O.O is the father of PW1. His evidence is similar to that of his wife, PW3. His evidence is that PW1 had not reached the age of majority by the time she got married to the appellant. **PW5 Z.C** informed PW3 that PW1 was living with the appellant. **PW6, P.C. HELLEN CHEPCHIRCHIR** investigated the case. She referred PW1 to hospital. According to PW6, the complainant voluntarily went to live with the appellant as they had a relationship.

The appellant was put on his defence. He gave sworn testimony that he does jua kali works. The complainant went to live with him before she was taken by her parents. She went to live with him and even her parents had granted her permission. According to the appellant, the complainant was not a school girl.

The main issue for determination is whether PW1 was defiled, whether it is the appellant who defiled her. Did the prosecution prove its case as required by the law. Could PW1 give her consent?

From the prosecution evidence, it is proved that PW1 had sexual intercourse with the appellant. Indeed the appellant admits that he had sexual intercourse with the PW1. I do therefore find that PW1 was defiled by the appellant. indeed PW1 is pregnant and her evidence is that it is the appellant's baby. Although counsel for the appellant submitted that the appellant was represented by counsel during the taking of the plea, the trial court's record does not support that allegation. Even if he was represented and the advocate later stopped acting for him, I do find that there was no violation of the appellant's rights as enshrined in Article 50 of the Constitution. The trial court record does not show that the appellant was denied the right to be represented by counsel.

Under **Section 124** of the **Evidence Act**, the evidence of a victim of a sexual offence does not need corroboration. The medical evidence in the form of the P3 form and the evidence that of PW2, Isaac Mukwana, does corroborate that the evidence of PW1. Thus the evidence of PW1 was corroborated by that of PW2.

Although the judgment did not state the issues for determination, the trial court went through the evidence and concluded that the prosecution had proved its case. It cannot be held that in each judgment each separate point or points for determination have to be itemized before the conclusion is reached. A trial court's reference to the evidence adduced and explanation as to how the court arrives at its conclusion is sufficient for purposes of the provisions of Section 169 of the Criminal Procedure Code. The trial court has to give explanation for its conclusion and at times such explanations and points for determination are

found within the body of the judgment. I do find that the judgment meets the requirements of Section 169 of the Criminal Procedure Code. Each judicial officer has his own style of judgment writing. Each judgment should not appear like a uniform continuous prose with issues for determination, reasons and conclusion. All what is required is identification of the issues and the justification for the decision

It is the appellant's defence and contention that the complainant had consented to the sexual intercourse and even her parents had allowed that situation. **Section 42** of the **Sexual Offences Act No.3** of **2006** states as follows:-

"For the purposes of this Act, a person consents if he or she agrees by choice and has the freedom and capacity to make that choice."

The definition of a child under the **Sexual Offences Act** is that given under the **Children Act No. 8** of **2001**. Under the Children Act, a child is defined as any human being under the age of eighteen years. Under the provisions of **Section 43** of the **Sexual Offences Act**, a child cannot give consent. It is therefore clear as stated in the judgment of the trial court that the complainant could not have given her consent as she is under the age of 18 years.

Other than the above findings, I have read this file with a lot of curiosity. The main issue that remain unresolved is whether the appellant is a criminal who deserves punishment. PW1 testified that she was not forced into the sexual intercourse with the appellant. The evidence of PW1 reads in some parts as follows:-

"The accused never forced me to sex. We had agreed to stay together. We slept several times with him. I was removed several time(s) from your (accused) home. I did return. I wanted to kill myself because parents were not allowing me to be married to you (accused). I want him. I have his baby."

It is the evidence of PW3, the mother to PW1 that PW1 wanted to be married to the appellant. PW1 never wanted to leave the appellant's home. PW1 was living with the appellant as his wife and she became pregnant.

The record of the trial court shows that the complainant (PW1) was 15 years old. PW1 testified that she was born in 1996. The birth certificate that was produced indicate that PW1 was born on 24th May 1996. The birth certificate was issued on 16th November 2010, some four months after the appellant had been charged in court. According to the age assessment contained in the P3 form, PW1 repeated twice in school and was in class six in the year 2010. The Doctor who assessed PW1's age concluded that she was above 15 years old.

The trial court had the advantage of seeing PW1. The trial magistrate interrogated PW1 before taking her evidence. This court has to deal with the evidence on record and has no advantage of evaluating the complainant. Indeed PW1 seemed not to be a complainant as her evidence is that she wants to stay with the appellant as she has his baby.

Sections 8(5) and **(6)** of the **Sexual Offences Act No.3** of **2006** states as follows:-

1. ***"……***

2. ***……***

3. ***……***

4. ***……***

5. ***It is a defence to a charge under this section if-***

(a) it is proved that such child, deceived the accused person into believing that he or she was over the

age of eighteen years at the time of the alleged commission of the offence: and

(b)the accused reasonably believed that the child was over the age of eighteen years.

6. The belief referred to in subsection 5 (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

Although the Act of sexual intercourse did occur between the appellant and PW1, I do not find that the appellant had the intention of committing an offence of defilement. In his defence, the appellant stated that the parents of PW1 had allowed them to live together. It is part of his evidence that PW1 informed him that she was not a school girl. Given a situation where the alleged complainant testifies that she was not forced or lured into the offence and that she would still want to live with the accused person, it becomes difficult for the court to simply make a finding that the complainant is under eighteen years and could not consent to the act and thereby convict the accused person. This is not a situation where the accused alleges that the complainant consented while the complainant denies such allegations. The complainant in this case maintain that she wanted to get married and wanted to live with the accused as her husband. She even wanted to kill herself because her parents could not allow her to be married to the appellant. The medical evidence shows that she seemed to have had sex before and her sexual organs were normal.

Given the circumstances of this case and there being no evidence that the appellant induced, lured or manipulated PW1 into having sex with him, I do find that the defence provided for under **Section 8(5)** and **(6)** of the **Sexual Offences Act** is available to the appellant. I do find that it is PW1 who made the appellant believe that she was of marriageable age, that is to say, above 18 years old. The relationship between the two was not secret and did not last for a few days. According to PW2, PW1 informed him that the sexual intercourse occurred several times in the year 2010. This is also stated in the P3 form. It is the evidence of the investigating officer, PW6, that PW1 voluntarily went to live with the appellant as they had a relationship. I do find that it is doubtful that the appellant knew that PW1 was below 18 years old.

As indicated herein, I did not have the advantage of seeing PW1 but her testimony before the trial court does establish that she was enjoying her relationship with the appellant. Justice would not be served if the appellant is put behind bars for 15 years only to meet his son on his 15th birthday yet the mother informed the court that she was living with the appellant as her husband. The appellant cannot be held to be someone who lures children and defile them. He did believe that he was in a serious relationship with someone who was ready to be married.

In the end, I do find that 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 21st day of June 2012

SAID J. CHITEMBWE
J U D G E