



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Appeal 374 of 2010**

**FRANCIS MUKWAVI .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(From the Original Conviction and Sentence in the Criminal Case No. 444 of 2009 of the Senior Resident Magistrate's Court at Taveta: C.N. Ndegwa – SRM)

**JUDGMENT**

The appellant was Convicted and Sentenced to twenty (20) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual offences Act No. 3.

The particulars of the charge being that on the 30th day of August, 2009 t about 5:00 pm at [particulars withheld] District the appellant had unlawful carnal knowledge of one **J J** a girl under the age of fifteen (15) years.

The brief facts of this case is that the Complainant a standard seven pupil at the time of this incident went to attend a relatives wedding while in the company of her sisters. Thereafter during the celebrations she met the appellant with whom she went home with and spent night together. The following day she went home but her parents were not impressed by her action and together with the Appellant were taken to Hospital for Examination and treatment and later police station where they spent some days in cells before the appellant was arraigned in court and she was treated as a witness. The appellant in his evidence in the lower court admitted having met the Complainant at a wedding and leaving together with her but denied having gone to his house with her. He also told the Court that she went to his house later and said that she had been chased by her parents.

Its common sense that if nothing had happened between him and the Complainant there would have been no reason for her to go to him and report to him of what had transpired upon her arrival at her home.

The complainant did testify on oath in court after a **Voire dire** examination and she gave a graphic narration as to what took place. She had sex with the Accused on the material night.

PW 4 Doctor Odep Dianga who examined and filled the P3 form found that her **labia majora** was normal the **labia minora** was inflamed. She had a whitish discharge and the hymen was broken. I find the Doctors evidence corroborates that of the Complainant.

The trial magistrate rightfully came to the conclusion that the Complainant had sexual intercourse with the appellant but because of her age she had no capacity to consent. The issue of the age was not canvassed at length. The P3 form indicates the estimated age as fourteen (14) years. No age assessment was done, no birth certificate was produced in Court.

The importance of age assessment in sexual offences need not be over-emphasized bearing in mind punishments are categorized over various age brackets and there is need for a trial Court to ascertain properly the age of the Complainant in particular and that of the Accused if there is contention that he is also a minor or appears to the Court to be under eighteen (18) years old.

In the present case the appellant as was charged with defilement and in the alternative Indecent assault of a female contrary to section 11(1) of the Sexual offences Act No. 3 of 2006. Whereas I find a Conviction under section 8(2) of the act to have been unsafe, owing to the fact of the failure to prove the age of the Complainant at the time of the defilement I am of the considered view that the alternative charge of Indecent assault on a female was proved.

Section 179 of the Criminal Procedure Code provides,

**“When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be Convicted of the minor offence although he was not charged with it”.**

In the present case the Appellant as charged in the alternative with Indecent assault, the charge was read to him. He cannot be heard to say that his rights under article 50 of the Constitution have been infringed.

There is overwhelming evidence to the effect that the appellant had sexual intercourse with the Complainant overnight on the day in question. His penis did touch or come into contact with the vagina of the Complainant. Though it is apparent that the two were friends and the act was consensual as the Complainant was under the age of eighteen (18) years the law takes it that she had no capacity to consent. The act was therefore unlawful and intentional.

The finding of the trial magistrate is accordingly altered and substituted with that of guilty on the alternative count of indecent assault contrary to section 11(1) of the Sexual offences Act No. 3 of 2006.

The Sentence of twenty (20) years imprisonment is altered and reduced to ten(10) years imprisonment. The appeal succeeds and is allowed to that extent only.

Judgment dated and delivered in open Court this **28th** day of **November, 2012**.

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

**In the presence of:-**

The appellant

Court clerk – Mr. Musundi