



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Criminal Appeal 19 of 2009**

**S. C .....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

***(From original conviction and in Criminal Case No. 94 of 2007***

***Resident Magistrate's Court at Kaloleni before F. Andayi - RM Court)***

**JUDGEMENT**

Suleiman Charo (the appellant) was convicted on a charge of defilement of a girl contrary to section 8(3) of the Sexual Offences Act. He was sentenced to serve 20 years imprisonment.

The particulars were that on diverse dates between the month of November 2006 and February 2007 in Kilifi District, within the Coast Province, being a person aged 17 years, induced B. J., a school going girl aged 15 years and had sex with her, making her pregnant, thus interfering with her education.

BJ testified that she did not know her date of birth but that she was 17 years old. She was a class 3 pupil at K.K but dropped out due to her pregnant state which she blamed on the appellant – at the time of testifying, she had delivered a baby girl. She could not recall what happened in March 2006 but it was her evidence that she had a love relationship with the appellant whom she says seduced her and she accepted his advances. They had sexual intercourse in November 2006 once on a date she could not recall, then she delivered in August 2007 when she had told appellant about the pregnancy, he did not say anything.

Later she was called to the assistant chief's office where she found appellant and his mother, they talked a little then the chief told them to go to the police station. It was her evidence that she and the appellant had agreed to marry and that agreement remained even as at the date when he was charged. She described her relationship with the appellant as good.

J.K (PW2) got information from his wife that BJ had got home at night and on being questioned, she said she had been with the appellant. He said BJ was aged 15 years. He too said that he did not know her date of birth only that her birth had been registered with the assistant chief. BJ said she was expectant and that appellant was responsible and the girl went away to stay with the appellant. PW2 reported the matter to police because he wanted his daughter to go to school and he had not allowed appellant to marry her. (PW3) Harrison Kombe, the area assistant chief confirmed receiving a report that BJ had got married to appellant for two weeks. Both appellant and the girl were summoned and they admitted that they were living together. The girl said she was 15 years and appellant was 18 years – He knew both of them as residents of his area and he had received a notification of birth in respect of the girl showing she was born on 13-6-91 and the same was produced as Ex.1.

Cpl. Melody Atike (PW4) who received the appellant from the assistant chief, confirmed that the report given was that appellant had taken PW1 for a wife.

Joshua Mwanyumba Mwakio (PW5) who examined PW1 found that she was pregnant – he filled the P3 form which was produced as Exhibit.

No medical examination was carried out to confirm that appellant was the one responsible for the pregnancy.

In his unsworn defence, the appellant confirmed that he lived at K.K and that on 27-10-08, PW1 went to his home, saying she had been sent away from home. So he took her stayed with her – supporting both PW1 and the child. His plea to the court was to be released so that he could go and attend to his wife and child.

The trial magistrate in his judgment noted that although PW1 said she had consented to their amorous relationship and in having sexual intercourse, he held that **“consent was immaterial in a charge of defilement.”**

He also considered the appellant’s own admission that the child was his and that he was living with complainant and the child as his family. It was also his finding that appellant did not indicate that he was mistaken as to the complaint’s age or that she misled him to believe that she was over 18 years and he found the complainant to be a child and appellant ought to have taken steps to verify her age. His finding was that appellant had sexual intercourse with complainant on 17<sup>th</sup> November 2006 and that he caused defilement by penetrating her genitals with his genital organs.

He held:

***“I find the accused person guilty of defilement of a child contrary to section 8(3) of the Sexual Offences Act; 2006, he is convicted accordingly”***

He was sentenced to twenty years imprisonment.

The State conceded the appeal saying the trial magistrate erred by failing to take into consideration the circumstances of the case as PW1 had told the trial court she did not know her date of birth, nor did her father know her date of birth. She asked the court to consider the fact that appellant and PW1 had been living as husband and wife and he was even taking care of her and the issue of their union.

The question as to whether appellant and PW1 indulged in sex, is not in issue, as appellant acknowledges the child as his, refers to complainant as his wife, and that they had been living as such even as the trial proceeded. The issue really was whether the age of PW1 was determined. She did not know her date of birth, nor did her father – there was a notification of birth and to have been issued by the late Chief Mwarungu, the trial magistrate did not make reference to that notification and it doesn’t form part of the record of appeal nor is it contained in the lower court’s original file. Quite apart from that, it is not clear who notified the chief of PW1’s birth and gave her date of birth, since her own parent did not know her date of birth. It was therefore unsafe to presume that PW1 was a child and then lacked ability to consent to sexual intercourse – her claim of being 15 or 17 years did not prove that was her age. It is for this reason alone that I find the appeal properly conceded and I quash the conviction and set sentence aside.

Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 29<sup>th</sup> day of **July 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**