



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 209 OF 2020**

**VINCENT IJENJI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgment of Honorable P.W Wasike Senior Resident Magistrate in Kapsabet Senior Principal Magistrate's Court Criminal Case No. 3183 of 2016 delivered on 17<sup>th</sup> December, 2020)***

**JUDGMENT**

VINCENT IJENJI, the appellant herein was charged in the lower court with the main count of defilement in violation of *Section 8(1)* as read with *Section 8(4)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on 23<sup>rd</sup> day of January 2016 at Mogen Location in Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AM, a child aged 17 years.

The appellant also faced an alternative count of committing an indecent act with a child, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006*. The particulars hereof being that on the 23<sup>rd</sup> day of January 2016 at Mogen Location in Nandi County, the appellant intentionally and unlawfully caused his penis to get into contact with the vagina of AM, a child aged 17 years.

The prosecution case is that the complainant herein was born on 15/12/1998. Her birth certificate was availed in court as an exhibit and indicates of the said date.

The complainant who gave evidence as PW-1 disclosed that prior to 23/1/2016 when the alleged defilement was committed, she was a friend to the appellant herein for a period of about 2 years but they had never had sex. The appellant was a motorcycle operator (Boda boda rider). She had indicated to the appellant of her intention to bring the relationship to an end. She was of school going age and was a student. On the material date she was from the shop. The appellant met her on the way and urge her to have sex with him. She declined. The appellant held her and led her into a man-made forest where he forcefully had sex with her. The complainant never told her mother about the said incident. She got pregnant. She was schooling at [Particulars withheld] Secondary school where she was in form one. It is from the school that the mother got to learn that she was pregnant. When the mother questioned as to who had impregnated her she did not disclose. She was taken to Serem Health Centre where she disclosed to the Nurse that she was impregnated by Vincent Injenji, a Bodaboda rider.

The matter was reported at Kabujoi Police Station. She gave birth on 24/8/2016. On 15/10/2016 the appellant was arrested. Samples were taken from the appellant, complainant and the child for DNA test. PW-3 received the samples and conducted the DNA at Kisumu Government Chemist. His finding is that the appellant chances that he is the father of the child is at 99.00%.

The appellant was then charged with the present offences.

The appellant gave a brief unsworn testimony on defence. He said he knew the complainant since the year 2014 and were friends. In the year 2016 she visited his home. She got pregnant. He deliberated with her parents and agreed to take care of the child. The parents however made other demands of which he could not afford. He was then accused and charged.

He prayed for forgiveness and indicated of his desire to take care of the child.

The trial magistrate evaluated the evidence, and found the main count proved by the prosecution beyond reasonable doubt. The appellant was thus convicted and sentenced to serve 15 years imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

***(1) Evidence was not properly evaluated and the decision is erroneous.***

***(2) The charges are defective.***

***(3) Ingredients of the offence were not weighed.***

***(4) The defence was erroneously dismissed.***

***(5) Extraneous issues were weighed by the trial court.***

The appeal was canvassed by way of written submissions and parties did file their submissions.

I have re-evaluated the appeal record in relation to the charges preferred, evidence adduced, judgment passed and sentence, grounds of appeal and submissions by both sides.

The undisputed facts are that by the time of the incident the complainant was aged 17 years old and was therefore a child. The appellant though does not dispute that he had sex with her which led to the birth of a child, states that the said act was consensual. However under *Section 42 of the Sexual Offences Act*, a child is incapable of giving consent for sex. The appellant though at appeal stage raises a defence that he had a reasonable cause to believe that the complainant was an adult, such was not raised in the lower court. He had known the complainant for a period of 2 years prior to the date of the alleged incident as they were friends. He must have therefore known her when she was 15 years old. She was of school going. There was enough obvious facts inclined towards that she was a child, and in case he was in doubt should have taken trouble to confirm, not to offend the law. His defence is coming in too late and is an afterthought, and unbelievable. He knew she was a child or had reasonable grounds to believe so.

In the case relied on by the prosecution, of ***Irene Ochieng –vs- Republic [2017] eKLR***, the court held that;

“Whenever the accused opts to rely on the defence under *Section 8(5) of the Sexual Offences Act*, the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate:-

***(a) That it was the child who deceived the accused person into believing that he/she was over the age of eighteen years at the time of the alleged commission of the offence;***

***(b) That the accused person reasonably believed that the child was over the age of eighteen years; and***

***(c) That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable.***

The appellant herein has failed to satisfy the said requirements. This is an open and shut case. The conviction and the sentence are sound. The appeal lacks merit and is dismissed.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JUNE, 2021.**

In the presence of:-

The appellant (Virtually in Eldoret prison)

Ms Limo for state

Ms Gladys - Court assistant