REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 171 OF 2015

BETWEEN

JULIUS KIPKOSGEI KORIR.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon.G. Adhiambo, SRM dated 27th November 2015 at the Magistrates Court at Kapsabet in Criminal Case No. 966 of 2015)

JUDGMENT

1. The appellant, **JULIUS KIPKOSGEI KORIR**, was charged, convicted and sentenced to 15 years' imprisonment for the offence of defilement contrary to **section 8(1)** and **(4)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the offence were that on 2nd December 2013 within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of TCK, a girl aged 17 years.

2. The appellant appeals against the conviction and sentence on the grounds set out in his memorandum of appeal dated 10th December 2015 as follows. That the learned trial magistrate erred in law and in fact in convicting him without taking into account the age of the complainant who was at the time of defilement aged 17 years and therefore capable of consenting to the act. That the trial magistrate erred in law and in fact in failing to take into account the appellant's defence the he was misled that the complainant was over 18 years and capable of consenting to sexual intercourse. That the trial magistrate failed to take into account the appellant's mitigation as to the age of the complainant before sentencing and that the trial magistrate erred in sentencing the appellant to 15 years imprisonment when there was no evidence to sustain the conviction.

3. Before I deal with this appeal, I recognise that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

4. As is apparent from the grounds of appeal I have outlined, the appellant does not dispute that he committed caused act of penetration to the complainant (PW 1). This was in fact confirmed by the fact that PW 1 gave birth to a child and the Government Analyst, PW 5, conducted a DNA on PW 1, the appellant and the child which concluded that the child shared DNA from the appellant and PW 1 and that there was 99.9% chance that the appellant and PW 1 were the biological parents of the child. The natural and irresistible conclusion is that an act of penetration took place leading to conception and then birth of the child.

5. In his unsworn statement, the appellant stated that he did not commit the offence. He stated when he met her, the complainant stated that she was 19 years old and he was ready to marry her and she agreed to be his wife whereupon they became intimate and she sooner became pregnant. He told the court that in line with Nandi tradition, he started to prepare for his parents and family to take dowry but PW 1's parents became angry and reported the matter to the police. He admitted that he had sired the child.

6. The question raised by the appellant is that PW 1 was not a child and if she was, then she misled him in to believing that she was over 18 years and therefore capable of giving consent. The defence he raises is provided for in **section 8(5)** and **(6)** of the ***Act***. which provide as follows:

> *8(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 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. [emphasis added]

7. PW 1 testified that she was in Standard 7 at a local primary school and that the appellant was a neighbour who was living about 100 metres away. The appellant approached her on 2nd December 2012 while she was herding cattle and they proceeded to his house where they had sexual intercourse. She later discovered she was pregnant and by the time of the trial she had given birth. In cross-examination by the appellant she stated that the appellant told her she would be his wife and he would allow her to proceed with her education. PW 1's mother, PW 2 confirmed she learnt of the PW 1's pregnancy and was taking care of the child.

8. In light of the evidence, can the court conclude that the appellant reasonably believed that the child was above 18 years? The appellant and PW 1 were neighbours. She had known him from 2012 and he also knew or must have known she was still going to school therefore displacing any notion that she was above 18 years. There is no evidence to suggest that it is PW 1 who led him to believe that she was an adult. In fact, it is that appellant who seduced her and took her to his house when he did the felonious act. The offence of defilement was accordingly proved.

9. PW 1's birth certificate shows that she was born on 7th May 1997 hence at the time the offence was committed she was 16 years old. The sentence of 15 years' imprisonment imposed was lawful as it was consistent with the mandatory minimum sentence under **section 8(4)** of the ***Act***.

10. The conviction and sentence are affirmed. The appeal is dismissed.

SIGNED AT KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at ELDORET this 3rd day of JUNE 2019.

H. OMONDI

JUDGE

Appellant in person.

Ms Mokua, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.