



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 213 OF 2012**

**W S.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original Conviction and Sentence in Criminal Case No. 748 of 2010 of the*

*Principle Magistrate's Court at Voi – Hon. Nyakundi – S.R.M.)*

**JUDGMENT**

**W S** hereinafter referred to as the Appellant was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement of a girl contrary to section 8(1) as read with section 8(4) of the Sexual offences Act No. 3 of 2006.

The particulars being that:-

***“Between the month of July, 2010 and the month of October, 2010 at [Particulars withheld] village within Taita – Taveta County he unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of a girl namely P M of the age of seventeen (17) years.*”**

The grounds of this appeal are that the Conviction was based on previous Sexual experience in contravention of Section 34(1) of the Sexual offences Act.

Secondly, that no DNA test was performed, to ascertain the paternity of the child born from the act.

Thirdly, that the Conviction was against the weight of the evidence adduced.

Section 34(1) of the Sexual offences Act provides,

***“No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced and no question regarding such sexual conduct shall be put to such person, the Accused or any other Witness at the proceedings pending before a Court unless the Court has, on application by any party to the proceedings granted leave to adduce such, evidence or to out such questions”.*”**

This provision of the law contemplates the adducing of evidence of character and previous sexual history.

The evidence which was in Court related to the period between the month of July, 2010 and the month of October, 2010 which forms the basis of the charge facing the appellant.

At page 8 line 18 of the proceedings this is what she told the Court,

***“ I had an affair with W. ( Accused). We began the affair in July, 2010. He came to my home. I was asleep. It was at 9:00 p.m. I was sleeping with my sister L. We had sex. I do not know how he came ..... After some time I did not receive periods. I went to help my father at the Hotel.... The Accused came to my home after two weeks. He came ahead of me. I found him sleeping on the bed. We also slept. We had sex three times. He left in the morning.... The Accused came again on 3rd August, 2010. We had sex three times at my home”.***

From the above it is abundantly clear that the narrative given by the Complainant is for the period contemplated in the charge sheet and it in no way amounts to evidence of previous sexual history.

Section 34(1) of the sexual offences Act therefore is not applicable.

Age. The mother of the Complainant testified to the effect that her daughter was born in 1993. The investigating officer did take the Complainant for age assessment and also did produce her birth certificate (Complainants) which shows the date of birth as 3rd May, 1993. I am satisfied that the age of the Complainant was properly ascertained.

Penetration. The Complainant did testify of the three sexual encounters she had with the Appellant at her home which the defence refers as previous sexual history but the acts subject of the charge of defilement. The appellant does not seem to seriously challenge the fact he had sexual intercourse with the Complainant. What he seems to challenge is the issue of paternity of the child. However, there is evidence to the effect that he had reached an agreement with the Complainant and her parents on how to take care of the child.

The same was noted by the learned trial magistrate in his Judgment page 20 line 15,

***“The Accused himself tended to suggest that he had sexual relations with the Complainant when cross – examining her. He did not deny having sex with the Complainant. All he denied was the allegation that he was responsible for he pregnancy. It appears that the Accused did not understand that having sex with a girl who is under the age of eighteen (18) years is an offence”.***

It is further noted that the Appellant was a matatu driver married and a father of two children. He must have been aware that the Complainant was an under age girl who was still in primary school. He has not put the defence that the Complainant had made him believe that she was over the age of eighteen (18) years.

I find no good reason to interfere with the finding of the learned trial magistrate. The Conviction was safe and the Sentence was legal.

The appeal has no merit and is disallowed.

Judgment delivered dated and signed this **4th** day of **March, 2014**.

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**M. MUYA**

**JUDGE**

**4TH MARCH, 2014**

**In the presence of:-**

Learned Counsel for the State Mr. Ayodo.

The appellant present in person

Court clerk Musundi