



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 270 OF 2013

JOHN KINYILIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Sexual Offences Case No. 21 of 2013 by Hon. S.A. Ogot on 11/10/13)

JUDGMENT

1. The Appellant was charged with defilement contrary to **section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006**.

Particulars thereof being that on diverse dates between **4th August** and **12th August, 2013** at unknown time, at **[particulars withheld] Village, Mutomo** Location in **Mutomo District** within **Kitui County**, intentionally and unlawfully caused his penis to penetrate the vagina of **M M** a girl aged **17 years**.

In the alternative the appellant was charged with **indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offence Act No. 3 of 2006**.

Particulars thereof being that on diverse dates between **4th August** and **12th August, 2013** at unknown time, at **[particulars withheld] Village, Mutomo** Location in **Mutomo District** within **Kitui County**, intentionally touched the vagina of **M M** a girl aged **17 years** with his penis.

2. He was tried, convicted on the main count and sentenced to serve **fifteen(15) years** imprisonment. Being aggrieved by the conviction and sentence he appealed on grounds that the trial learned magistrate erred in both law and fact by failing to appreciate that he was married to the complainant; and all parties involved had consented to the marriage.
3. In his written submissions he stated that his marriage to the complainant was no secret affair. He called upon the court to reduce the sentence imposed.
4. The appeal was opposed by the State. The learned State Counsel, **Mrs Abuga** stated that the prosecution adduced evidence that proved the age of the complainant; the complainant was found inside the house of the appellant and the clinical officer confirmed that she had a missing hymen. She called upon the court to find that the conviction was proper and the sentence was within the

law.

5. Briefly the facts of the case were that PW1, **M M**, a child aged 17 years in standard 7 encountered the appellant who convinced her to go into the bush with him. He had sex with her whereafter they went to his home. He said he had married her. His mother gave her clothes to wear in the morning. She stayed with him for **three (3) days**. They continued engaging in sexual intercourse. On the **12th August, 2013** her brother led police officers to the house. Both of them were taken to the police station. She was subjected to medical examination. The appellant was charged.
6. In his defence the appellant said he married the complainant on the **4th August 2013**. He sent elders to her home who were instructed to return the complainant. He complied. As he waited for report from the complainant's father he was arrested.
7. This being the first appeal, as a court I am duty bound to re-evaluate all the evidence adduced at trial and come to my own conclusions. I must bear in mind that I neither saw nor heard witnesses who testified and make such an allowance. (see ***Okeno versus Republic [1972] E.A. 32;***)
8. It is not in dispute that the appellant had sexual intercourse with the complainant. His argument, however, is that he had married her. This was evidence of penetration of the complainant. The evidence of the complainant that he had sex with her is corroborated by medical evidence adduced by **PW5, Daniel Mulwa** a clinical officer who on examining her found the hymen missing. He formed an opinion that she had engaged in sex.
9. The issue to be determined is therefore;-

- i. Whether the complainant was aged 17 years.
- ii. Whether she was capable of consenting to the act.

10. A birth certificate was produced in evidence which was proof of the date of birth of the complainant. She was born on the **17th March, 1996**. At the time of the act of penetration the complainant was **17 years** old. She was a child (***vide Section 2 of the Children's Act, 2001***). She was incapable of consenting to sexual intercourse. It has not been alleged that the appellant was mistaken as to her age. The learned trial magistrate analyzed evidence adduced and arrived at a correct conclusion.
11. From the foregoing the appeal against conviction lacks merit.
12. With regard to the sentence imposed, it is the minimum prescribed sentence for the offence committed. This court has no reason to interfere with it.
13. The appeal therefore fails. Accordingly it is dismissed.

DATED, SIGNED and DELIVERED at KITUI this 13TH day of MAY, 2014.

L.N. MUTENDE

JUDGE