



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APEAL NO. 73 OF 2013**  
**SIMON MUHIA NDUNG'U.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**(Being an appeal against conviction and sentence in the Murang'a Principal Magistrates Court Criminal Case No. 373 of 2009 (Hon. I.K. Orege) in a judgment delivered on 24<sup>th</sup> March, 2010)**

**JUDGMENT**

The appellant was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **sub section 8(4)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on diverse dates between 25<sup>th</sup> and 29<sup>th</sup> day of January, 2009 at Murang'a Township in Murang'a district within central province, the appellant had carnal knowledge of C N M a girl under the age of 18 years.

According to the complainant's evidence, she deliberately left her home and moved in with the appellant. As at the time she joined the appellant at his residence, she was aged sixteen and the two parties came together with sole purpose of establishing a marriage union; thus for the time she stayed with the appellant, the complainant had settled as his wife until her father "interrupted" her new phase in life and had the appellant arrested by the police on suspicion of having committed the offence for which he was charged and arrested. According to this witness she saw nothing wrong in living with the appellant as his wife.

Her mother, **M W M (PW2)**, testified that the complainant was aged sixteen years at the material time; the documents produced in court showed that she was sixteen years and seven months at the material time. She escaped from home on 25<sup>th</sup> May, 2009 and was only traced in the appellant's house four days later. She confirmed that the complainant was taken for medical examination after the appellant had been arrested.

The complainant's father, **R M M (PW3)** also testified that her daughter was aged sixteen and that she disappeared from home on 25<sup>th</sup> January, 2009. He made a report to the police that the appellant was cohabiting with his daughter. The police who received the report police constable **Sophia Righa (PW4)** testified that she issued the complainant with a P3 form and even escorted her to the hospital.

The clinical officer, **P.K. Mwangi (PW4)** examined the complainant on 29<sup>th</sup> January, 2009. According to the laboratory test results, there was evidence of spermatozoa in the complainant's genitalia but there was no infection.

In his evidence, the appellant did not deny that he was cohabiting with the complainant as they had

mutually agreed to live together as a married couple. He testified he was not aware of the age of the girl and despite his enquiries the complainant had declined to tell him.

After considering the foregoing evidence, the learned magistrate came to the conclusion that the prosecution had proved its case beyond reasonable doubt; he therefore convicted the appellant and sentenced him to serve fifteen years in prison.

Being dissatisfied with the conviction and the sentence, the appellant appealed to this court. In his petition the appellant contended that the learned magistrate should have considered the complainant's testimony that she believed she was old enough for marriage and she saw nothing wrong living with the appellant as her husband. The appellant also argued that the learned magistrate erred in law and in fact for disregarding the fact that the appellant had no means of telling the age of the complainant once she presented herself as being old enough for marriage.

The appellant filed written submissions in which he reiterated his argument that the learned magistrate erroneously ignored his defence in his judgment. The state counsel, Ms Keya, opposed the appeal and argued that there was sufficient evidence of defilement and that there was no doubt the complainant was below eighteen years. The state, according to counsel, had proved its case beyond reasonable doubt and the conviction was safe. As far as the sentence was concerned the counsel argued that fifteen years imprisonment is the minimum sentence provided by the law; it was a mandatory sentence and therefore even this court could not interfere with it.

I have considered the evidence on record and the submissions by both the appellant and the state counsel. According to the clinical officer's evidence the vaginal swab revealed that there were spermatozoa in the complainant's genitalia; the complainant herself told the court that she had had sex with the appellant for three days. It was apparent therefore that penetration which is a vital component of the offence of defilement had occurred.

Section 8 (1) and (4) of the Sexual Offences Act under which the appellant was charged reads as follows:

**8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

Under **subsection 5 of section 8**, the Act goes further to provide for circumstances under which a person who would otherwise be convicted of the offence under **section 8 (1) and (4)** will be acquitted. It provides as follows:

**(5) It is a defence to a charge under this section if-**

**(a) it is provided that such a 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 person reasonably believed that the child was over the age of eighteen years.**

For the legislature to come up with this provision, it must have, in its wisdom, understood that one could easily be misled into believing that a minor of sixteen or seventeen years was of age because the difference between persons of these ages is blurred in many respects and it is therefore not easy to tell, by mere physical appearance, that one is within the prohibited age bracket.

All that the accused person needs to demonstrate in order find cover under this provision is to show that he was deceived by the minor and that he reasonably fell for the deception.

It is apparent that the appellant raised this defence at the trial; he testified that the complainant presented herself as a person who was of the age of majority and his enquiries to ascertain her exact age did not bear any fruit. She kept it to herself and this she could possibly do for numerous reasons and not necessarily because she wanted to hide from her erstwhile husband the fact that she was under age.

When the appellant raised this defence, the burden was on the prosecution to persuade the court that the appellant was not misled and that circumstances were such that he could not have believed the complainant's deception. There is no evidence that this was done.

I have read the learned magistrate's judgment and it appears that the learned magistrate neither considered the appellant's defence nor gave any reasons for disregarding it. This omission prejudiced the appellant's case.

My conclusion is that the appellant's appeal is merited and ought to be allowed. I hereby allow it and order that the appellant be set at liberty forthwith unless he is lawfully held under a separate warrant.

**Dated, signed and delivered in open court this 5<sup>TH</sup> day of May 2014**

Ngaah Jairus

JUDGE