

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 73 OF 2013

HAMISI SACHITA alias NATHAN ELIJAH.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the original Criminal Case No. 801 of 2011

in Butali Senior Resident Magistrate's Court. [JUDGMENT OF M.L. NABIBYA, AG. SRM])

J U D G M E N T

The appellant was charged with 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 were that the appellant *on diverse dates between 6.3.2011 and 10.7.2011 in Kakamega North District within Western Province intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of R M a girl aged 16 years.*

The appellant was convicted and sentenced to serve 15 years' imprisonment. The grounds of appeal are that the prosecution failed to prove its case, the core ingredients of the offence of defilement were not proved beyond reasonable doubt and that the prosecution evidence as a whole did not disclose a criminal offence. Mr. Onsando, counsel for the appellant submitted that the charge sheet did not give any specific date of the alleged defilement while the P3 form gives a date of 10.7.2011. The birth certificate produced gave the name of **R** whereas the charge sheet gave the name of **R**. The age of the victim was also not established. Miss Opiyo, for the State opposed the appeal and submitted that the birth certificate produced was for the same person. The age was proved by the birth certificate. The complainant testified that she was defiled on several occasions and the sentence is lawful.

The complainant **R M** testified that she was a Form V student at [particulars withheld] Secondary School. She was 16 years old. On the 8.1.2011 she was heading to school when the appellant was riding a motorbike offered her a lift. The appellant seduced her and promised to provide everything for her including lunch. She agreed. The appellant used to take her to school from January up to March 2011. On the 6.3.2011 they went to Malava and booked a lodging and had sex. The appellant continued taking her to school and they would book a lodging in Butali and have sex. He purchased her school shoes and uniform. In August she realized that she was pregnant. They tried to terminate the pregnancy. The appellant was arrested on the 18.12.2011 and later charged with the offence.

PW2 E N testified that she is the auntie to **PW1** and they stay together. She noted that **PW1** was pregnant and on 26.10.2011 she took her for pregnancy test. **PW1** told her it was the appellant who had impregnated her. The matter was reported to the Kabras police station and the appellant was arrested and charged. **PW3 KIZITO SIFUNA** was based at the Malava district hospital. He examined **PW1** and noted that she was expectant. This was on the 18.12.2011. He concluded that **PW1** was defiled.

The appellant was put on his defence. In his unsworn evidence he testified that he is a mason. He was arrested and taken to Malava police station where he stayed for three days. The complainant's family wanted his parents to negotiate with them but that did not happen. He denied committing the offence.

From the evidence on record it is established that PW1 and the appellant had an affair. I called for a probation report that was prepared and filed on 25.6.2014. According to the report the affair between the two was known to PW1's parents and it was not a secret. The appellant would go to PW1's home and ask for PW1. The report also shows that PW1 gave birth but the child later died. The two families have reconciled and PW1 has moved to Nairobi in search of employment after completing school. It is established that according to the appellant he thought that PW1 was an adult.

From the evidence on record and the probation report I do find that the two parties had an affair. Although PW1 was under the age of 18 years she behaved like an adult and started going to lodgings with the appellant and have unprotected sex. I do find that the defence under **section 8(5)** that appellant believed that PW1 was an adult applies. The probation report indicates that the matter was only reported to the police when the appellant refused to take responsibility after PW1 became pregnant. I do not think that the law was intended to punish such situations. The family of PW1 was fully aware that their daughter was having a sexual relationship with the appellant. I do find that punishing the appellant is not fair in the circumstances.

In the end I do find that the appeal is merited and the same is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 14th day of October 2014

SAID J. CHITEMBWE

J U D G E