

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 24 OF 2013

JAMES OOKO ELKANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

FURTHER ORDERS

When the judgment in this case was delivered on 20-1-2014 the court ordered that age assessment be conducted in respect to the complainant. The state asked for more time severally and the court record clearly shows the time as 4-3-2014, 25-3-2014, 5-5-2014, 12-5-2014, 10-6-2014, 25-6-2014, 7-7-2014, 14-7-2014, 21-7-2014, 31-7-2014, 24-9-2004 and finally on 2-10-2014 the court refused its request. It means that the state was granted an aggregate of about 9 months to simply undertake age assessment of the complainant.

Apparently, on 21-7-2014 they brought in a birth certificate of the complainant but this was not the court's direction. On 31-7-2014 the learned state counsel told the court that the complainant cannot be traced.

From the above observation I respectfully do not think that the respondent is ready in any way to help this court arrive at a fair conclusion of this appeal. The nature of this matter does not warrant this court to arrive at a decision that is to say the least shaky and not anchored on the law.

Consequently, this court is left with no other option but to allow the appeal. There is no certainty as to the age of the complainant. The appellant alleges that she was 21 years and that she was his girlfriend and they were going to marry. This argument was never challengeg or countermanded by the respondent.

I do find that this is a clear case where the benefit of doubt ought to be exercised in favour of the appellant. I do exercise the same and set the appellant free unless lawfully held.

Dated, signed and delivered at Kisumu this 10th day of November, 2014.

**H.K.
JUDGE**

CHEMITEI