



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 74 OF 2015**

**BETWEEN**

**MESHACK NYONGESA..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An Appeal from the judgment of the High Court of Kenya at Kitale, (Karanja, J.) dated 18<sup>th</sup> March, 2014*

**in**

**H.C.CR.A. NO. 55 OF 2013)**

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**JUDGMENT OF THE COURT**

1. **MESHACK NYONGESA**, the appellant, was charged with the offences of defilement contrary to **Section 8(1)** as read with **Section 8(4)** and child trafficking contrary to **Section 13(a)** of the Sexual Offences Act, 2006. It was alleged that on 18<sup>th</sup> July 2010 at *[particulars withheld]* Village in West Pokot County, the appellant caused “his penis to penetrate the vagina of” RS “a girl aged 17 years.” In respect of count 2, it was alleged that on 3<sup>rd</sup> October 2010, at the same place, the appellant received RS, a child aged 17, for the purpose of commission of a sexual offence.

2. The appellant pleaded not guilty to both charges but after trial before the Acting Principal Magistrate at Kapenguria, he was convicted on both counts and sentenced to fifteen (15) years imprisonment on count one and ten (10) years imprisonment on count two. His appeal to the High Court having been dismissed he has come to this Court on a second appeal.

3. In his memorandum of appeal, the appellant complains that the two courts below erred in not realizing that the charges against him were defective; that had the two courts below properly analysed the evidence on record, they would have realized that, at the material time, the complainant was or appeared to be above 18 years old; that the prosecution case was riddled with fatal contradictions; that material witnesses were not called; and that his defence was not considered.

4. At the hearing of the appeal, the appellant relied entirely on his written submissions which he had filed.

On ground 1, the appellant submitted that the charges were defective in that they were at variance with the evidence adduced in court. On the second ground, the appellant argued that in the absence of age assessment, the complainant's age was not proved beyond reasonable doubt. He dismissed as a mere photo-copy, hence secondary evidence, the copy of the complainant's birth certificate produced in court. He also dismissed the letter from Kapenguria Polytechnic as not helpful in proving the complainant's age. He argued that he believed that the complainant, a girl pursuing a tailoring course in a polytechnic, was over 18 years.

5. Mr. Mulati for the State dismissed this appeal as lacking in merit. He submitted that the copy of the birth certificate, the production of which the appellant did not oppose, conclusively proved that, at the material time, the complainant was under 18 years old. He therefore urged us to dismiss this appeal in its entirety as the sentences imposed are legal.

6. Prior to the enactment of the Sexual Offences Act, sexual predators, who ruined the lives of our children, escaped unpunished or with lenient sentences. We therefore laud the enactment of that Act. As we do that, we should in the same breath express our concern about the unanticipated problem that the Act has caused to our boy child.

7. We take judicial notice of the fact that these days, our children engage in sexual adventures at very early ages. Male children, as young as 14 years, have been brought to our courts charged with defilement, sometimes of females about the same age or slightly younger. Upon conviction, boys above 18 years old have been sentenced to mandatory life or long terms of imprisonment, since the *Sexual offences Act* prescribes minimum sentences. We think that time has come to consider certain amendments to the Act to give Courts some discretion in passing sentence in certain cases.

8. Having considered these rival submissions and carefully read the record, we are of the view that this appeal can be disposed of on the ground of the apparent age of the complainant. From the appellant's evidence in court and that of the complainant, it is clear to us that the appellant seduced the complainant and took her as his wife. They have a child and the appellant was supporting both mother and child.

9. Although his age is not stated, the appellant is obviously a young man. At the material time, the complainant was about 17 years old. There is nothing on record about her appearance. She may very well have appeared an adult as the appellant claimed before us.

**10. Section 8(5)** of the Sexual Offences Act provides a complete defence to a charge of defilement if it is shown that the accused believed that the child was 18 years or above. It provides that:

**It is a defence to a charge under this section if—**

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

**(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.**

11. We take judicial notice of the fact that these days, children, especially females, appear older than they actually are. In the circumstances, given the fact that this is a defence which few non-lawyers know about, it is our considered view that where a young man is charged with defiling a girl child above the age of 16 years, the trial court should ascertain whether he had reason to believe that the girl was 18 years or above. The appellant has raised this defence for the first time in this appeal. Whereas the defence set out under *section 8(5)* of the Act may not have been strictly applicable in the appellant's case, but the fact that the complainant was a college girl may have caused the appellant to believe that she was an adult.

In the peculiar circumstances as stated above, we allow this appeal, quash the appellant's conviction and set aside the sentence imposed upon him. The appellant shall therefore be set free forthwith unless otherwise lawfully held.

**DATED and delivered at Eldoret.**

**This 25<sup>th</sup> day of November, 2016.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original

**DEPUTY REGISTRAR**