



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL APPEAL NO 46 OF 2014**

**JOHN NDAI AMIRI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 97 of 2012 in the Senior Resident Magistrate’s Court at Wundanyi delivered by Hon M. Chesang (RM) on 29<sup>th</sup> March 2013)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant, John Ndai Amiri, was tried and convicted by M. Chesang, Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (3) of the Sexual Offences Act No 3 of 2006. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment.
2. The particulars of the charge were as follows :-

**“On the diverse dates between April 2011 and September 2011 at [particulars withheld] within Taita Taveta County, unlawfully and intentionally caused his penis to penetrate the vagina of J C M a girl aged 17 years.”**

3. The particulars of the alternative charge were as follows:-

**“On the diverse dates of (sic) April 2011 and September 2011 at within [particulars withheld] Taita Taveta County, unlawfully and intentionally touched the vagina of JC M a girl aged 17 years with his penis.”**

4. Being dissatisfied with the said judgment, on 9<sup>th</sup> November 2015, the Appellant filed Mitigation Grounds of Appeal which stated inter alia:-
  1. **THAT he was a first offender and a layman on matters of law.**
  2. **THAT he was not well informed of the Complainant’s age at the time he got engaged to her.**
  3. **THAT he was a father and breadwinners of his family.**
  4. **THAT he had become rehabilitated and transformed (sic).**

5. His Written Submissions were also filed on 9<sup>th</sup> November 2015 while the State's Written Submissions and List and Bundle of Authorities were dated and filed on 16<sup>th</sup> November 2015.
6. When the matter came up for the hearing of the appeal on 16<sup>th</sup> November 2015, both the Appellant and the State informed the court that they would rely entirely on their respective Written Submissions as they did not wish to highlight the same.

## **LEGAL ANALYSIS**

7. As can be seen from his Mitigation of Appeal, the Appellant did not deny that he had had sexual contact with the Complainant (hereinafter referred to as "PW 1"). As grounds (3) and (4) were mitigation grounds, the only issues for determination by this court was whether or not ignorance is a defence in law and whether or not there was any legal basis to disturb the Trial Magistrate's finding on the ground that the Appellant was not aware of PW 1's age by the time he got engaged to her. The court will therefore address the two (2) issues under the heads shown hereinbelow.

### **I. IGNORANCE OF THE LAW**

8. The Appellant stated that while he appreciated the fact that ignorance is no defence, he would not have committed the offence had he been aware of the law. He submitted that he was now sufficiently informed of the law and promised to be an ambassador of the said law. He therefore pleaded for a less severe punishment.
9. On its part, the State argued that ignorance is no defence in law and that having participated in proceedings which were conducted in a language that he well understood, the Appellant did not suffer any prejudice.
10. As both the Appellant and the State were *ad idem* of the position of ignorance in law, the court found itself in agreement with the State that ignorance of the law is no defence. For the said reason, the Appellant's Ground of Appeal would not succeed and the same is hereby dismissed.

### **II. NON- DISCLOSURE OF PW 1'S AGE**

11. The Appellant began by quoting that "**Love is blind**". He blamed this unexplainable feeling and PW 1's mature physical appearance, which was deceptive, for the predicament he had found himself in. He contended that he did not know that PW 1 was a minor and that since she was only shy of a few months to turning eighteen (18) years, she had attained the minimum age of giving consent in a sexual relationship.
12. The State referred the court to the case of **Moses Nato Raphael vs Republic [2015] eKLR** where the Court of Appeal rendered itself as follows:-

**"...As long as there is evidence that the victim is below 18 years, the offence of defilement will be established...The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability..."**

13. It did appear from the proceedings that PW 1 was seventeen (17) years by the time she befriended the Appellant and engaged in a sexual relationship. While submitting in this matter, in his own words, the Appellant termed his relationship with PW 1 as '**immature and unlawful**'. No value would be added in trying to establish whether or not there was indeed any sexual contact between the Appellant and PW 1 as the fact was admitted. This was sufficient proof that defilement did occur.
14. To invoke the defence that he was misled into believing that PW 1 was not a minor when he or

she engaged in sexual relations with him, the Appellant ought to have demonstrated the following:-

- a. **THAT PW 1 deceived him into believing that she was over the age of eighteen years at the time of the alleged commission of the offence;**
- b. **the accused reasonably believed that PW 1 child was over the age of eighteen years.**

15. The Appellant told the Trial Court that he was married. In his examination-in-chief, he did not say that PW 1 had misled him about her age. It was only during cross-examination that he stated that he did not know PW 1's age. He said that PW 1 only informed him that she had completed primary school but had not proceeded further.
16. It was clear from the Appellant's evidence that he did not enquire how old PW 1 was, much to his detriment. Had he demonstrated the steps he took to ascertain PW 1's age after she told him that he had completed primary school and proven that she misled him about her age thereafter, the Appellant could comfortably have sustained a defence as provided for in Section 5 of the Sexual Offences Act Cap 62A (Laws of Kenya).
17. Having had due regard to the circumstances of the case, the court came to the firm conclusion that the Prosecution was able to prove its case beyond reasonable doubt. It was irrespective that the Appellant was a first offender or that he was reformed or that he was not aware of the law or that he was the breadwinner of his family.
18. The sentence for defiling such a child of PW 1's age is given in Section 8(4) of the Sexual Offences Act. The same provides as follows:-

**“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.”**

19. Accordingly, the court's hands were tied as the law provides one (1) minimum sentence. The Appellant cannot therefore have the benefit of reduction of his sentence as he had proposed.

## **DISPOSITION**

20. As the Appellant's guilt was unequivocal, having admitted to having committed the offence, this court found that he had not advanced any sufficient reason to persuade it to interfere with the decision of the trial court. The court hereby declines to quash and/or set aside the sentence that was meted upon the Appellant by the trial court as the same was lawful and fitting and instead affirms the said sentence that was imposed on him.
21. The upshot of this court's judgment, therefore, was that the Appellant's Appeal filed on 9<sup>th</sup> November 2015 was not merited and the same is hereby dismissed.
22. It is so ordered.

**DATED and DELIVERED at NAIROBI this 17<sup>th</sup> day of December, 2015**

**J. KAMAU**

**JUDGE**

In the presence of:-

John Ndai Amiri..... Appellant

Sirima..... State

Gilbert Barua– Court Clerk



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