



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 32 OF 2012**

ARTHUN MSHILA MANGA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 105 of 2010 of the Senior Resident Magistrate's Court at Wundanyi – Orenge - **SRM**)

**JUDGMENT**

Appellant **ARTHUN MSHILA MANGA** was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement contrary to section 8(4) of the Sexual offences Act No. 3 of 2006.

The particulars are that on the 14th day of February, 2010 at **[Particulars withheld]**, Taita-Taveta County the Accused had unlawful carnal knowledge of J. M. a girl aged seventeen (17) years.

The grounds for appeal in the main is that of age factor.

It is the appellants contention that the age of the Complainant was not ascertained and proved and secondly that the case in the lower court was riddled with inconsistencies and contradictions.

On the issue of age assessment the Complainant herself at page 8 line three of the proceedings did tell the court that she is seventeen (17) years old and at form three **[particular withheld]** girls. Her mother J. S. (PW 2) did tell the Court that she had forgotten the age of her daughter.

The clinical officer (PW 3) did produce a P3 form and a child welfare card as exhibits on behalf of his colleague Jenilize who it was said was on study leave.

The trial magistrate admitted the two documents under section 77(2) of the Evidence Act. He further did note that the case involved a child and there was need to have a speedy trial and the court could not await the clinical officer who was on study leave for two years.

The child health card shows the date of birth as 21st September, 1993. It is the clinical officer who produced it and it was marked as exhibit No. 2 for the prosecution. There was no objection to its

production.

The Accused did not cross-examine the witness who produced it. He did not ask questions in relation to the P3 form either. I am satisfied that the age of the Complainant was properly assessed as seventeen (17) years.

From a perusal of the evidence adduced in court its apparent that he complainant was known to the appellants before and that he had invited her to his house where they had sexual intercourse. At page 8 line 7 of the proceedings she states,

**“I went to his house and we had sex. He caressed me before we had sex. I had stayed for about one hour before I left to go home”.**

It is because she was late in going home that her parents were furious and interrogated her as to her whereabouts all that time. Her mother PW 2 had told the court that she had sent her daughter (complainant) at 4:00pm but she returned home at 9:00 pm and upon interrogation she said that she was at the house of the Appellant where they had sexual intercourse but they had used a condom.

The clinical officer who examined the complainant found that her hymen was not intact and the vagina was gapping.

On the issue of contradictions. It is contended by the appellants counsel that the complainant did contradict herself as to whether she knew the appellant before this incident.

This case was heard by two magistrates. When it started **de novo** the complainant had testified to the effect that the appellant was her friend. Before the previous magistrate she had testified that she met the Appellant that day but during cross-examination she did testify that she knew the appellant as Mshila and that he had given her his mobile telephone number. While I do agree that there is element of contradiction, I am of the considered view that it does not go to the roof of the case. The fact still remains, whether they knew each other that day or not, the two had sexual intercourse in the house of the appellant.

Having carefully analysed the evidence adduced before the trial court I find that the Conviction was safe. The imprisonment term of fifteen (15) years is the minimum provided for. It is legal. There is no reason to disturb it.

This appeal has no merit and is disallowed.

Judgment delivered dated and signed this **9th** day of **October, 2013**.

.....

**M. MUYA**

**JUDGE**

**9TH OCTOBER, 2013**

**In the presence of:-**

Learned Counsel for the state Miss Mwaura

Learned counsel for the appellant Mr. Mwakisha

Court clerk Musundi



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