



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**Criminal Appeal No. 21 Of 2019**

**(Being an appeal from the judgement of Hon. M.I.G Moranga (SPM) dated 8th March 2019 in criminal case No. 42 of 2018)**

**BMA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) and (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 25<sup>th</sup> day of March 2018 at [Particulars Withheld] farm within Trans-Nzoia County intentionally caused your penis to penetrate into the vagina of J. E. A. a child aged 17 years.**
2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 25<sup>th</sup> day of March 2018 at [Particulars Withheld] farm within Trans-Nzoia County intentionally by use of your genital organ namely penis caused contact with the genital organ namely vagina of J. E. A. a child aged 17 years.**
3. The Appellant was convicted and sentence to serve 17 years' imprisonment hence this appeal. The summary of the evidence as presented during trial is worth consideration before looking at the merits or otherwise of the appeal.
4. **PW1** testified that she was a student at [Particulars Withheld] College. She went on to state that the Appellant has been her friend from the year 2014. That they have had several consensual sex together. They were arrested by her brother who had both of them taken to Matisi police post and later to Sibanga. She was later taken to the hospital for treatment and examination.
5. **PW2 E** is the father to the Complainant. She said that he was a widower and the Complainant was aged 18 years' old. He went to state that the Complainant disappeared from school and he reported her disappearance at the police station. Later his son managed to trace the two and they were arrested. He said that he knew the Appellant who was his neighbour.
6. **PW3 AME**, the brother to the Complainant testified of how he arrested the Appellant while he was in the company of the Complainant. He said that PW1 had disappeared from school and they were looking for her.
7. **PW4 FAA** a pastor at [particulars withheld] Ministry testified that the Complainant was one of their children at [particulars withheld] Orphanage and as he travelled back from Nairobi he was informed about the disappearance of the Complainant. He informed her parents as well as made the report at Sibanga police station. Later he was called by pw3, the brother of the complainant and informed him that she had been traced. The following day they picked her from Matisi police post and took her to the hospital.
8. **PW5 JOHN KOIMA** the clinical officer from Kitale County Referral hospital examined the Complainant and using the notes of Dr Kegode filled the P3 forms. He concluded that the hymen was missing and was old looking. There was also vaginal discharge. He concluded that there was penetration.
9. **PW6 CORP.BENJAMIN TARUS** from Sibanga Patrol Base carried out the investigations having taken over from PC Alex Simiyu. They recorded witness statements after the matter had been reported. Earlier own it was reported that PW1 had disappeared. Eventually they were arrested and brought to the station. He issued them with a P3 form which was filled and thereafter preferred charges against the Appellant.
10. **PW7 PHARIS SILALI** from the dental unit Kitale County Referral hospital examined the minor and observed that she was 17 years'

old. He produced the Dental Age Assessment report.

11. When placed on his defence the Appellant gave sworn evidence denying the charges and said that he had come from Kabarnet on 26<sup>th</sup> March 2018 the previous day and her mother told her to take her phone for charging. On the way he met PW2 and PW3 who beat him up and later taken to Kitale Ndogo camp and later Matisi police post. Later he was taken to Sibanga police post and was surprised to be accused of rape. He denied the charges.

**ANALYSIS AND DETERMINATION.**

12. The court ordered the parties to file their written submissions which they have. The court has perused the same carefully as well as the entire proceedings at the lower court.

13. The court agrees with the learned state counsel that all the three ingredients of the offence, namely, the age of the minor or victim, the identity of the perpetrator as well as penetration were proved in this matter.

14. The age was proved by the production of the Dental Age Assessment which was not contested. As a matter of fact, the minors father said that she was 18 years' old.

15. On the question of penetration, the evidence of the minor was believable and graphic. The minor's brother found them at 5am leaving the Appellants house.

16. Having stated so, it appears from the report of the Probation Service dated **31<sup>st</sup> May 2018** that she was 17 years and 10 months old. On the portion dealing with **personal history** the officer found that;

**“though there are no birth documents his mother says that he was born on 11/7/2000. This implies that he is about 17 years and 10 months old as at now.”**

17. In the absence of any other contrary Age Assessment the trial court ought to have taken into consideration the report which was before it. Essentially the court was dealing with a case of minors behaving badly and exposing societal inadequacies so to speak. It is imperative that the trial courts invariably and where it appears on the face of that court that the accused person is probably a minor ought to down tools until this question of age is determined.

18. For now, this court on that reason alone declares a mistrial. The court would have ordered a retrial but it is evident that the complainant was equally experimenting her teenage life and it appears from the appellant's mitigation that she was already married elsewhere.

19. For the above reasons, the appeal is allowed, the Appellant set free unless lawfully held.

**Dated, Signed and Delivered at Kitale this 29<sup>th</sup> October 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**29/10/2020**