



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO.75 OF 2018**

**(Being an appeal from the decision of Hon. P. K. Mutai (SRM)**

**in Criminal case No. 94 OF 2018)**

**MOSES MDOGO ICHELEZE.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant was charged with the offence of **defilement of a child contrary to Section 8(1) and (3) of the Sexual Offences Act no 3 of 2006**. The particulars of the offence were that **on diverse dates between January 2016 and 20<sup>th</sup> August 2017 at Amuka location within Transzoia County caused your penis to penetrate the vagina of PMB a child aged 14 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 offence were that on diverse dates between 10<sup>th</sup> January 2016 and 20<sup>th</sup> August 2017 at Amuka Location Kitale within Transzoia County intentionally caused contact between your penis and the vagina of PMB a child aged 14 years**.
3. The Appellant was convicted and sentenced to 20 years' imprisonment hence this appeal. The parties were ordered to file written submissions which they have complied. The summary of evidence as presented during trial is as hereunder.
4. **PW1 NYONGESA GEOFFREY** from Kitale District hospital examined the Complainant and filled the P3 form on 21<sup>st</sup> April 2018. His findings were that the hymen was broken and she was already pregnant. He produced the P3 form as well as the treatment notes.
5. **PW2** the Complainant testified that she was a class 8 pupil at **[Particulars Withheld]** primary school and she was 15 years old. She said that sometimes in June 2017 while at home her mother sent her to the shops and she met the Appellant who proceeded to seduce her and he even bought her doughnuts worth Ksh.20. He then accompanied him to his house where they engaged in sexual activity.
6. The Complainant went on to state several other days which they engaged in sexual activity with the Appellant inside a maize field as well. She thereafter missed her monthly period and she was discovered by her teacher to be pregnant. She was taken to the hospital and the same was confirmed. She told her parents, the teachers and the police that the Appellant was responsible.
7. **PW3 JWS** the father to the Complainant said that he knew the Appellant who was his neighbour and that he was called by the school head teacher and informed that the Complainant was pregnant. He inquired and she told him that the appellant was responsible. She gave birth on 25<sup>th</sup> May 2018. Later the Appellant was arrested after intervention from the children's department.
8. **PW4 CORP. PAUL KARANJA** from Kitale police station carried out the investigation, after the matter had been reported. He said that the Appellant went into hiding and he issued a warrant of arrest. He said that the Appellant confirmed that he was in a relationship with the complainant. He recorded statements from the witnesses and preferred the charges. He also produced the certificate of birth of the Complainant.
9. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he had never engaged in any sexual liaison with the Complainant and that he was in school during the said period. He said that the pregnancy could be of Kevin, Stephen or Juma.

## ANALYSIS AND DETERMINATION

10. The court has perused the grounds of appeal by the Appellant which to say the least are general in nature. He said that the evidence as tendered were inconsistent and should not have sustained the charge.

11. The three ingredients of the offence that must be proved so as to sustain the charge are the age of the victim, the identity of the perpetrator and penetration. This court in this appeal is guided by the findings in the case of **OKENO VERSES REPUBLIC (1973) E. A. 32** where it observed as follows.

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”***

12. The age of the minor was not contested as the certificate of birth produced though it appears it was procured while the matter was on indicated that she was born on 25<sup>th</sup> December 2003.

13. On the issue of penetration, the fact that she was found to be pregnant and even by the time of testifying she had already delivered was sufficient to establish this ground.

14. The identity question could as well be answered in the affirmative but only to the extent that the parties knew each other. There was no eye witness to the incident. The Appellant was known in the area by the Complainant as well as her father.

15. In the absence of an eye witness to corroborate what the Complainant said, how certain was the respondent that the Appellant was responsible for the pregnancy? It appears that the only reason why the Appellant was arrested and charged was because the Complainant became pregnant.

16. That pregnancy was not ascertained that it belonged to the Appellant. What would have happened had she not conceive? It is very probable that she would have continued with her way of life with the Appellant or some other men. There were names floated during cross examination, including those of Stephen and Juma. The Appellant later repeated them in his unsworn evidence.

17. This brings in the character of the Complainant. Section 124 of the Evidence Act provides that the court will proceed to convict if it finds that the Complainant was truthful. It states that;

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

18. In the perspective of this court, it is unlikely that the minor may have engaged herself in sexual affairs with the Appellant alone. The surest way was to undertake a DNA test. This would have sealed the whole case.

19. This court is conscious of the fact that in defilement matters undertaking a DNA is not the only reason for conviction but other factors also come into play. In this case however, there was no eye witness. The only evidence is that of the minor. The incident come into being when it was discovered that she was expectant. Other names were floated who may have had relationships with her.

20. The above casts doubt on the credibility of the Complainant’s character and invites doubts. This doubt would have been sorted out by undertaking a DNA exercise noting that the charges facing the Appellant were indeed grave and would sent him in jail for many years.

21. For the above reasons this court finds merit in this appeal, the Appellant is hereby set free unless lawfully held.

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

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**H. K. CHEMITEI**

**JUDGE**

**29/10/2020**