



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 15 OF 2018**

**(Being an appeal arising from Kitale Chief Magistrate's court Sexual Offence)**

**Case No. 62 of 2017 delivered by P.C. Biwott Senior Principal Magistrate on 28/2/2018)**

**TOBIAS ROBIN BARASA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence was that **on the diverse dates between 1<sup>st</sup> February, 2017 to 31<sup>st</sup> March, 2017 within Trans -Nzoia County, intentionally caused his penis to penetrate into the vagina of DNK a child aged 17 years.**

2. The alternative count 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 the diverse dates between 1<sup>st</sup> February, 2017 to 31<sup>st</sup> March, 2017 within Trans -Nzoia County, intentionally caused contact between his genital organ namely penis and the genital organ namely vagina of DNK a child aged 17 years.**

3. After a full trial the appellant was convicted and sentenced to 15 years imprisonment hence this appeal. Before looking at the merits or demerits of the appeal it shall be appropriate to summarise the proceedings at the trial court.

4. **PW1 the complainant** who was later declared to be a hostile witness stated that she was 17 years old and a form III pupil at [particulars withheld] Secondary school. He said that she met the appellant in December 2016 and danced together at [particulars withheld]. They exchanged phone numbers and later left to a 2 roomed house where they engaged in sexual intercourse. He escorted her home. She later became pregnant and according to her the same was caused by the appellant. She testified also that she lost her virginity at class 7 but with a different person.

5. **PW2 ENK** is the brother to the complainant. He said that he was her guardian as well. He was called to school in May 2017 and informed about the complainant's pregnancy. He took her to the police station and later to the hospital. She had informed her teachers the person responsible for her pregnancy. He did not know him. The appellant was arrested at Khetias Supermarket.

6. **PW3 John Koima** the clinical officer examined the complainant and found her to be pregnant. Her hymen was broken and there was no injury on her vagina.

7. **PW4 CPL Felicity Rono** from Kitale police station gender office carried out the investigations and preferred charges against the appellant. She said that the complaint implicated the appellant who was her boyfriend. She did produce the complainant's birth certificate.

8. When put on his defence the appellant gave sworn evidence denying the charges. He said that he was arrested at Khetias Supermarket doing promotional work by 3 people. He was taken to Kitale Police station and later charged.

**Analysis and Determination**

9. The crux of the appellant appeal centres on the entire nibric of the prosecution evidence. According to him the same was not sufficient to have heard him convicted.

10. Having gone through the same as well as the proceedings herein this court is inclined to allow this appeal for the simple reason that the character of the complainant was wanting. I state so for the reason that she admitted that she lost her virginity in class 7. Essentially therefore this is a child who must have engaged herself in sexual activity early enough.

11. If this was so, was it difficult to engage herself in Sexual activity with other man other than the appellant. It appears from her evidence that their encounter was brief, and that was during the December holidays. No other evidence was led to suggest that the appellant was with the complainant. Infact perhaps had the complainant not been pregnant, the whole scenario may have gone silent.

12. The fundamental issue in such borderline cases involving minors was to undertake a DNA exercise. This in my view would have sealed the case. To believe that the complainant with such questionable background who had infact implicated another boy called Jackton, would be risk. In short I do not find her to be truthful.

13. Apparently, there was no attempt to call any other independent witness to buttress that she was seen with the appellant dancing and exchanging phone numbers at the Social hall.

14. Again the DNA test on the baby would have been the easiest route to this matter. The appeal is allowed, the appellant set free unless lawfully held.

**Delivered, signed and dated at Kitale this 30<sup>th</sup> day of January, 2019.**

---

**H.K. CHEMITEI**

**JUDGE**

**30/1/19**

**In the presence of:**

**Mr Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court**