



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 46 OF 2015**

**BENARD WANJALA SIROMTRO.....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 were that on the **diverse dates between 1<sup>st</sup> and 30<sup>th</sup> September 2013 at [Particulars Withheld] trading centre within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of MNM 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 diverse dates between 1<sup>st</sup> and 30<sup>th</sup> September 2013 at [Particulars Withheld] trading centre within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of MNM a child aged 17 years.**

3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The grounds raised in his appeal centres generally on the evidence tendered by the prosecution. He argued that the same was not consistent enough to have warrant a conviction.

4. The facts as presented during trial can be summarised as follows;-

**PW1** Stated that she was 17 years old having been born on 25/11/1995 and by then a form one student at [Particulars Withheld] Academy. She said that she was lured into the appellant's house on 29<sup>th</sup> September 2013 where she had been sent by her mother to purchase vegetables. He defiled her in his bedroom.

5. The same occurred on 28<sup>th</sup> October 2013 where again he defiled her in his bedroom. His wife was not there except the young children whom they left. She failed to attend school and her younger sibling reported the incident to her mother. Her mother then went to the school where she was given a letter to take to the chief. After interrogating the complainant she told them of her liason with the Appellant.

6. The Appellant was arrested. The complainant was taken to Kitale District Hospital for treatment and further examination. A P3 form was equally issued.

7. **PW2 FNM** was a pupil at [Particulars Withheld] primary school in class 6. She testified that on 28<sup>th</sup> October 2013 she went to school. She went to PW1 class to borrow a dictionary (Kamusi) but she was not in class. She reported to the parents that she did not go to school.

8. **PW3 Farice Silali** the dental officer from Kitale District hospital produced the dental age assessment report prepared by Dr. Ndege which showed that the complainant was aged around 17 years.

9. **PW4 John Koima** a clinical; officer from Kitale District Hospital examined the complainant and found her hymen torn. She was having her periods during the examination time.

10. **PW5 APC Francis Rotich** from Kiminini AP Camp rearrested the appellant when brought by the members of the public.

11. **PW6 BN** is the mother to the complainant. She said that on 28<sup>th</sup> October 2013 FM who schooled with the complainant came home and told her that the complainant was not at school. Later and after some few minutes the complainant arrived but was hesitant to tell her where

she was.

12. On 29<sup>th</sup> October 2013 she went to school and was given a letter to take to the chief so that she could disclose where she was. She told them that she was at the appellant's place. She was then referred to the police and later Kitale District hospital where the complainant was treated.

13. When placed on his defence the appellant gave sworn evidence denying the charge. He said that the whole idea was a fabrication of fellow pastors who were jealous of his progress of getting more members in his church.

#### **Analysis and Determination**

14. The court has perused the evidence together with the submissions by both the appellant and the learned State counsel. The State has conceded to this appeal. Basically on the grounds that the age of the complainant was a borderline one. The dental age assessment placed her around 17 years old.

15. Taking into consideration the other two ingredients namely the identity of the perpetrator as well as whether she was defiled, I find the same were clearly proven. The complainant evidence was clear and straightforward. She was consistent even on cross-examination. The incident took place during the day and in my view she clearly knew the appellant.

16. The medical documents produced showed that although she was menstruating, the hymen was torn. Her evidence as found by the trial court was truthful. Had the question of her age not been doubtful, I would have dismissed the appeal. I equally note that ordinarily there is a margin of error given to the age analysis. The complaint could as well be 18 years old.

17. I equally note that the appellant has been in custody from 8<sup>th</sup> November 2013 and I suppose that he has learned his lesson.

18. The appeal is hereby allowed the appellant set free unless lawfully held.

**Delivered, signed and dated at Kitale this 25<sup>th</sup> day of March, 2109.**

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**H.K. CHEMITEI**

**JUDGE**

**25/3/19**

**In the presence of:-**

**Mr Omoria for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**