



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 16 OF 2018

(Being an appeal arising from Conviction and sentence in Kitale Chief Magistrate's Court S.O. No. 162 of 2016 delivered by Hon. P.C. Biwott (SPM) on 7/3/2018)

ALEX JUMA OPICHO.....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**. The particulars of the charge was that **on the 22nd day of July, 2016 at [Particulars Withheld] centre within trans nzoia county intentionally caused your penis to penetrate vagina of MNS a child aged 17 years.**
2. The alternative count was committing an **indecent act Contrary to Section 11(1) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge was that **on the 22nd day of July, 2016 at [Particulars Withheld] centre within Trans Nzoia County intentionally caused the contact between your penis and vagina of MNS a child aged 17 years.**
3. The Appellant was convicted and sentenced to serve 15 years imprisonment hence this appeal. Before looking on the merits or otherwise of the same, which has been opposed by the Respondent, it's appropriate to summarise the evidence as presented during trial.
4. **PW1 the complainant** stated that she was born on the 5th January, 1999 and was a form 4 student at [Particulars Withheld] Friends School. She said that she got to know the appellant in the year 2015 as he was building a house for her cousin. They befriended each other. They met on 22nd July, 2016 and they went to the Appellant's friend at Kiminini centre where they had sex. The complainant did not tell her parents for fear of being beaten
5. Sometimes in October, 2016 she felt sick and was taken to the hospital where she was diagnosed with a pregnancy of about 4 months. She nevertheless miscarried and the foetus died. She told the father that the Appellant was responsible and this led to his arrest.
6. **PW2 CSK** testified that he was the father to pw1 who was now aged 18 years. He said that he was called by the deputy head teacher [Particulars Withheld] secondary school and informed of the complainant's illness. He went to the school and picked her up. They went to the hospital where she was discovered to be pregnant.
7. She told her that the Appellant was responsible and he decided to look for him. He was later arrested and brought to Kitale police station where he was charged. He also took the child to Kitale district hospital where he was treated and the P3 form filled.
8. **PW3 GABRIEL GICHUKI** a clinical officer from kitale district hospital produced the P3 form which showed that the hymen was broken and old looking. He found that she was pregnant and had some infection. He produced the said P3 form.
9. **PW4 PC FRANCIS ROTICH** from Kiminini AP camp arrested the Appellant under the instructions of PW2.
10. **PC PETER KWATENGE** from Kitale police station gender office carried out the investigations once the matter was reported at the station. He recorded statements from the witnesses and relied on the medical documents as he preferred charges against the Appellant.
11. When placed on his defence he gave sworn evidence denying the charges. He said that he was a mason and arrested while at his home. He denied that he knew the complainant.

ANALYSIS AND DETERMINATION

12. The court has perused the entire proceedings meticulously as well as the written submissions on record by both parties. The court'S duty is to analyse the evidence afresh and come up with a fresh and independent finding taking a precaution that it did not have the opportunity of seeing the witnesses during trial. **(See OKENO VS. REP. 1973 EA 32).**

13. The three ingredients of defilement are now well known, namely the age of the victim, the identity of the perpetrator and penetration. In the grounds of appeal raised by the appellant, the substance thereof is a general attack on the findings of the trial court. He argues that the matter was not proved beyond the shadow of doubt.

14. Looking at the evidence globally, there is no doubt that the complainant engaged herself in sexual activity and that is why she became pregnant although the pregnancy aborted as per the medical evidence on record.

15. The age of the complainant was clearly established by the production of the certificate of birth although the Appellant wanted to challenge the period when it was obtained. Clearly it was obtained way before the incident.

16. Who then defiled the complainant? As clearly pointed out by the trial court, the Appellant cannot say that he did not know the complainant. He admitted that he was a mason, a trade which pw1 said that she knew him to be involved in. Beside this they had been friends for over one year a fact which I do not find the complainant lied to the court.

17. In my view therefore I find the complainant truthful as per the proviso to Section 124 of the Evidence Act. She was consistent all through and there was no demonstration that she may have engaged herself sexually elsewhere.

18. That line of conclusion brings in her character. It appears to me that the sexual encounter was consensual save to add that had she not been pregnant she would not have informed anybody even her mother. She stated that she did not concede to the sexual advancement by the complainant, yet after the fact she did not do much to mitigate like informing someone close to her even her teachers. Although she was 17 years and almost 18, I do not think that she was too naïve to imagine that what the appellant did was correct and merits protection.

19. On his part, the Appellant knew that although she had accepted to befriend her she was still school going and therefore he ought to have waited till she completes her studies. His denial in his defence did not hold water or at all.

20. Having stated so, I find that the complainant acquiesces in the whole offence and as stated above had she not become pregnant she would not have reported the matter.

21. For the above reasons, I shall dismiss the appeal for being of no merit. Using the discretion of this court and considering the overall circumstances of the offence, this court sets aside the sentence of 15 years imprisonment and replaces it with a 5 years' imprisonment from the date herein.

22. Orders accordingly.

Dated, signed and delivered in open court at Kitale this 7th day of August, 2019.

H. K. CHEMITEI

JUDGE

7/8/19

In the presence of:

Mr Omoria for Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.