



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO 71 OF 2018**

**(Being an appeal from the Judgement of Hon. P. K. Mutai in Kitale CRCC No. 126 of 2017)**

**KMM.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**KMM.....ACCUSED**

**JUDGEMENT**

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1), 8(3) of the Sexual Offences Act**. The particulars of the charge are that **on the 8th day of October 2017 within Trans - Nzoia County intentionally caused your penis to penetrate into the vagina of MAK a child aged 15 years.**
2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act**. The particulars of the charge are that **on the 8th day of October 2017 within Trans-Nzoia County intentionally caused contact between your genital organ namely penis and genital organ namely vagina of MAK a child aged 15 years.**
3. The Appellant was convicted and sentence to serve 20 years' imprisonment hence this appeal. Before looking at the merits of the appeal it shall be worthwhile to summarise the evidence as presented during trial.
4. PW1 the complainant stated that she was aged 15 years old and a form 2 student at [Particulars Withheld] secondary school. She said that on 9/10/17 she was sent to the posho mill by her mother and she met the Appellant whom is also called *Rajab* on the way. The Appellant was riding his motor cycle and he went with her to his home. At the Appellants home he proceeded to have sexual intercourse with the complainant and thereafter released her to go back home.
5. She did not inform anybody concerning the incident but on 11/10/17 she had a headache and she informed her mother. She was taken to Kitale hospital and was found to be pregnant and HIV positive as well. She said that she had had previous sexual intercourse with the Appellant without any form of protection.
6. The matter was then reported at the police station where she was issued with the P3 Form. She accused the Appellant for being responsible for the pregnancy since she had not had any other sexual intercourse with anyone else.
7. **PW2 AK** is the complainant's father. He said that he was away for a week and when he came back home he found the Complainant at home instead of being at school. She disappeared for 2 weeks from 22/9/17 when he learned that she was staying with her aunt and she was reluctant to go to school. She was also rude and her body was changing physically. She was taken to Kitale hospital where she was found to be pregnant and infected. He explained to her the results and she said that the appellant was responsible. He said that he had suspected that the Appellant had an affair with the minor.
8. **PW 3 P.C (W) AGNES ACHIENG** from Sikhendu police post carried out the investigation and preferred charges against the appellant. She said that PW2 brought the information to the police station and she issued him with the P3 Form which was duly filled and she recorded statements from the witnesses and preferred charges against the Appellant. She was told by the Complainant that they have been in the affair

since 2015.

9. The appellant gave unsworn evidence denying the charges. He said that he had visited his uncle at p[particulars withheld] and when he came back he was told that he was required at the chief's office. He went there and he was arrested and accused of defilement. He said that medical test was carried out and he was found to be HIV negative whereas the Complainant was found to be positive.

#### **ANALYSIS AND DETERMINATION**

10. The court has perused the entire proceedings carefully as well as the submissions by both the Appellant and the Respondent. What is contained in the grounds of appeal by the Appellant is a general attack on the evidence as presented during trial. He complained that there was insufficient medical evidence to prove that he was the person responsible.

11. There is no dispute concerning two critical ingredients to prove the offence of defilement, namely, the age of the Appellant and penetration. The copy of the certificate of birth demonstrated her age. On the other hand, the pregnancy she was carrying showed that there must have been penetration.

12. Was the Appellant responsible? This would have been answered easily had the Respondent conducted a DNA exercise since the complainant was already four months pregnant. Equally the complainant was already as found infected with HIV viruses and what would have been easier on the part of the prosecution other than examining the Appellant as well.

13. The above conclusions are based on the fact that the complainant's character was wanting in the circumstances. She seemed to have willingly engaged herself in sexual activity with the appellant much earlier and were it not for the pregnancy and the infection nobody else would have known.

14. This begs the question whether there would have been other persons who caused the pregnancy and the infection. There was no eye witness to the incident and **Section 124 of the Evidence Act** expects the court to convict if it believes that the minor was truthful. Taking wholesomely the character of the complainant the trial court should have granted the appellant the benefit of doubt which this court hereby does.

15. It should be noted that considering the nature of the case and the gravity of the sentence, there was no reason for the investigating officer to have hurried the investigation. At least even if the DNA would have taken sometimes, she should have had a medical report to established that the appellant was not HIV positive. The Appellant alluded in his defence though unsworn and the trial court should have considered.

16. In the premises, this appeal is allowed. The Respondent should in the future consider DNA exercise where the victim is pregnant or where a child has been conceived and born in such circumstances. This would ease the pressure on all the parties generally and enable the trial courts arrive at a quick settlement of the matter.

17. The appeal is allowed, the appellant set free unless lawfully held.

**Dated, signed and delivered in open court at Kitale this 18<sup>th</sup> day of December, 2019.**

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**H. K. CHEMITEI**

**JUDGE**

**18/12/19**

**In the presence of:-**

**Mr. Omooria for Respondent**

**Appellant – present**

**Court Assistant – Silvia**

**Judgement read in open court**