



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 3 OF 2016**

**(Being an appeal arising from conviction and sentence in Kitale Criminal Court No. 2159 of 2014 delivered by P. Biwott Senior Principal Magistrate on 26/1/2016)**

**DERRICK KISANGI.....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(3) of the Sexual Offences Act No 3 of 2006**. The particulars of the Offence were that **on diverse dates between 23<sup>rd</sup> December 2013 to 31<sup>st</sup> March 2014 within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of J. N. W. 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 No. 3 of 2006**. The particulars of the offence were that **on diverse dates between 23<sup>rd</sup> December 2014 and 31<sup>st</sup> March 2014 within Trans-Nzoia County, intentionally caused the contact between his genital organ namely penis and genital organ namely vagina of J. N. W. a child aged 15 years.**
3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The brief facts as per the evidence on record showed that **PW1 the complainant** who claimed to be a student at [particulars withheld] secondary school and aged 16 years became pregnant and gave birth on 2/10/2014 to a baby girl. She claimed that the appellant was the father of the child having known him for one year.
4. **PW2 E W** the mother to the complainant stated that she got to know that PW1 was pregnant when she became weak and withdrawn. On inquiry she said that the appellant was responsible for the pregnancy. Apparently she knew the appellant who was her neighbour. She took her to the hospital where she delivered on 2/10/2016.
5. **PW3 Joh Koima** a clinical officer from Kitale District hospital produced the P3 form which confirmed that the complainant was pregnant.
6. **PW4 CPL Harun Lumatele** at Toll Administration Police post arrested the appellant after receiving report from the complainant's parents with supporting letters from the area chief as well as the school head teacher.
7. **PW5 S W** the father to the complainant stated that he received the report from his wife regarding the pregnancy. The complainant told him that it was the appellant who impregnated her.
8. **PW6 CP Margaret Kilimo** testified on behalf of Sergeant Nabwire who carried out the investigations and had recorded statements from the witnesses and preferred charges against the appellant. She produced the complainant's birth certificate as well as the child's notification of birth.
9. When put on his defence the appellant gave sworn evidence denying the charge. He only explained how he was arrested on 27/4/2014 while he came back from selling milk and taken to DCIO Officer Kitale police station. He generally denied the charges.

**Analysis and Determination**

10. I have read the entire proceedings together with the lengthy submissions by the state and the appellant. The state rightfully in my view conceded to the appeal.

11. From the outset, the complainant did not even attempt to mention where and when they had sexual intercourse with the appellant. All that she did was to tell her mother that the appellant was responsible for her pregnancy. Her evidence in chief is full of holes. The prosecution did not lay any basis of her sexual encounters. Naturally and legally the appellant did not have any obligation to fill up the gaps.

12. In my view there is nothing to show that the appellant on the face of it had sexual intercourse with the complainant. They may have known each other for one year but that was not enough.

12. Perhaps it would have been prudent to have conducted some DNA test to verify that the child belonged to the appellant.

13. Consequently and without going to the merits or demerits of the grounds raised in this appeal, I think that ground alone stands to allow the appeal. There is nothing to show that it was the appellant who sexually penetrated the complainant as per the legal requirements.

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

**Delivered, signed and dated at Kitale this 12<sup>th</sup> day of April 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**12/4/18**

**In the presence of:**

**Mr Kakoi for the State**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**