



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 1 OF 2017

K J.....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(4) of the Sexual Offence Act No. 3 of 2006**. The particulars of the offence was that **on the 28th day of September, 2015 at [particulars withheld] village within Trans Nzoia County, intentionally caused your penis to penetrate into the vagina of L. A. 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 offence were that **on the 28th day of September 2015 at [particulars withheld] village within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and genital organ namely vagina of L.A. a child aged 17 years.**

3. The appellant was sentenced to serve 15 years imprisonment hence this appeal.

4. The facts as presented during trial were that **PW1 the Complainant** aged 17 years testified that she had consensual unprotected sex with the appellant on 28/9/2015. She became pregnant and had to abandon school. She was advised by the appellant to undertake an abortion but she considered too risky. Beside this the appellant did not have funds to undertake the same.

5. **PW2 Kirwa Labatt** the Clinical officer from Kitale County hospital confirmed the pregnancy when he examined her. He produced the P3 form to that effect.

6. **PW3 Z O** the father to the complainant attested to this fact. He was called by a teacher from St [particulars withheld] where her daughter was who broke the news to her. He reported the incident to the police and took her to Kitale District hospital.

7. **PW4 Corporal Felicity Cheron** from gender office Kitale police station carried out the investigation and preferred charges against the appellant.

8. When put on his defence the appellant gave unsworn evidence and stated that he was a form III student at [particulars withheld] Secondary school and was then 18 years. He narrated how he was arrested on 12/3/2016. He thought he was going to be charged with offence related to pool games but instead he was charged with the current offence which he still denied.

Analysis and Determination

9. I have perused the entire proceedings as well as the written submissions by both the appellant and the learned state counsel. What is not in dispute is the part that the complainant became pregnant as a result of sexual intercourse.

10. The question however is whether the appellant was the cause of the pregnancy. The state has conceded on this appeal solely on the grounds that the appellant ought to have benefited from the Provisions of Section 8(5) of the Sexual Offence Act.

11. I think the above conclusion holds water. I have analysed the evidence on record and I find that the complainant though 17 years of age knew more than an ordinary minor. She in fact advised her boyfriend to use a condom, and thus appears not more than once.

12. In my view she presented herself as a person who the appellant would be excused from thinking that she was not a minor.

13. More fundamentally though is the defence which apparently came later from the appellant. He presented a copy of birth certificate which showed that he was born on 15/11/1998. Although the trial court found so during mitigation it however rejected it on the grounds that it was made to hoodwink the court and that the appellant was aged 18 years as per the assessment.

14. I respectively find that the trial court erred in this. The moment it acknowledged receipt of the same even if it was late in the day, substantial justice would demand that, being a legal valid document it ought to have been taken into consideration. Infact if there was any doubt further inquiries should have been made.

15. Looking at the circumstances obtaining surrounding this matter there was every possibility that at the time of commission of the offence the appellant could have been aged between 17 and 18 years. My above conclusion is buttressed by the investigation officers' testimony during cross-examination that both were students and did their action secretly.

16. In the premises this appeal ought to succeed. The same is allowed, the appellant set free unless lawfully held.

Delivered, signed and dated at Kitale this 12th day of April 2018.

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.