



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 54 OF 2015**

*(Being an appeal arising from Kitale Chief Magistrate's*

*court in Criminal Case No. 3134 of 2013 delivered*

*by C.N. Mugo Resident Magistrate on 16/4/2015)*

**WALTER JUMA WAKHUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

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 charge were that **on diverse dates between June 2013 and 23<sup>rd</sup> November within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of R.N. M. a child aged 14 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 June 2013 within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of R.N. M. a child aged 14 years.**
3. He was convicted and sentenced to 20 years imprisonment hence this appeal. Before looking at the grounds of appeal it shall be appropriate at this juncture to summarise the evidence as presented during trial.
4. **PW1, the complainant** told the court that she was 14 years old and a class 4 pupil at [particulars withheld] primary school. That the appellant had been her boyfriend since January 2013. On various dates, which included August 2013, 17/11/2013 till 23/11/2013 she went to her place and had sexual intercourse. As a consequence of this she became pregnant. She was later traced by her parents and arrested in the appellant's house. She was taken to Kitale District hospital where she was found to be 5 months pregnant.
5. **PW2 P.C. Galeb Yator** carried out the investigations and preferred charges against the appellant. He said that the appellant was arrested by the vigilantes and brought to police station. He equally escorted the minor to the hospital where the P3 form was filled.
6. PW3 John Koima the clinical officer from Kitale District hospital filled the P3 form after examining the complainant and found that the hymen was broken and pregnancy positive. He produced the P3 form as well as the treatment chits.
7. **PW4 G N M** the mother to the complainant testified that the complainant was 14 years old at the time of her disappearance from home. That she disappeared from 17/11/2013 at 7 pm and she informed the village elder on 18/11/13 after looking for her in vain. On 22/11/2013 at 6 pm she was informed by some young girl of the complainant's whereabouts. She went to the appellant's house around 10.00 pm and she heard her daughters voice. At 11.00 pm she took a vigilante Benjamin and arrested them and took them to Kitale police station. Later the complainant was taken to hospital.
8. **PW5 Pharis Silali** from Kitale District hospital dental department produced the dental age assessment report on behalf of Dr Kiprop who assessed the minors age and found that she was 14 years old.
9. When put on his defence the appellant testified of how he wanted to purchase a farm in Kitale and the owner needed kshs 80,000/-. He paid kshs 40,000/- to one Chengoli who later defrauded him and refused to refund the money. That on 24/11/2013 he went to a friend's house (Walter Simiyu) and spent the night there. He wanted to go back to Nakuru where he ordinarily stays but was arrested by 2 people at

around 7 pm who claimed to be police officer. He was taken to the chief's camp and later to the police station. He continued to deny the charges.

### **Analysis and Determination**

10. The substance of the appellant grounds as set out in the petition dated 17/4/2015 are that, the crucial witnesses were not called to testify, Contradictions in the evidence of the witnesses, DNA was not conducted and that his defence was not taken into consideration.

11. I have perused the entire proceedings as well as the submissions both by the appellant and the respondent. This being a first appeal, the court is enjoined to re-evaluate the evidence afresh and come up with a new finding altogether.

12. Three critical elements are necessary for this offence to be established . First of all the age of the victim must be proved, the identity of the perpetrator and that penetration must have taken place.

13. The report by the dental expert Dr. Kiprop clearly places the complainant age at 14 years old. The same was corroborated by her own oral testimony and that of her mother. Although no other documentary evidence was produced I am satisfied that the minor was 14 years old or thereabouts at the time of the offence.

14. Was the appellant the perpetrator? The answer in my view is in the affirmative. Although he tried to explain in his unsworn evidence along story of how he tried purchasing land and got defrauded, I do not think the said defence in any way shook the evidence by the minor. The minor explained vividly on how on several occasions she had sexual encounters with the appellant in his house. None of those encounters took place outside his house.

15. More importantly at the time of arrest, the complainant was found in the house of the appellant. Although, it would have added more weight for the prosecution to have called the vigilant who bursted the two, the evidence of the complainant's mother was still strong. I do not see any suggestion of malice on the part of the minor's mother. No evidence was led even during cross-examination to suggest bad blood between the appellant and the minor's mother.

16. That brings in the 3<sup>rd</sup> element of penetration . Clearly, there was one. This is explained by the pregnancy carried by the minor as found by the clinical officer. The complainant explained the several times that she had sexual intercourse with the appellant.

17. The appellant in one of his grounds has suggested that DNA exercise ought to have been conducted, I presume to determine who was responsible for the pregnancy. Whereas this could have been true, there was no evidence on record to suggest that the complainant had engaged herself with multiple sexual partners. It appears that the only person she had engaged herself sexually was the appellant whom she referred to as her boyfriend.

18. The incident occurred on several occasions and one can easily conclude that the identification of the perpetrator, in this case the appellant was not in dispute.

19. There was suggestion by the learned state counsel that the appellant should be afforded benefit of doubt pursuant to the provision of Section 8(5) of the sexual offences Act.

The main reason being that the minor misrepresented herself as an adult and consequently the appellant should not be blamed.

20. Section 8(5) of the Sexual Offences Act in my view is a special defence Section for an accused person. That section ought to be treated circumspectively and with great care and caution. One must actually demonstratively directly and or indirectly that all along, he assumed that the victim was an adult or presented herself so.

21. In this case, I do not see any such suggestion. The appellant did not deny that the minor was a neighbour and a primary school going child. In my view, he took advantage of an adolescent girl who was literally "experimenting." The appellant was simply an adult. If he needed a wife or a girlfriend, surely, he could not prey on a primary school going child. His defence in any event does not demonstrate this. Worse still he gave unsworn defence which did not afford any opportunity of cross examination. He did not bother to call Changoli or Walter Simiyu to support the side of the story he was advancing.

22. In the premise I do not see any reason why I should disturb the trials court findings. The appeal is hereby dismissed.

**Delivered, signed and dated at Kitale this 11<sup>th</sup> day of April 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**11/4/18**

**In the presence of:**

**Mr Kakoi for State**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read out in open court.**