



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 83 OF 2016

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Criminal Case No. 4248 of 2014 delivered by P. Biwott Senior Principal Magistrate on 24/2/2016)

S K K.....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(4) of the Sexual Offence Act No. 3 of 2006**. The particulars are that **on the 14th day of May within Trans -Nzoia County, intentionally caused your penis to penetrate into the vagina of N. C. S. a child aged 17 years.**

2. He was also charged with the alternative count of **committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 14th day of May 2013 within Trans Nzoia County, intentionally caused contact between your organ (penis) and genital organ (vagina) of N.C.S. a child aged 17 years.**

3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The facts and evidence can be summarised as hereunder.

4. **PW1 the complainant** told the trial court that she was 19 years at the time of testifying. That between 2006 – 2013 the appellant was her boyfriend. That she married him on 13/5/2013 when she left school and eloped with him. They had several sexual intercourses which resulted in her giving birth to a child. They moved and lived in Turbo where she was traced by her parents and the appellant arrested.

5. **PW2 – S S** is the father to the complainant. He said that the complainant instead of going to school disappeared from home for over one year. Later in October 2014 they traced her to Turbo where the appellant was arrested. Apart from having a baby the complainant was equally HIV Positive.

6. **PW3 R M** a Kenya Police Reservist and a brother to PW2 led in the arrest of the appellant and brought him to Kitale police station from Turbo.

7. **PW4 Kirwa Labatt** produced the P3 form in respect to both the appellant as well as the appellant. He found her genitalia to be normal and hymen broken (old). She was HIV Positive. The appellant equally tested HIV Positive.

8. **PW5 Corporal Felicity Cheron** took over the investigations from I.P Nabwire who had recorded statements from the witnesses and preferred charges against the appellant. She also produced the birth certificate which showed that the complainant was born on 3/3/1997 and was therefore 17 years old.

9. When put on his defence the appellant gave unsworn evidence denying. He denied that he knew the complainant and that he was 20 years old. He stated that PW2 had leased their land but did not plough it that year although he had paid the sum of Kshs 10,000. He therefore took refuge in Turbo till the time he was arrested. He denied knowing the complainant.

Analysis and Determination

10. I have carefully read the facts and evidence as presented as well as the submissions by both the appellant and the respondent.

11. The learned State Counsel conceded to this appeal on the grounds that there was reasonable grounds as provided under Section 8(5) of the Sexual Offences Act No. 3 of 2006. That the complainant presented herself as a grown up woman and thus capable of entering into a

marriage union.

12. Although the appellant denied knowing the complainant in his unsworn evidence, I do not think that holds water. I am satisfied that indeed they knew each other very well. Sufficient evidence was led to show that they lived together as husband and wife. There is no evidence to suggest that the complainant was a student as his father attempted to prove.

13. More importantly, her engagement with the appellant for the one year and more importantly from 2006 as stated by the complainant speaks volumes. Regrettably, both contracted HIV disease as found by the clinical officer.

14. I am satisfied that the complainant though from her birth certificate showed that she was 17 years, presented herself as a mature woman or an adult for that matter. She did not explain what she did to untangle herself from the appellant for the one year they lived together in Turbo. Neither did she even attempt to show that she was in a confinement of some sort.

15. For the foregoing reason and in line with Section 8(5) of the Sexual Offences Act No. 3 of 2006 this appeal succeeds. The appellant is hereby set free unless lawfully held.

Delivered, signed and dated at Kitale this 11th day of April 2018.

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.