



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 7 OF 2018

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court Sexual Offence case No. 67 of 2017 delivered by P. Biwott Senior Principal Magistrate on 13/2/2018)

MOSES LUMACHELE MUKANGI.....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 were that **on the diverse dates between 1st April to 30th April 2017 at [particulars withheld] area within Trans-Nzoia County intentionally caused his penis to penetrate into the vagina of B.M. 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 1st April to 30th April 2017 at [particulars withheld] area within Trans Nzoia County intentionally caused contact between his genital organ namely penis and the genital organ namely vagina of B.M. a child aged 15 years.**

3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.

4. The summary of the evidence as presented were that **PW1 the complainant** was a class 8 pupil at [particulars withheld] primary school and aged 15 years. She said that while at home her mother sent her to a posho mill – (this was between 1st April to 30th April 2017 when the schools were closed). She met the appellant on the way who told her that his sister Joan had a science book and that he collects from his house. She went there but did not meet Joan. The appellant then closed the house and defiled her.

On other occasion the appellant equally defiled her and gave her some Kshs 70. One of the evenings the complainant's mother met the two embracing each other and she reported the matter to her husband. The matter was escalated to the chief's office and this led to the appellant's arrest. The complainant was taken to the hospital and she was found to be pregnant. The appellant was later arrested and charged.

5. **PW2 E N** the complainant's mother testified that she found the two embracing each other at the fence but they both ran away when they saw her. She told her husband and on inquiry the complainant told them of what had gone on between them. They were arrested and taken to the chief's office and later to Kitale police station.

6. **PW3 Dr Sammy Osore** produced the dental age assessment report which placed the age of the complainant at 15 years.

7. **PW4 John Koima** produced the P3 form as filled by Dr Gekode. He found the complainant to be pregnant and her hymen absent. The report was dated 2/6/2017.

8. **PW5 P.C. Protus Kaleda** of Kitale police station picked the appellant and the complainant from the Assistant chief's office at Rafiki area and brought them to the station.

9. When put on his defence the appellant gave sworn evidence denying the charge. He said that he had known the complainant for about 3 months, he explained how he was arrested on 4/6/2017 at 5.00 am while he was asleep in his house.

Analysis and Determination

10. The appellant grounds in his appeal which basically has attacked the prosecution case not to have been proved beyond reasonable doubt.

He said that key witnesses were not called and that the entire evidence was fabricated.

11. I have perused also the submissions of both parties on record.

12. The age of the complainant which is a key ingredient in proving the offence was not disputed. Although the appellant submitted that the complainant could be as well aged about 19 years, there was no such doubt based on the complainant's own evidence and that of the doctor.

13. As to whether she was defiled or not, that was squarely answered by the pregnancy she carried. The evidence showed that there was infact threatened abortion which was not successful.

14. Was the appellant responsible for the defilement. I find the answer to be in the positive side for the reason that the explanation by the complainant was unshaken during cross-examination. She graphically explained the two occasions when she was defiled by the appellant in his own house. Although Joan the appellant's sister was not called to testify. I do not see any reason why she would zero in on the appellant unfairly.

15. More importantly, what triggered this was when PW2 found the two embracing each other. It appears that their running away created suspicion. When the complainant was interrogated she spilled the beans.

16. In the history of the medical evidence produced the complainant alleged that she had sexual intercourse with one Sammy in 2015. That would have been sufficient to find her untruthful. However, the pregnancy she had as rightfully found by the trial court could not be traced to 2015. The irresistible conclusion would be that the appellant was responsible even without the benefit of the D.N.A.

17. In dismissing this appeal, I find that though the complainant would have had her own weakness, the appellant knew that she was a primary school pupil and the more reason for him to have been careful to avoid any temptation towards her. There was nothing to suggest that he was framed or that there was bad blood between her and the complainant's parents.

18. The appeal is hereby dismissed.

Delivered, signed and dated at Kitale this 24th day of May 2018.

H.K. CHEMITEI

JUDGE

24/5/18

In the presence of:

M/s Kakoi for the State

Appellant present

Kirong – Court Assistant

Judgment read in open court.