



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 63 OF 2017**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Sexual offence No. 11 of 2017 delivered by M.I.G. Moranga Principal Magistrate on 18/8/2017)**

**JOHN WEKESA SITUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The appellant was charged with the offence of **Defilement 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 the diverse dates between August 2016 and 6<sup>th</sup> day of January 2017 within Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of M C a child aged 15 years.**
2. The alternative charge was **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 diverse dates between August 2016 and 6<sup>th</sup> day of January 2017 within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of M C a child aged 15 years.**
3. The appellant was convicted and sentenced to 20 years imprisonment hence the appeal herein. In his amended grounds of appeal the appellant has argued that the evidence by PW1 and PW2 were insufficient, no independent witnesses were called and generally the prosecution failed to prove its case beyond the shadow of doubt.
4. The facts and evidence as presented can be summarised as hereunder. **PW1 the complainant** testified that she was 15 years old and a class 6 pupil at [particulars withheld] Primary school. That on 6/10/2016 she was struggling over a book with his brother J K when he shouted in front of their mother A C that the appellant used to enter the maize field with the complainant. She went to school nevertheless but did not come back for fear of being beaten by the mother. She instead went to her grandmother's home.
5. She testified that she had sexual intercourse with the appellant on various days and times at the maize field as well as some forest. She stayed at Christine's home from October 2016 till January 2017. She was brought home in the company of her grandmother and taken to school where she explained to the headteacher in the presence of her father her relationship with the appellant. The appellant was arrested while the complainant was taken to the hospital for examination.
6. **PW2 I R K** a father to the complainant testified of how her daughter on 6/10/2016 had disagreed with J K and shouted that she had been going to maize field with the appellant. The said witness testified of how he looked for her when she failed to come back that day. He searched for her all the way to Suam in Uganda and in fact reported the matter at Suam police station. Later she was found at her grandmother's place in Uganda and brought. When she went to school she narrated to them concerning her sexual liaison with the appellant. The matter was taken up and the appellant arrested and later charged.
7. **PW3 Mesuny Masai** a Kenya Police Reservist coordinated in arresting the appellant from his place of business and took him to the school where the complainant was.
8. **PW4 PC (W) Winnie Akoth** received the appellant and placed him in the cells when he was arrested. She equally accompanied the father as well as the complainant to Chepchoina dispensary for medical check up.
9. **PW5 Cosmas Musikoyo** from Chepchoina, a medical officer examined the complainant and filled the P3 form. He found that the hymen was missing and old looking.

10. **PW6 Pharis Silali** from Kitale District hospital produced the age assessment report for the complainant which showed that she was 15 years old.

11. The appellant when put on his defence gave unsworn evidence denying the charge. He explained how he was carrying on with his business on 23/1/2017 till later in the day he was arrested by a Kenya Police Reservist called Mesuny and taken to [particulars withheld] primary school. He met Mzee K, the headmaster and the complainant. The girl admitted that she knew the appellant. He was then taken to Suam police station where he was incarcerated and later charged. He denied the offence.

### **Analysis and Determination**

12. The court has perused the evidence on record as well as the submissions by both the appellant and the learned State counsel. The state has admitted the appeal and in my view for a good measure.

13. There is no doubt that the minor engaged herself in Sexual intercourse as found in the medical report (P3 form). Her age was well established by the production of the dental age assessment report.

14. There are two issues which I take up and which I find that this appeal ought to succeed. The first is the lack of evidence by J K the complainant brother. Actually he was the genesis of the complaint. It even appears that all along he had seen the appellant with the complainant entering the maize field. His evidence in my view would have corroborated that of the complainant.

15. Secondly and more importantly is the attitude of the complainant. Having had sexual intercourse with the appellant for all those times, could one not conclude that she acquiesced and that the appellant would be entitled to claim a defence under Section 8(5) of the Sexual Offences Act? Even if I could be wrong, why then would she disappear from October 2016 to January 2017 forcing her parents to undergo great mental stress?

Even if she was afraid that she could be punished there was no evidence that her mother and by extension her father had the intention of punishing her.

16. For the two grounds I do not think that she could benefit from the proviso to Section 124 of the Evidence Act Cap 80. She does not appear to be truthful.

17. For those reasons the appeal is allowed. The appellant set free unless lawfully held.

**Delivered, signed and dated at Kitale this 26<sup>th</sup> day of September, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**26/09/18**

**In the presence of:**

**Mr Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court**