



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 85 OF 2013**

**(Being an appeal arising from conviction and sentence in Kitale**

**chief magistrate's court 1851 of 2012 delivered**

**by P. Kuclecho Resident Magistrate on 3/7/2013)**

**BENSON WANJALA WAMALWA ALIAS BENJAMIN.....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 of the offence were that **on the 10<sup>th</sup> day of March 2012 in Trans -Nzoia County, intentionally caused his penis to penetrate the vagina of LNB a child aged 15 years.**
2. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The learned State counsel has conceded to this appeal which in my view is the correct position.
3. The facts are straight forward . The appellant is alleged to have defiled the complainant leading to her pregnancy. She said after recanting her evidence two times that it was the appellant who defiled her. She said that the appellant called Benja was her boyfriend since 2011 and had sexual intercourse in the year 2012.
4. **PW1 Dr Ken Ndege** did dental age assessment and found her to be between 15 and 16 years old.
5. **PW2 Linus Ligare** a clinical officer from Kitale District hospital when he examined her found that she was about 3 months pregnant.
6. **PW3 BWC** her father testified of how when they realised that she was pregnant they kicked off the process of arresting the appellant who was their neighbour.
7. **PW5 APC Daniel Kosgey** arrested the appellant who was identified by PW3.
8. **PW6 P.C. William Adenyi** carried out the investigations and preferred charges against the appellant.

9. In his sworn defence the appellant denied the charges and explained how he was arrested on 30/7/2012. He denied that he was called Benjamin.

10. As stated earlier the State rightfully conceded to this appeal. The records clearly showed the complainant to have been very inconsistent. Infact she had to be stood down twice and declared a hostile witness. If it was so during trial then under the provisions of Section 124 of the Evidence Act she cannot benefit from the Proviso thereof. She appeared untruthful and inconsistent. The same is so for the simple reason that there was no eye witness to the offence. Being a single witness therefore, her evidence should have been forthright and without any trace of coercion or at all.

11. More importantly the trial court should at least have insisted on production of identification documents of the appellant i.e national identity card. The offence facing the appellant was so grave to leave a lacuna in his identification. There was no reason for doubting whether he was called “Benson” of “Benjamin” if indeed he had identity card.

12. Equally, what difficulty was there in carrying out a DNA exercises for the baby? This in my view would have been a waterproof evidence against the appellant.

13. Although the age of the complainant was found to be between 15-16 years it was strange enough for her to state in her evidence that she was 19 years. The difference was too wide and the court should have taken judicial notice.

14. All in all, the appellant should have been granted the benefit of doubt which this court shall proceed to do.

15. The appeal is allowed the appellant set free unless lawfully held.

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**H.K. CHEMITEI**

**JUDGE**

**18/12/18**

**In the presence of:**

**Mr. kakoi for Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**