



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 2 OF 2015**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Criminal Case No. 603 of 2013 delivered by Hon. P.W. Wasike Resident Magistrate on 14/1/2015)**

**DAVID KEMBOI CHELANGA.....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 diverse dates between 15<sup>th</sup> December 2012 and 1<sup>st</sup> March 2013 at [particulars withheld] within Trans Nzoia County, intentionally caused your penis to penetrate the vagina of M N S 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 charge were that **on diverse dates between 15<sup>th</sup> December 2012 and 1<sup>st</sup> March 2013 at Matisi location within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the vagina of M N S a child aged 14 years.**
3. The appellant was convicted and sentenced to serve 20 years imprisonment hence this appeal. Before looking at the merits or demerits of the said appeal, its appropriate to summarise the proceedings as presented during trial.
4. **PW1 the complainant** testified that she was born on 8<sup>th</sup> October 1998 and a class 7 pupil at AIC Primary school. She said that she was lured by the appellant and promised to get her a job. They travelled to Kitale and stayed with her with the hope of securing the job. The job was not forthcoming and in the meantime they stayed together as husband and wife in a rented house at **[particulars withheld]**.
5. At some point, the complainant borrowed a phone in which she used to call her mother. She lied to her that she was in Mombasa. Her mother later traced the owner of the phone and as a result they managed to arrest both the complainant and the appellant. The complainant was taken to Kitale District hospital where she was examined and the P3 form from Kitale police station filled. She admitted that she stayed with the appellant for 2 months and had unprotected sex.
6. **PW2 N A O** testified that she was in the market at Moi's Bridge where she sells vegetables. When she came back in the evening, she did not find the complainant and the rest of her children did not know where she had gone. Her bag as well as some money (5000/-) was missing.
7. After several days she received a phone call from the complainant who told her that she was in Mombasa. She tried calling but the phone hanged. She later called and the owner picked the phone and explained to her that the complainant had borrowed the same. She traced the owner at **[particulars withheld]** who as a result of his cooperation managed to trace where the complainant was. They arrested her through the assistance of police reservist (KPR).
8. **PW3 G B O** testified that he had conversation with PW2 previously. He knew the complainant as his neighbour as well as her husband the appellant. They assisted in arresting the appellant from his house. They took them to Kitale Police Station.
9. **PW4 M B K** a shopkeeper at **[particulars withheld]** testified that the complainant used her phone to call her mother in February 2013. He said that her mother that she was in Mombasa working for an Indian. Later pw2 called him and together to trace the complainant whom they arrested together with the appellant. The girl was found cooking tea. PW2 also found her bag in the said house.
10. **PW4 John** the clinical officer District hospital examined the minor and filled the P3 form. She found the complainant hymen to be torn

and old looking and bruises on her private parts. He concluded that there was defilement.

11. When placed on his defence the appellant gave unsworn evidence explaining the circumstances of his arrest, namely his donkey cart hit a motor cycle and damaged its brake, lights and side mirror. He was unable to pay for the same a situation which led to his arrest. He was however charged with a different offence and not what was related to the motorcycle. He denied the charge.

### **Analysis and Determination**

12. The court has perused the proceedings as well as the entire evidence on record. The three ingredients of this nature of offence are the age of the minor, that penetration occurred and the identification of the perpetrator.

13. The age of the minor was well explained and the production of the birth certificate sealed the same.

14. As regards the question of penetration, the minor's explanation and the production of the P3 form as well as the treatment notes was sufficient evidence that she had been defiled.

15. The evidence on record by all the witnesses placed the appellant squarely in the picture. The evidence of the minor tallied with that of the other witnesses including her mother as well as the Kenya Police Reservist (KPR) officer and the shopkeeper. She was found inside the appellant's house preparing tea. The bag which PW2 had complained about was found inside the house.

16. The defence by the appellant did not elicit much. Being unsworn did not offer much probative value. As a matter of fact he did not explain why he was with the complainant for the two months.

17. Save of the age of the minor, I find that her failure to extricate herself from the appellant for the two months needed an explanation. The fact that she was infact able to lie to her mother speaks volumes. I think this was a truant teenager.

18. There was the question of recalling the complainant pursuant to the provisions of Section 200 of the C.P.C. The records showed that the prosecution did its best to no avail. However the appellant did earlier on cross-examined her extensively and I do not see any prejudice he suffered by failing to cross-examine her again.

19. In view of the character exhibited by the complainant, I would however dismiss the appeal but order that the appellant be released unless lawfully held. I note that he was a young man of 24 years and he has been in custody since 8<sup>th</sup> March 2013. The period he has served is sufficient enough to have taught him a lesson.

**Delivered, signed and dated at Kitale this 18<sup>th</sup> day of December, 2018.**

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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.**