



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 72 OF 2017

(Being an appeal arising from conviction and sentence in Kitale

Chief Magistrate's Court in Sexual Offence No. 130 of 2015

M.I.G. Moranga Principal Magistrate on 19/9/17)

EMMANUEL WASIKE WABOMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with **defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on diverse dates between 4th March, 2015 and 12th May 2015 within Trans-Nzoia County intentionally caused his penis to penetrate into the vagina of E N M a child aged 16 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 were that **on diverse dates between 4th March, 2015 and 12th May 2015 a within Trans-Nzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of E N M**.
3. He was convicted and sentenced to 15 years imprisonment hence this appeal. The facts and evidence as presented at the trial court is worth a summary before looking at the merits of the appeal.
4. PW1, the complainant testified that she was 17 years old and a form 2 student at *[particulars withheld]* school. That on 4/3/2015 her grandmother had gone for a funeral. She then on her own volition went to the appellant's place where they spent the night and had consensual sexual intercourse. She came back to the house the following morning while her siblings were still asleep. Apparently she had left the door opened.
5. When her grandmother came her younger brother informed her that the complainant had not slept home in the night that she had gone for the funeral. When confronted she lied to her grandmother that she had gone to Brigid's home who was her aunt.
6. Later she went to the market where she met the appellant and was arrested by her uncle Amos and taken to Sikhendu police post. She confessed at the police station that she had spent at the appellant's home. After a month she discovered that she was pregnant. That pregnancy however aborted.
7. **PW2 E M W** was the grandmother to the appellant. She narrated how she went for a funeral on 4/3/2015 at Kipsaina leaving behind the complainant and 2 other young siblings. When she came back she was told by Geoffrey, the young boy that the complainant did not sleep home that evening. She asked the complainant who told her that she had gone to Matunda, her aunt's place.
8. Later after 2 weeks the appellant's wife called her and warned her concerning the relationship between the complainant and the appellant. She looked for the appellant who was referred to as 'kuka" but had gone away.
9. Later she heard that the appellant was in the market talking to the complainant in a company of her girlfriend. She arrived home and found that the complainant had packed her belongings and left. They were both arrested the next day and taken to Sikhendu police post. She was taken to the hospital and on examination found to be 3 months pregnant. Later she lost the pregnancy.
10. **PW3 P.C(W) Nelvin Purity Nabwire** carried out the investigations when the report was brought to Kitale police station and the complainant and the appellant brought at the station. She issued her with a P3 form which was filled. She recorded statements from the

witnesses and preferred charges against the appellant.

11. **PW5 Kiptai Rotich Philemon** from Matunda Sub County Hospital filled the P3 form for the complainant. She found the hymen perforated and was 2 months and 18 days pregnant.

12. When put on his defence the appellant gave sworn evidence and denied the charges and the allegations.

13. DW2 Emma Kitui the grandmother to the appellant defended him by introducing an issue of a motorcycle which he had given to one Amos, the complainant's uncle which he took the logbook. According to her evidence the arrest of the appellant was a vendetta against her because of the motorcycle incident.

Analysis and Determination

14. The State has conceded to this appeal solely on the grounds that the complainant's behaviour all along, afforded the appellant the benefit provided under Section 8(5) of the Sexual Offences Act. That Section in a nutshell provides that it is a defence if the complainant exhibit a behaviour consistent to an adult and not a minor.

15. The three ingredients of sexual offences namely, the age of the minor, the penetration and the identity of the perpetrator were established. As at the time of the incident the complainant was 16 years or thereabouts. The evidence as found in the P3 form namely that she was 3 months pregnant was not rebutted.

16. As to the identity of the perpetrator, it was clear that the appellant had sexual liason with the complainant. Although what came out was only one incident, from the evidence of the minor and the cross-examination it appears that they had sexual relations more than once with the appellant.

17. The appellant grounds of appeal together with his submissions hold no water. Nevertheless there was every evidence to show that the complainant was a truant teenager. By leaving her siblings that night and going to the appellant's house clearly showed her intention. She lied to her grandmother that she went to her Aunty in Matunda. It was only at the police station that she cracked and confessed.

18. For that reason alone the appellant, though he did not plead in his submissions, ought to benefit from the Provisions of Section 8(5) of the Sexual Offences Act. The appeal is hereby allowed, the appellant set free unless lawfully held.

Delivered, signed and dated at Kitale this 18th day of December, 2018.

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.