



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 81 OF 2017

(Being an appeal arising from conviction and sentence in

Kitale Chief Magistrate's Court in Sexual Offence No.158 of 2016

delivered by P. Biwott Senior Principal Magistrate on 6/10/2017)

KENNEDY KIMTAI CHEPTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of **defilement contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on diverse dates between 28/9/2016 and 18/10/2016 – Saboti within Trans - Nzoia County, intentionally caused his penis to penetrate the vagina of JCJ, a child aged 16 years.**
2. The alternative charge was **committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on diverse dates between 28/9/2016 and 18/10/2016 – Saboti within Trans - Nzoia County, intentionally caused contact between his penis and vagina of JCJ, a child aged 16 years.**
3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal.
4. The facts as per the trial court's proceedings are that the complainant who was 16 years of age and a class 7 pupil at *[particulars withheld]* primary school went and lived with the complainant from 13th August 2016 to 18th September 2016. While in the said home they stayed together as husband and wife till she was discovered by her mother PW2. She then organised for her to be arrested together with the appellant.
5. The complainant was taken to the hospital by PW3 who found her hymen torn and old looking. The evidence from the complainant showed that they had regular sexual intercourse with the appellant.
6. **PW4 Pharis Silali** produced the dental age assessment which showed that the complainant was aged 16 years.
7. **PW5 P.C. Peter Khwatenge** carried out the investigations and preferred charges against the appellant.
8. **PW6 Stephen Wafula Nambali** a Kenya Police Reservist assisted in arresting both the appellant and the complainant. He said that the complainant was under the bed in the appellant's house that early morning.
9. In his sworn defence the appellant denied the charge or even knowing the complainant. He said that he had problems with Victor and Kennedy who were the complainant's siblings.

Analysis and Determination

10. I have perused the proceedings carefully together with the submissions herein. The learned State counsel has conceded to this appeal on the grounds that the appellant should benefit from the provisions of Section 8(5) of the Sexual Offences Act.

The same states as follows;

“8(5) It is a defence to a charge under this Section if

a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b) the accused reasonably believed that the child was over the age of eighteen years.”

11. The evidence of the complainant clearly showed that she presented and portrayed herself to be of a marriageable age. Infact she said that had it not been for her mother, who disrupted the status quo she would have been with the appellant.

12. For that reason alone the appeal is allowed. The appellant is granted the benefit of that section.

13. The appellant be 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.