



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 61 OF 2016

(Being an appeal arising from conviction and sentence from Kitale Chief Magistrate's Court Criminal Case No. 4337 of 2014 delivered by P. Biwott Senior Principal Magistrate on 27/5/16)

PATRICK OLIMA ONYUMAAPPELLANT

VERSUS

REPUBLICRESPONDENT

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 diverse dates between 1st and 3rd November 2014 within Trans Nzoia County intentionally caused your penis to penetrate into the vagina of P K a child aged 13 years.**

2. He was equally charged with the alternative count of **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 1st and 3rd November 2014 within Trans Nzoia County, intentionally caused the contact between his genital organ (penis) and genital organ namely vagina of P K a child aged 13 years.**

3. The appellant was convicted and sentenced appropriately. He proceeded to file this appeal citing several grounds. I have equally perused his submissions as well as those of the learned state counsel.

4. The state counsel on his part has conceded the appeal on the grounds of inconsistencies in the prosecution case and especially the evidence of the complainant.

5. Without going into much details of the proceedings and in agreeing with the learned state counsel it appears that the complainant who was a total orphan testified that she was 19 years old and a student at [particulars withheld]. She however stated that she was 14 years according to the certificate of birth produced but as far as she was concerned she was born on 5/11/1997. She even disowned the letter from the school denying that her name was P K.

6. She admitted that she lived with the appellant at [particulars withheld] as husband and wife. That they had sexual intercourse during that time. From the proceedings it appears that the complainant became pregnant an issue not captured in the P3 From.

For some unexplained reasons the complaint was placed in the cells for 2 months before going again to live with the appellant.

7. In the process of giving her testimony the complainant was declared a hostile witness. She even accused the appellant for being responsible for her pregnancy.

8. **PW2 Kirwa Labat** the Clinical Officer from Kitale District hospital did not capture the issue of pregnancy in his P3 Form.

9. The sum total of my finding is that the complainant cannot benefit from the provisions of Section 124 of the Evidence Act.

In my view she did not appear to be truthful. Her age was in doubt. Regardless of the production of the birth certificate I do not find the rest of her evidence corroborated. She appeared to have consented in staying with the appellant.

10. Consequently, the appeal is allowed. The appellant set free unless lawfully held.

Delivered, signed and dated at Kitale this 11th day of December, 2017.

H.K. CHEMITEI

JUDGE

11/12/17

In the presence of:

M/S Kakoi for the Respondent

Appellant – present

Court Assisatnt – Kirong/Silvia

Court: Judgment read in open court.