

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 96 OF 2012

B D O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 841 of 2008 in the Principal Magistrate's at Bondo)

J U D G M E N T

The appellant was charged with the offence of Defilement of a girl contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on diverse dates between the month of April 2007 and December 2007 at [particulars withheld] Village in Kisumu District, Nyanza Province, unlawfully defiled S J O a girl aged 14 years.

The appellant was convicted and sentenced to 20 years imprisonment. He abandoned his petition of appeal filed on 1-10-2012 and substituted it with new grounds which in a nutshell mitigated the sentence.

The brief facts of this matter however are that the complainant PW1 who was an orphan stayed with the appellant in the latter's home under the care of the appellant's mother who was her aunt. She schooled at [particulars withheld] Primary School. She testified that on numerous occasions she would be defiled by the appellant and all efforts to seek help from the appellant's mother were fruitless as she would treat her as being rude and arrogant. After sometime she conceived and became pregnant. Being naive it took her 4 months and an intervention from the school teacher to realise this.

She was thereafter chased away from her aunty's home and she went to live with her grandmother **F O, PW3** until she delivered.

PW2 Joseph David Onyango Ohara, was her school head teacher who confirmed the above facts. Apparently, the appellant's mother was aware of her pregnancy and she told PW2 that she knew the person responsible.

Subsequently, PW3 reported the matter to the children's department and the police. The police through PC Yohaha Lengandu carried out the investigation and took the blood samples of the appellant, the complainant and the child to the government chemist for analysis.

PW5 Henry Kiptoo Sang, an analyst produced the DNA results which showed that the appellant was the father of the child. Although one doctor Tanui failed to produce the P3 form in respect to the complainant, I do not think that the same was consequential.

When put on his defence the appellant who was a secondary school student by then denied the charge. He however did not deny that he knew the complainant. His mother who was a co-accused called 3 witnesses who testified in her favour.

The appellant in my understanding does not deny the charge as well as the conviction and sentence. The case and facts are well settled. Especially the production of DNA report which was conclusive.

Although challenged by the DW5 Jared Obiero Opondo, a clinical officer later, he however admitted during cross examination that he was not an analyst and the trial court dealt with the issue extensively.

The appellant's mitigation borders on the fact that he was a young university student at [particulars withheld] International University and that he has reformed and consequently desires to proceed with his education. Whereas this is true, the complainant on the other hand must have undergone horrific sexual abuse by the complainant. He took advantage of her age and being an orphan to defile her severally. As earlier stated she was not even aware of the pregnancy until the teachers intervened at school. Above all she was left with the burden of taking care of the child.

In the light of the above scenario, I do not think that this is a matter that merits a review of the charges. Infact the relevant section that the charge is brought, namely 8 (3) does not provide for an alternative punishment except custodial one. In the premises the appeal is hereby dismissed.

Dated, signed and delivered at Kisumu this 25th day of May, 2015.

H.K. CHEMITEI

JUDGE