



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 115 OF 2012

(Being an appeal arising from conviction and sentence

in Kitale Chief Magistrate's Court criminal Case No. 3033 of 2010

delivered by J.A. Owiti Senior Resident Magistrate on 16/10/2012)

EZEKIEL ROTICH NDIEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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 was that **on the 14th day of November 2010 at [particulars withheld] within Trans Nzoia County intentionally caused his penis to penetrate the vagina of EBA a child aged 15 years.**

2. The appellant denied the offence and the prosecution called 4 witnesses whose evidence can be summarised as follows.

PW1 the complainant stated that she was 16 years old and as at the time of the incident she was already pregnant. She stated that on the material day she had gone to her boyfriend's house the appellant and had engaged themselves sexually for several times. She stayed there for 3 days till Kenya Police Reservists came and arrested them. They were taken to Gitwamba police station and later Kitale police station. She was taken to Kitale District hospital for treatment and a P3 form was filled.

3. **PW2 Linus Ligare** from Kitale District Hospital who examined the complainant found that she was already pregnant and her hymen was torn and old looking.

4. **PW3 MM** the mother to the complainant stated that the complainant was born on 19/6/1995. That she disappeared from home on 15/11/2010 and she suspected that she went to the appellant's place who was a neighbour. She went there and found both of them. They however ran away when she saw her. She went and informed her husband who organised for their arrest. On cross-examination she said that the appellant locked the house when he saw her.

5. **PW4 Paul Kimani Mwangi** from Kitale police station received both the minor and the appellant when they were brought to the station by the Kenya Police Reservist. He recorded the statements and preferred charges against the appellant. According to the minor, she was schooling with the appellant and they developed a relationship which led to marriage.

6. When placed on his defence the appellant gave sworn evidence. He said that he was home harvesting maize after standard 8 examinations. He was called by Kenya Police Reservists and told that he was needed at the station. They went to Gitwamba police post where he was placed in the cells. He denied the offence and particularly impregnating the complainant.

Analysis and Determination

7. The evidence so far presented during trial clearly showed that the appellants and the complainant knew each other. They were both pupils or former pupils at [particulars withheld] primary school.

8. As to whether the complainant was defiled or not, the same is true as evidenced by the fact that she was found to be pregnant, an issue not

contested even by the appellant.

9. Was he responsible for the pregnancy? Did he defile the minor? I have carefully perused the evidence of the minor and indeed I do not find anything to suggest that she did not have any sexual relationship with the appellant. Although the only eye witness was PW3 the complainant's mother. I find it difficult to believe that there was any collusion.

10. Obviously, it would have been prudent to have had a D.N.A. conducted so as to establish whether indeed the pregnancy was from the appellant. It is my view that based on such straightforward evidence of pregnancy, medical science which is nowadays easily accessible should be called in to aid. There was no need to have denied that chance to the defence. In any case, the same would have rested any doubt as to whether the complainant had any other sexual liason with other men or man other than the appellant.

11. Be is as it may, I do not think the absence of DNA test absolve the appellant. I do not think the evidence of the minor was contradictory at all. It however appears that both were generally young. The appellant had completed his standard 8 exams. The complainant was equally experimenting on her body. She was quick to buttress this by stating that she had several rounds of sexual intercourse with the appellant.

12. Based on the above and the character of the complainant, I find that the period served by the appellant in custody and thereafter in jail should be enough to have taught him a lesson.

13. The appeal is otherwise dismissed. The appellant is hereby set free unless lawfully held.

Orders accordingly.

Delivered, signed and dated at Kitale this 11th day of February, 2019.

H.K. CHEMITEI

JUDGE

11/2/19

In the presence of :

Mr Omoria for Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.