



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 106 OF 2018**

**(Being an appeal arising from conviction and sentence in Kitale**

**Chief Magistrate's Court in Criminal case No. 1590 of 2012**

**delivered by M.I.G. Moranga Principal Magistrate on 28/11/2018**

**KEVIN OCHIENG OWOYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant was charged with the offence of **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 of the charge were that **on diverse dates between 29<sup>th</sup> June 2012 and 1<sup>st</sup> July 2012 at [particulars withheld] within Trans -Nzoia County intentionally caused his penis to penetrate into the vagina of NLA a child aged seventeen 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 of the offence was that **on diverse dates between 29<sup>th</sup> June 2012 and 1<sup>st</sup> July 2012 at [particulars withheld] within Trans-Nzoia County intentionally caused the contact between the genital organ namely penis and the genital organ namely vagina of NLA a child aged 17 years.**

3. The Appellant was convicted and sentenced to 15 years imprisonment thus this appeal. The amended Memorandum of appeal has raised several grounds and before looking at them its worthwhile to summarise the proceedings as per the trial court.

4. **PW2 Linus Ligare** the Clinical Officer from Kitale District hospital examined the complainant and found that her hymen was torn and old looking. He concluded that she had been defiled. According to him the complainant had sexual intercourse with her boyfriend two weeks prior to 29/6/2012. The examination was done on 3/7/2012.

5. **PW1 the complainant** testified that on 29/6/2012 she went to the appellant's place, a 3 bedroomed house. He defiled her in the same house. She stayed overnight and the following day she left and went to her friends place, one R. That was on 30<sup>th</sup> June 2012. She however did not go home but came back to the appellant's place and spent the night at a maize store with R as the appellant feared that his cousin should not see the complainant.

6. The following day she left with R and went home through the school. She was however arrested by some male pupil who spotted her next to the school compound and her parents called. They were taken to the Chief's camp where they were canded and through the appellant cell phone, they traced him and was arrested. They were taken to Kitale police station and the following day escorted to the hospital for examination.

7. **PW3 Dr. Jonathan Kiprop** assessed the complainant's age and found that she was 17 years old.

8. **PW4 P.C. Galeb Yator** from Kitale police station gender unit carried out investigation. He said that the complainant was escorted to the station by a village elder. He issued the complainant with a P3 form which was filled at Kitale District hospital, Her age was also assessed and he preferred charges against the appellant. According to him the appellant kept the complainant in custody from 29/6/2012 to 1/7/2012.

9. **PW5 RNM** testified that the complainant came to their house and spend the night there. They left on 1/7/2012 to visit the complainant's friend called S at Section 6. They spend the night at that man's place. He led them go the following day and as they went they were arrested by one Maxwell. They had gone to the appellant house after being taken to the Chief's place. They arrested the appellant as well as the two girls.

10. **PW6 SA** is a father to the complainant. He testified that the complainant disappeared from home from 29/6/2012 and they began searching for her. He reported at the Chief's office on 2/7/2012 concerning her disappearance. He was called by his wife and informed of the arrest of the complainant as she attempted to escape. Using the appellant's phone, they traced his house and arrested him.

11. The appellant when placed on his defence gave sworn evidence denying the charge. He said that he had completed his University education and had come visiting his aunt around 23/6/2012. He said that on 1/7/2012 while working on his laptop he heard people calling and demanding to see one V. They started beating him and took him to the village elder. There were 2 girls whom he learned that they had come to his aunt's place. He was arrested and taken to the police station and later charged. He denied having given the complainant his trouser. He said that the two girls appeared over 18 years old. According to the appellant custom he could not have taken her to his aunt's place.

12. He said that by then he had a girlfriend whom he later married. The complainant immediately got married to someone else.

13. **DW2 BA** the appellant's aunt states that she works at [particulars withheld] and that the appellant had come visiting her. She said that he was a good boy who was well brought up. She was aware that he had a girlfriend whom he married and had one child. She said that someone came asking for one V and he had no idea who v was. A crowd then emerged and stormed her house and landed on the appellant and began assaulting him. He was rescued by the village elder.

14. She went to the village elder the following day who told him that N had been reported to have slept out in three incidences. Further that she got married immediately and by then had 2 children.

15. **DW3 Anthony Suosho Lumerechi** does community policing at Bidii Ward. He said that in July 2012 she was at Assistant Chief's Office where they heard screams from the neighbour. They said that one Victor was with a girl from the area. He saw the appellant and he restrained the crowd and referred them to pursue the issue at Kitale police station. He said that he had known the complaint as she was used to be brought to his office for counselling. He said he was brought in class 7 after she disappeared from home. She was found again at the forest with the son of K. She was equally involved with the son of the village elder. As at the time of the case, she was married.

16. **DW4 RM** testified that she knew the appellant who stayed with her aunt. He said that on 29/6/12 she did not see any girl enter the appellant's house. She said that as she prepared supper on 2/7/2012 she heard the appellant's scream and a crowd were assaulting him. The village elder Anthony, came and rescued him and took him to the Chief's camp. At the chief's office he found 2 girls who had claimed to have been raped by the appellant.

### **Analysis and Determination**

17. The court instructed the parties to file written submissions which I have perused as well as the court's proceedings and the evidence presented.

18. The learned State Counsel has conceded to this appeal on the grounds that the age of the complainant was not conclusive and that benefit ought to have been given to the appellant for presuming that she was over 18 years old and not a minor.

19. Equally that the conduct of the minor all through was inconsistent with that of a child. Specifically, that even after leaving the appellant's home she went back again with her friend. In other words she appeared untruthful.

20. I have perused the proceedings herein and indeed I find the sentiments expressed by the learned State Counsel to hold water. Looking at the evidence of the complainant and her key witnesses PW5, it appears to contradict what she stated. At some point she claimed to have gone back to visit her friend S, a person not mentioned by the complainant. She also alleged that they slept in a maize store whereas PW5 said that they slept in a room.

21. The complainant stated that she wore the appellant's trouser, at the time of her arrest. This question of a trouser never featured anywhere in the evidence of the prosecution witnesses. Yet at the same time she stated that she was in school uniform and a civilian sweater,. Why was the trouser not produced?

22. A fellow called Maxwell features heavily as the one who arrested the girls. He was not called to testify. This was a crucial witness between the girls and the complainant's father as well as the local Assistant chief.

23. PW5 stated that they spend the night at the appellant's place where they all slept on one mattress. Apparently the complainant stated that they spend the night with PW5 inside a maize store minus the appellant.

24. On the question of the appellant's age, according to the P3 form, it was indicated by the police that she was 14 years old. Yet the doctor assessed her at 17 years. Obviously and as clearly submitted by the State Counsel, a margin of error is ordinarily allowed. The complainant could as well be 17 or 18 years.

25. The character of the complainant was not challenged as presented by the village elder. She appeared to have been a truant going by the number of complaints received against her. This element ought to have been taken into account.

26. In the premises I find this appeal meritorious. The court has perused the authorities cited too. The appellant is hereby set free unless lawfully held.

**Delivered, signed and dated at Kitale this 11<sup>th</sup> day of February, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**11/2/19**

**In the presence of:**

**Mr Omoria for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**