



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 123 OF 2015**

**(From original conviction and sentence in Criminal Case No. 2595 of 2014 of the Chief Magistrate's Court Kitale delivered by C.C. Kipkorir – Resident Magistrate on 27/11/2015)**

**DICKSON SIMIYU WANJALA.....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 are that **on the 2<sup>nd</sup> day of July 2014 at [particulars withheld] village within Trans Nzoia County, intentionally caused his penis to penetrate the vagina of S. N. N. a child aged 16 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 are that **on the 2<sup>nd</sup> day of July 2014 at [particulars withheld] village within Trans Nzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of S.N.N. a child aged 16 years.**
3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.
4. Before looking at the grounds raised in the appeal as well as the parties written submissions it shall be worthwhile to summarise the proceedings as they appear during trial.
5. **PW1 the complainant** testified that she was 16 years old and a form 2 student at **[particulars withheld] Secondary school**. That on 29/6/2014 she was heading to Kabuyefwe for a Christian union meeting when she met the appellant. He told him to go there on 2/7/2014 instead of going to school. She obliged and went to his house. They then had sex for about 1 ½ hours. She thereafter went home. The appellant paid for her fare. When she arrived she refused to disclose to her mother where she was but after being beaten by her father she confessed and was taken to the police station. The appellant was traced courtesy of the complainant and arrested.
6. **PW2 C N** the mother to the complainant stated that the complainant did not arrive home as expected after school but she came late. The bottle of milk which she usually carried milk to school for purposes of offsetting her school fees was brought by one Stella. Later she arrived home and upon being beaten by her father she confessed to what had transpired. She took her to Kitale District hospital where she was examined and treated.
7. **PW3 P.C. John Ochola** arrested the appellant after PW1 and PW2 brought the complaint. They arrested him in his house after being pointed out by the complainant.
8. **PW4 Kirwa Labat** the clinical officer from Kitale District hospital examined the complainant and filled the P3 form. She found her external genitalia normal but her hymen was broken. He confirmed that she had been defiled.
9. **PW5 Rose Sabul** from Kitale Police Station took over the investigations from one Fedis Wanjiku who had carried out the investigations and recorded statements from the witnesses and preferred charges against the appellant. She also produced the P3 form as well as the certificate of birth.
10. When put on his defence the appellant gave unsworn evidence denying the charge. He said that he was a casual labourer and was awoken at 4.00 am on 6/7/2014 by 3 police officers who then arrested him and took him to Kitale Police Station where he was booked and later charged with the said offence. He continued to deny it.

## **Analysis and Determination**

11. Having summarised the said proceedings, its appropriate now to determine whether indeed the appellant's appeal is meritorious. I have read both written submissions by the counsel for the appellant as well as the respondent. At this juncture, being a first appeal, the court is enjoined to re-evaluate the evidence afresh.
12. There is no doubt that based on the evidence of the complainant and corroborated by the clinical officer the complainant engaged herself in sexual activity. The P3 produced as well as the treatment notes speak as much.
13. Equally, the age of the complainant, which is a key ingredient in this matter is clearly exemplified by the production of the birth certificate. She was clearly 16 years or thereabouts.
14. The million dollar question however is whether the appellant defiled the complainant. The evidence of the complainant contrary to the submissions by the appellant counsel appears truthful. She failed to attend school that day. The bottle used to carry milk was brought by one Rachael. She clearly explained how she met the appellant earlier own and later on the material day.
15. Although the appellant defence did not give any explanation on his whereabouts on the material day, he did not deny the fact that he did not know the complainant or that they did not meet that particular day.
16. I find that the appellant knew all along that he was dealing with a school going girl. It appears that save for the intervention of her father, the complainant would not have told her parents what had happened.
17. The appellant in my view would have benefited from the provision of Section 8(5) of the Sexual Offences Act, except that there was nothing to suggest that he was not aware that he was dealing with a student, who was willing and eager to forego her schooling.
18. Consequently I find that the prosecution proved its case beyond any shadow of doubt. There was sufficient evidence at least from the complainant that she engaged herself in sexual activity, almost willingly with the appellant.
19. The appeal on that ground stands dismissed. However I notice that the trial court convicted the appellant to serve 20 years imprisonment presuming that she was below the age of 16 years.
20. I think the proper sentence ought to be that falling under Section 8(4) of the Sexual Offences Act. This would therefore mean that the appellant should have been jailed for a period of not less than 15 years.
21. In the premise I shall alter the sentence from 20 years to 15 years custodial sentence.
22. Further, and taking into consideration that the appellant has been in custody since 7/7/2014 the said 15 years should be computed from the said date.
23. Save for the above tampering with the sentence, the appeal is otherwise dismissed.

Delivered, signed and dated at Kitale this 10<sup>th</sup> day of May 2018.

---

**H.K. CHEMITEI**

**JUDGE**

**10/5/18**

**In the presence of:**

**M/S Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**