



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 2 OF 2018**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Sexual Offence case No. 31 of 2017 delivered by P. Biwott Senior Principal Magistrate).**

**EZEKIEL WANDERA.....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(2) of the Sexual Offences Act No 3 of 2006**. The particulars of the offence were that **on the diverse dates between 31<sup>st</sup> December 2016 and 3<sup>rd</sup> day of March 2017 at [particulars withheld] farm, in Chepchoina location, within Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of H S L a child aged 17 years.**
2. He Was equally charged with the alternative count of **Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on diverse dates between 31<sup>st</sup> December 2016 and 3<sup>rd</sup> day of March 2017 at [particulars withheld] farm, in Chepchoina location, within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of H S L a child aged 17 years.**
3. The evidence as presented during trial were that **PW1 the complainant** was a form 4 student at [particulars withheld] secondary school and aged 17 years old. She testified that on 31/12/2016 while she was at home one Ezekiel told her that the appellant wanted to see her in his house. His house was about 100 metres from their home.
4. She obliged and when she arrived they sat outside but then the appellant asked for sex but she told him that she was a student and that would interfere with her studies. He then asked the other boy to open the door which he did and the appellant pushed her inside the house. The door was then locked from outside. He proceeded to defile her and thereafter she left for home.
5. After the school were opened she found that she was pregnant. She decided to run with the appellant and went to Matisi and later Kiminini where she lived with the appellant and his brother. Later after some disagreement she learned that the appellant was planning to abandon her. She informed some Nyumba Kumi person who called her mother and was rescued. The appellant was later arrested and taken to Kiminini police station. She was taken to the hospital for medical examination.
6. **PW2 E N N** testified that the complainant was her 3<sup>rd</sup> born and had gone missing. They reported to the police. On 3/3/2017 she got a call that she had been seen at Kiminini. She went there and met 2 Nyumba kumi people. They looked for the appellant and arrested him. She took the complainant for medical examination.
7. **PW3 Emma Kemunto Ondiria** a clinical officer from Endebess sub County district hospital examined the complainant and produced the P3 form. She found the genitalia normal with broken hymen which was old looking. She found that the complainant was pregnant.
8. **PW4 P.C. Margaret Namusasi** from Endebess police station gender Section carried out the investigation after the appellant was taken to the said police station. She said that the complainant was 2 months pregnant and a student at Anderson secondary school. She recorded statements from the witnesses, referred her for age assessment and had the P3 form filled. She produced the birth certificate as well as the P3 form. She preferred charges against the appellant.
9. When put on his defence the appellant gave sworn evidence denying the charges. He said that he was a hawker in town and he did not know the complainant. He narrated how on 3/3/2016 at Masaba primary school during games time he was hawking simsim at the school when 2 men approached him concerning his phone. One of them claimed that the phone was his and they harassed him. A mob gathered and he feared for his life. They agreed that they go to the police station. At the station a lady was present and his fingerprints were taken. He was later charged with the offence which he still denied.

## **Analysis and Determination**

10. I have perused the entire proceedings herein as well as the exhibits produced. I have equally read the submissions by the appellant and specifically the grounds laid down in his appeal.
11. I have no doubt that the complainant's age was proved by the production of the birth certificate which showed that as at the time of the incident she was 17 years old. Further the production of the letter from [particulars withheld] secondary school, showed that she was indeed a student at the said school. There was no other suggestion that she was not a student.
12. As to whether she was defiled or not, the evidence by the clinical officer and the production of the P3 form showed that she was already pregnant thus defilement occurred. Apparently, she lost the pregnancy during the pendency of the case.
13. Was the appellant responsible? I hold that the answer is on the affirmative for the simple reason that after discovering that the minor was pregnant, they decided to elope and went to Kiminini. The evidence of PW2 coupled with the letter dated 6/3/2017 from [particulars withheld] High school corroborates this.
14. Although those who rescued the complainant were not called to testify, I am satisfied that she was rescued at Kiminini a distance far from her home.
15. It would indeed be a lie as suggested by the appellant that he did not know the complainant. The defence he gave simply explained how he was arrested. Although the complainant was rescued separately from where the appellant was arrested, I find that her evidence of eloping and staying with the appellant after discovering that she was pregnant and thus afraid to stay home was believable.
16. Obviously DNA could not have been undertaken as the pregnancy was lost in the intervening period.
17. Under the provisions of Section 124 of the Evidence Act I find that the Complainant was truthful in her testimony.
18. This appeal is hereby dismissed.

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

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**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.**