



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 23 OF 2015

(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court criminal case No. 358 of 2013 delivered by Mary W.N. Senior Resident Magistrate on 12/2/2015)

ALEX LAGAMA OMINDE.....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 charge was that **on unknown date of August, 2012 in Wareng district within Rift Valley Province intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of PN a child aged 16 years.**

2. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal which raises several issues. The brief summary of the evidence as presented at the trial court was that **PW1 the complainant** a class 5 pupil at [Particulars Withheld] primary school and aged 16 years testified that in August 2012 she had been sent to the shop by her mother. On the way she met the appellant who then accosted her and subsequently defiled her. She did not tell her parents immediately. After a while her mother noticed that she was not looking physically normal and she told her that she was having headaches. She was taken to the hospital and found to be pregnant. She subsequently delivered.

3. **PW2 MM** the mother to PW1 testified that she noticed that her body was changing and she complained of stomachache. She took her to the District Hospital and was found to be pregnant. She told her that she had been defiled by the appellant. She also produced the certificate of birth for the complainant.

4. **PW3 Dr Jane Yatich** from the Moi Teaching and referral hospital produced the P3 form on behalf of Dr. Kibet which showed that the complainant was 8 months pregnant.

5. **PW6 AK** a teacher at [Particulars Withheld] Primary school produced the school records which showed that PW1 was a class 5 pupil between 2nd January 2012 and 23rd November 2013.

6. **PW7 Henry Kiptoo Sang** from the Government Chemist produced DNA samples taken from the appellant, the complainant and the baby which concluded that the appellant was the father to the child.

7. When put on his defence the appellant gave sworn evidence. He said that he was a mason and was called at the AP Camp and told that the complainant's mother had brought a complaint concerning his daughter whom she said that he had impregnated. He said that she was demanding kshs 100,000/= to settle the matter. He did not have the money that is why he was arrested.

8. On cross-examination he did not deny that he was the father to the child especially after the production of the DNA report.

Analysis and Determination

9. The court has perused the proceedings herein as well as the submissions by the parties. It is clear that what nailed the appellant was the production of the DNA report. He admitted during his defence that indeed it was so. If this was the case then the only logical conclusion which the trial court found was that he defiled the minor and all that she told the court was true.

10. Clearly they were people who knew each other. Were it not for the pregnancy then nobody would have known the incident.

11. Its however appalling that the appellant who had his own family and were neighbours to the complainant, whom she knew clearly that she was a class 5 pupil at [Particulars Withheld] primary school, would be tempted to defile her. This in my view was the height of a long drawn criminal mind.

12. Save for the issue of sentencing, which the state rightfully conceded that it was wrong, all the other grounds raised in the appeal ought to fail. This appeal is therefore dismissed.

13. As stated above, the proper sentence in which the charge ought to have been brought is 8(4) and not (3) of the Act noting that she was 16 years old.

14. In the premises the sentence of 20 years is set aside and he shall be sentenced to 15 years from 24/1/2013 noting that he conducted his trial while in custody.

Orders accordingly.

Delivered, signed and dated at Eldoret this 12th day of October, 2018.

H.K. CHEMITEI

JUDGE

12/10/18

In the presence of:

R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.