



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 34 OF 2017**

**(Being an appeal arising from conviction and sentence in Kitale chief Magistrate's Court criminal case No. 2063 of 2013 delivered by P.W. Wasike Resident Magistrate on 28/3/2017)**

**LUCAS KITOTO ODERO.....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 1<sup>st</sup> day of June 2012 and 17<sup>th</sup> day of August 2013 at [particulars withheld] village – Grassland within Trans Nzoia County intentionally caused his penis to penetrate the vagina of S N W a child aged 15 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 were that **on diverse dates between 1<sup>st</sup> day of June 2012 and 17<sup>th</sup> day of August 2013 at [particulars withheld] village – Grassland within Trans Nzoia county, intentionally caused the contact between his genital organ (penis) and the genital organ (vagina) of S N W aged 15 years.**
3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal.
4. The appellant has raised several grounds of appeal which I shall endeavor to deal with but first of all it is necessary to summarise the evidence as presented during trial.
5. **PW1 Kirwa Labat** a clinical officer from Kitale District Hospital produced the P3 form in respect to the complainant. He found that she had lost her virginity long time and there was smelly discharge.
6. **PW2 the complainant** testified that she was 16 years old and formerly a class 8 pupil at [particulars withheld] primary school. She testified that the appellant was his boyfriend and they stayed together for about 2 months. In between they had regular sex which gave rise to a birth of a child who was 2 months by the time of testifying.
7. **PW3 Samuel Nangero Ereng** is a community policing officer who assisted in arresting the appellant. When he went to the appellant's home he found the complainant. She told him and the chief that she was home because of school fees problems. He brought both to Kitale police station.
8. **PW4 W W** is a father to the complainant. He said that the complainant was a truant who began disturbing her for a long time. That she disappeared from home when there was teacher's strike. Later he received a call from the area chief to go to her office where he found the complainant who was equally with the appellant.
9. He went with her home but thereafter she disappeared and they traced her at Bondeni in Kisawai. She was taken to the hospital by one Nabwire a police officer. He said that when she came home she was found to be pregnant. He told her that the father to the child was the appellant.
10. **PW5 Inspector Jostine Nabwire** carried out the investigations and recorded the witnesses statements and preferred charges against the appellant.
11. When put on his defence, the appellant gave sworn evidence and it did not elicit much.

## **Analysis and Determination**

12. The court has perused the proceedings carefully as well as the written submissions by the counsels on record. The well and now acceptable grounds of the offence at hand that needs to be proved are the age of the complainant, the evidence of penetration and the identity of the perpetrator.

13. The age of the complainant was not in dispute as clearly explained by her father as well as the evidence of the birth certificate produced.

14. Similarly, there was no difficulty in the identity of the appellant. The minor was found in his house and that evidence cant be controverted. PW3 in particular was instrumental in arresting the appellant.

15. The issue of penetration in my view resulted in the birth of the child. Again the same was established by PW1.

16. The only issue which I find buffling is the behaviour by the complainant. Clearly she behaved all along like an adult. There was no evidence to suggest that she tried to leave for home. Even after the father tracing her she decided to run away from her home.

17. In my view she did not behave like a minor and even though the same did not come up during trial or even by the appellant, I find that this is among the rear cases that blame shifts from the appellant to the minor. This behaviour is buttressed by the fact that even at the hands of the local administration she lied that she had been sent away from school because of fees.

18. The above benefit ought to go to the appellant. The appeal is allowed. The appellant set free unless lawfully held.

**Delivered, signed and dated at Kitale tis 9<sup>th</sup> day of November, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**9/11/18**

**In the presence of:**

**Mr Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court**