



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 75 OF 2013

(Being an appeal arising from the original conviction and Sentence in Kitale Chief Magistrate's Court in Criminal case No. 1565 of 2011 delivered by J.M. Nang'ea Senior Principal Magistrate on 4/6/2013)

SIKUCHE MAYAMAAPPELLANT

VERSUS

REPUBLICRESPONDENT

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(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence was that in the month of June 2010, at [particulars withheld] village within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of V W M a child aged 16 years.

2. He was convicted and sentenced to 15 years imprisonment hence this appeal. Before considering the grounds raised by the appellant in his petition it shall be appropriate to summarise the evidence as presented during trial.

3. **PW1 the complainant** stated that she was 16 years old. She stated that she was a class 7 pupil at [particulars withheld] primary school. That in the month of June 2010 at 6.00 am she was sent by her mother to buy sugar at the local shop. On her way back she met the appellant who was at the door of the house of one Godwin. He greeted her and pulled her inside the house where he proceeded to forcefully defile her. As a consequence of the defilement she became pregnant. She further stated that she could not tell her mother for she feared. Later in February 2011 her mother discovered that she was pregnant. She said that she knew the appellant who was their school prefect.

4. **PW2 W W** is the mother to the complainant. She said that her child was 16 years having been born in December 1995. She discovered that she was pregnant when she came back from her uncle's home. She told her that she was defiled by the appellant in June 2010. The matter was reported and they were issued with a P3 form. The appellant was arrested by Kenya Police Reservist (KPR) in July 2011.

5. **PW3 Francis Barchebo** from Kitale District hospital produced the P3 form dated 23/3/2011. By then the complainant was due for delivery.

6. **PW4 PC Paul Mwangi** from Kitale police station carried out the investigation and charged the appellant. He also recorded statements from the witnesses.

7. **PW5 Dr. Kiprop Jonathan** a dentist from Kitale District Hospital produced the dental age assessment for the complainant who was found to be aged between 16 and 17 years.

8. When put on his defence, the appellant gave unsworn evidence denying the charge. He said that it was pw2 who wanted him to be his lover and he escaped. He said that there was a teacher who had sexual intercourse with PW1 and that he was maliciously implicated.

Analysis and Determination

9. The court has perused the proceedings as well as the written submissions by the appellant. The State apparently did not file any submissions.

10. There is no doubt on the question of the complainant's age as the dental age assessment produced was sufficient.

11. Secondly, the defilement of the complainant was not in dispute as the birth of the child was uncontested.

12. The only point of contest was whether it was the appellant who defiled the minor. The evidence so far is that of the complainant. There

was no eye witness. Apparently Godwin the owner of the house where the incident took place was not called.

13. The complainant and the appellant were school mates. Infact the appellant was a prefect.

14. In light of the above can it be said that there was mistaken identity? I do not think so. The incident according to the complainant took place at 6.00 am. I suppose there was sufficient light.

15. What I am unable however to appreciate is the truthfulness of the complainant. If she became pregnant as a result of the incident how then was it possible for her not to know that she was not pregnant till February 2011, about 8 months thereafter? Why did she fail to reveal even to any of her relatives or even her school teachers. I do not think that it was possible for her to hide pregnancy for that long yet she knew that the same was as a result of force.

16. More importantly, one Godwin the owner of the house which the incident allegedly took place was not called to testify or least of all to record his statement.

17. I find that the mere fact that the appellant was a primary school pupil and a prefect for that matter would in ordinary sense encourage the complainant to raise the complaint of defilement or at worst pregnancy to her teachers.

18. In such case where pregnancy occurs, it would infact been prudent for the prosecution to have conducted a DNA examination. That would have sealed or determine the case.

19. For the above reasons I find that the complainant cannot benefit from the Provision of Section 124 of the Evidence Act. I do not find her wholly truthful.

20. The benefit of doubt shall go to the appellant who is hereby released unless lawfully held.

Delivered, signed and dated at Kitale on this 9th day of November, 2018.

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.