



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 31 OF 2019**

**(Appeal arising out of conviction and sentence of Hon. Moranga M.I.G. (Senior Principal Magistrate)**

**in Kitale Chief Magistrate's Court Criminal Case No. 96 of 2017 delivered on 12<sup>th</sup> April 2019)**

**ALEX KIRWA CHEROBEN ..... APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Alex Kirwa Cheroben, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 15<sup>th</sup> day of August 2017 within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of BCN, a child aged fifteen (15) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 15<sup>th</sup> day of August 2017 within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely his penis and the genital organ namely the vagina of BCN, a child aged fifteen (15) years. The Appellant pleaded not guilty when he was arraigned before the trial court. After full trial, the Appellant was convicted of the main count and sentenced to serve **twenty (20) years imprisonment**.

The Appellant is aggrieved by the respective conviction and sentence hence this Petition of Appeal. The grounds in support of the Petition are that the court failed to take into account that he was 17 years of age upon arrest; the charge sheet was defective; there was no compliance with **Section 150** of the **Criminal Procedure Code**; that the prosecution evidence was marred with inconsistencies and was not weighty. The Appellant urges this Court to allow the Appeal, quash the conviction and set aside the custodial sentence and consequently set him at liberty.

During the hearing of the appeal, parties informed the court that they would rely on their written submissions. The Appellant maintained that there was insufficient medical records proving defilement. There was no proof of penetration. There was no cogent proof that the attire worn by the complainant were soiled. The complainant and the Appellant were in a consensual sexual relationship and would use condoms when engaging in the act. The complainant willfully engaged in sexual relations with the Appellant. The trial court committed a miscarriage of justice when he failed to grant the Appellant his request to have the case start *de novo*. Consequently, the trial court was in breach of **Section 150** of the **Criminal Procedure Code**. The failure to re-call PW1 prejudiced his case. Finally, the court failed to consider his defence.

Mr. Omooria for the State opposed the appeal. He stated that the prosecution proved that the complainant was fifteen (15) years old relying on the age assessment report, the testimony of the complainant and her father and the charge sheet. Further the court was satisfied as to her age having seen her at trial. On penetration, the state submitted that bearing in mind the principle of absolute penetration, it had proven that indeed the same was answered in the affirmative. This is because the complainant confirmed that he used a condom and she removed her clothes out of her own volition. PW2 found them dressing up in a room. PW3 observed a missing hymen and injuries on her labia and concluded that there was penetration. On identification, the prosecution maintained that the complainant's knew the Appellant as their neighbour. The complainant's father also identified him at the scene. The Appellant's identification was that of recognition.

As regards the Appellant's defence, the Learned Prosecutor submitted that **Section 150** of the **Criminal Procedure Code** was complied with and the same is captured in the proceedings. His defence of being seventeen (17) years at the time of arrest is an afterthought. The discrepancies raised were immaterial to tilt the outcome of the case. They did not show any lack of credibility on the part of the prosecution witness. He was of the view that the sentence meted on the Appellant was proper and urged the court to dismiss the appeal and uphold the conviction and sentence.

The guiding principle in our jurisdiction insofar as this court sitting on a first appeal is that it's the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court before reaching its own independent determination whether or not to uphold the conviction. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**Njoroge Vs Republic [1986] KLR 19**). In the present

appeal, the issue for determination by this court is whether the prosecution established the charges brought against the Appellant to the required standards of proof.

The prosecution produced seven (7) witnesses. In its bio to establish the charge against the Appellant, PW1, the complainant testified that she was a student at [Particulars withheld] Primary School and was in Class six (6) born in 2002. On 15<sup>th</sup> August 2017, she went to the shop and met with the Appellant. She recognized him as their neighbour. The Appellant informed her of his love for her. She said she wasn't ready and needed time. They proceeded to the Appellant's friend's house, Ronny, who was not there at that time. They had sexual intercourse on the beddings on the floor. He sexually assaulted her. It was painful. They both removed their clothes out of their own free will. The Appellant wore a condom. She said it was her first time to have sexual intercourse with him. After dressing up, her father in the company of others, came and tied them with a rope. They were taken to Sango Police Station. She later on recorded her statement. She was treated and issued with a P3 form. She has treatment notes from Kitale District Hospital.

PW2, the complainant's father, testified that her daughter is fifteen (15) years born in 2002. On that day, he was at work. He was informed by Chepkorom, PW4 that he had seen his daughter enter a house and close door with someone. He and others went to look for them. They found them in the house. The door was not locked. The person who opened the door was the Appellant. He was fixing his belt. The complainant was pulling up her trouser. They were interrogated at the assistant chief's office. They then recorded statements at Kitale Police Station. He then took his daughter for treatment. He met the Appellant for the first time at that house.

PW3, a clinical officer at Kitale County Hospital, examined the complainant on allegations of defilement. On observation, the hymen was missing and fresh looking. She complained of pain and had injuries on her labia. These were signs of penetration. There were epithelial cells in her urine. She was administered an emergency pill and Amoxil to prevent infection. Her clothes were soiled. He filled the P3 form and produced that and treatment notes as PExh 1 and 2 respectively during trial. She was muddy. He doesn't know if she had fallen from a motorcycle.

PW4, Moses Chepkorom, stated that on that day, he had come from Kitalale. He saw a girl and a boy (aged between 20 and 24 years) near some rentals. He could identify the girl as PW2's daughter. It looked like the boy was harassing the girl. He then informed PW2. He knew the Appellant but had not known him for a very long time. PW5 presented the age assessment report as PExh 3. The complainant was examined on 17<sup>th</sup> August 2017. Her teeth were grown to the 2<sup>nd</sup> molars. The 3<sup>rd</sup> molars had not erupted. Estimated age was fifteen (15) years. Her teeth were still erupting.

PW6, the arresting officer, stated that on 15<sup>th</sup> August 2017, the Appellant and complainant were brought to Sango AP Camp. It was alleged that it was the Appellant that defiled the complainant. After interrogation, the Appellant was escorted to Kitale Police Station.

PW7, the investigation officer, was called to duty on 16<sup>th</sup> August 2017. The Appellant was in custody accused of defilement. The complainant disclosed that she had been defiled and knew the perpetrator well. The incident had occurred on 15<sup>th</sup> August 2017. She was examined in hospital and had her age assessed. She recorded statements and later charged the Appellant.

The Appellant was placed on his defence. In his unsworn testimony, he stated he is in the business of sand harvesting. On the fateful day at 9.00 a.m., he met three people who wanted him to assist them to smear their house with mud. He went with them; one of them was called Chepkorom. They went to Sango Police post. He then met a girl, the father and son. They (complainant and Appellant) both denied knowing each other. He denies having defiled the complainant.

The prosecution must establish the following three ingredients to prove the charge of defilement:

1. Age of the complainant
2. Penetration
3. Identification of the perpetrator

This court has aptly summarized the evidence of the trial court. On the complainant's age, PW1 testified that she was a class 6 student at that time born in 2002. This was corroborated by her father PW2 who confirmed that she was born in 2002. The court further relied on the age assessment report marked PExh 3. The court further found that the Appellant did not offer in his defence that he was misled to believe that she was or held herself out to be an adult. All these pieces of evidence established that the complainant was fifteen (15) years old. At the time, this evidence remained uncontroverted. This court forms the opinion that indeed the complainant was a minor aged fifteen (15) years at the time of the incident.

The next issue is penetration. Per Section 2 (1) of the Sexual Offences Act defines, "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

PW1 testified that the Appellant had sexual intercourse with her on 15<sup>th</sup> August 2017. It was her first time. She stated that he wore a condom. He sexually assaulted her. It was painful. This was corroborated by the testimony of PW7. PW3 noted that on observation, the hymen was missing and fresh looking. She felt pain and had injuries on her labia. This was evidence of penetration. There were epithelial cells in her urine. She was administered with an emergency pill and Amoxil to prevent infection. There was overwhelming evidence based on the testimonies of the witnesses that there was indeed penetration.

On to the third element of the identification of the perpetrator. PW1 testified that she knew the perpetrator before the incident. He was as his neighbour. He was also positively identified as a neighbour by PW4. He testified that he knew the Appellant. On the fateful day, he seemed to be harassing the complainant. He informed the complainant's father. The trial court was satisfied as to the veracity of the complainant's

statement. She was truthful. She properly identified the perpetrator. This court finds no reasons to disturb the findings of the trial court in regard to the question of identification.

As regards the defence raised by the Appellant, the trial court evaluated same and found that it was baseless. This court has analyzed the said defence in light of the grounds of appeal put forward in the Appellant's petition of Appeal and articulated in his submissions. This court holds that it was established that the Appellant and the complainant had a history of sexual relations. From the evidence of PW1, the intercourse on that day was their first encounter. He further did not raise these allegations during the trial. The allegation is an afterthought. Additionally, PW4 testified that the Appellant seems to be harassing the complainant. This evidence was not challenged by the Appellant. In the court's mind, the trial court considered the evidence of the Appellant and arrived at a just conclusion.

From the court record, the trial magistrate considered the Appellant's request for the case to start *de novo*. The court considered his submissions and delivered a ruling on 26<sup>th</sup> November 2018. This court finds that there was no miscarriage of justice on the part of the trial court. As regards the recalling of the complainant under **Section 150 of the Criminal Procedure Code**, the court allowed his request subject to the complainant's availability. The Appellant was tasked with furnishing information on her whereabouts since the prosecution had experienced challenges. He however did not fulfill his obligation. Upon explaining the predicament the prosecution was faced with, the Appellant told the court that he no longer wished to have the complainant recalled. Consequently, the prosecution case was closed.

The ingredients to support a conviction on a charge of defilement were proved by the prosecution to the required standard of proof beyond reasonable doubt. Having reevaluated the evidence adduced before the trial court, this court for the above reasons holds that the Appellant's appeal against conviction in respect of the above charge lacks merit and is hereby dismissed. This court shall not interfere with the conviction of the trial magistrate.

As regards sentence, the Appellant was charged under **the Sexual Offences Act**. He was given a custodial sentence of **(twenty) 20 years**. In her assessment, the trial magistrate considered the offence and the Appellant mitigation. She also took into consideration the fact that he had been in custody during the trial. Under **Section 8 (3) of the Sexual Offences Act**:

**“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”**

The Appellant appeals against the conviction and sentence and seeks that they both be quashed. The trial court took into account the relevant factors. This court takes further account of the minimum sentence imposed by statute and the submissions raised. The trial court did not take into account the period that the Appellant was in remand custody prior to his conviction. In that regard, the Appellant is hereby sentenced to serve fifteen (15) years imprisonment from the date of this judgment.

It is so ordered.

**DATED AT KITALE THIS 26<sup>TH</sup> DAY OF JULY 2021**

**L KIMARU**

**JUDGE**