REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 80 OF 2017

(Being an appeal from the Judgment of Hon. M. I. Moranga in Kitale Criminal Case No. 1997 of 2014)

PETER WANJALA BARASA.....APPELANT

VERSES

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) and 8(4) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence were that **on diverse dates between 1st April, 2013 and 2nd December, 2013 within Trans-Nzoia county intentionally caused your penis to penetrate into the vagina of BC a child aged 17 years.**

2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.** The particulars of the offence are that **on diverse dates between 1st April, 2013 and 2nd December, 2013 within Trans-Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of BC a child aged 17 years.**

3. The Appellant was convicted and sentence to 15 years' imprisonment hence this appeal. The summary of the proceedings at the trial court shall be considered before looking at the merits or otherwise of this appeal.

4. **PW1 the Complainant** told the court that she was born on 15/8.1997 and that the appellant was known to her although he was not her immediate neighbour. She testified that she had a boy/girlfriend relationship with the Appellant and on numerous occasions she was picked by the appellant and taken to his house where they would have sexual intercourse. As a result, she became pregnant. All the while she would lie and would not let her parents know where she had disappeared to.

5. In the year 2014 when the schools closed she gathered courage and informed her mother. The Appellant on learning that she was pregnant became wild and did not want anything to do with her. She was taken to the police station and later escorted to the hospital where the P3 Form was filled. By the time she was recalled for cross examination she had already delivered her baby.

6. **PW 2 JOHN KOIMA** the clinical officer from Kitale District hospital examine the complainant and basing his findings on the other treatment notes found that the hymen was torn and old looking and was pregnant.

7. **PW3 MSC** stated that she was the mother to the Complainant. She produced the certificate of birth. She was a student at [particulars withheld] Secondary school in form 2. She however eloped and she did not go to school. She found her at the home of one SK. She said that the Appellant was befriending the Complainant and at some point they were counselled at the AP post and left. Eventually she was called at the police station after the arrest of the Appellant. By then the Complainant was pregnant and she said that the Appellant was responsible.

8. **PW 5 MICHAEL MUCHIRI** from Kitale police station gender unit took over the matter from P.C Yator who had been transferred and who recorded witness statements and preferred charges against the Appellant.

9. When he was placed on his defence, the Appellant gave unsworn evidence denying the charge. He said that by 2012 he was already married and was staying with his wife whom they already had one child. He denied that the Complainant ever slept in his house.

10. **DW2 ELECTRINE CHEMTAI PETER,** the wife of the Appellant testified on his behalf. She said that they got married in 27/3/2012 and they have since stayed together as husband and wife. She said that she has never left home neither has the Appellant stayed away or slept away from home. She has never seen the complainant at her home.

ANALYSIS AND DETERMINATION.

11. The court has perused the proceedings carefully as well as the submissions both by the Appellant and the learned state counsel. It is clear that the grounds raised in the petition of appeal in summary suggest that there were no sufficient grounds to have warranted the trial court to have convicted the Appellant.

12. The three ingredients that must be proved in such an offence are now clear, namely, the age of the Complainant, whether penetration occurred and whether it was the Appellant who was the perpetrator.

13. The age of the Complainant was not disputed as evidence by the production of the birth certificate as well as oral evidence by the minor and her mother.

14. The clinical officer produced the P3 form which showed that she was pregnant and that her hymen was old looking. The issue of penetration was answered by the pregnancy.

15. Who was responsible? There was no eye witness to the incident. The person called SIDI mentioned by the Complainant who was a go-between and whom she alleged to have been using her phone to communicate with the Appellant was not called to testify neither did she record any evidence. What is left therefore was the Complainant's word against the Appellants.

16. The law under the provision of Section 124 of the Evidence Act grants the court the opportunity to convict based on the evidence of a single witness if the court thinks that she was truthful. In this case, and looking at the character of the Appellant I do not think that she was entirely truthful. The above conclusion is based on the fact that she seemed to have wilfully engaged herself in the sexual activity with the Appellant allegedly for a long span of time. If this was the case could it be possible that being sexually active she could as well have been involved with other men?

17. At the same time, based on the evidence of her mother, the Complainant in my view appeared truant or she was experimenting her adolescence badly. She refused to go to school and all efforts by her mother were fruitless. In essence she was indiscipline. In that regard she cannot benefit from the provisions of the Act cited above.

18. The trial court alluded to the question of DNA in its decision. In such a situation where it is not very clear based on the character of the victim, it becomes necessary for the trial court to order a DNA exercise so as to dispel any doubt over the paternity of the child or the pregnancy for that matter. It is necessary for the courts and in particular the prosecution to take keen interest and utilise the scientific advancements at its disposal so as to hasten some borderline cases.

19. This court states so for the simple reason that the period to be served by an accused person once convicted is so serious that no room should be left in ensuring that an offence is clearly proved and no room for ambiguity.

20. The Appellant's evidence was persuasive in my view and ought to have been considered especially that of the Appellant's wife. It appears the Investigating Officer did not visit the scene to ascertain whether the Appellant and the Complainant were close to each other.

21. All in all, I find that there is merit in this appeal for the simple reason that the Complainant did not appear to be truthful. Had the prosecution considered a DNA exercise this matter would have rested. For now, and as things are it is not possible to conclude that the Appellant had befriended the minor and that he was responsible for the pregnancy.

22. The appeal is allowed, the Appellant set free unless lawfully held.

Dated, signed and delivered in open court at Kitale this 18th day of December, 2019.

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H. K. CHEMITEI

JUDGE

18/12/19

<u>In the presence of:-</u>

Mr. Omooria for Respondent

Appellant – present

Court Assistant – Silvia

Judgement read in open court