



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 80 OF 2018

(Being An Appeal From The Decision Of M. I. G Moranga (PM)

In Criminal Case No. 86 Of 2016)

PAUL LOCHOMIN.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

PAUL LOCHOMIN.....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 26th and 27th day of June 2016 at [particulars withheld] village in Trans-Nzoia County intentionally caused your penis to penetrate into the vagina of MNS a girl aged 16 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 charge were that **on the 26th and 27th day of June 2016 at [particulars withheld] village Trans-Nzoia county intentionally caused contact between your genital organ namely penis and the genital organ namely vagina of MN S a girl aged 16 years.**

3. The Appellant after full trial was convicted and sentence to 15 years' imprisonment hence this appeal which has raised various substantial grounds. The court shall proceed to consider albeit in summary the evidence that was presented during trial and thereafter determine the issues as raised in the appeal.

4. PW1 KIRWA LABATT a Clinical Officer examined the Complainant and filled the P3 form. He found her to be already pregnant and that there were no tears or bruises in her private part and the hymen was missing.

5. PW2, the Complainant stated that she had just concluded class 8 and she was to join Form 1 save for the baby she had delivered. She said that she knew the Appellant who was her friend as at January, 2016 and that they had engaged on sexual intercourse with him on various occasions. As a result of that she became pregnant and the Appellant took her to one of his relatives, (O) place where they were discovered and arrested.

6. That they were arrested on 28th June, 2016 and taken to the AP Post where she was later taken to the District hospital for examination and age assessment. She denied on cross examination that the pregnancy was of one Oscar whom the Appellant insisted that he was the Complainant's husband.

7. PW3 PHARIS SILALI from Kitale District hospital produced the dental age assessment report in respect to the Complainant showing her estimated age to be 16 years.

8. **PW4 PSO** the father to PW1 testified that when he came home on 26th June, 2016 he did not find the Complainant and it was claimed that she had gone for a haircut. She did not come home that day and he inquired from relatives to no avail. He was called on the 28th June, by one Protas Ndiema a village elder and told of her whereabouts. He then organised for her arrest. He said that she was found with the Appellant. He denied that she was married and that dowry had been paid.

9. When placed on his defence the Appellant gave unsworn evidence denying the charge and explained how he was arrested on the 28th June, 2016 and taken to the AP camp. He denied the charge and said that the Complainant was already married to one Oscar.

10. **DW2 HARRISON SIMIYU** testified on behalf of the Appellant and stated that he was in charge of *nyumba kumi* in his area and he knew both the Appellant and the Complainant. He said that he was told of the Appellants' arrest and all he knew was that the Complainant was married to one OWK. He said that as far as he was concerned the Complainant was a girl of questionable character.

11. **DW3 EWS** also said that he was the Complainant's uncle as he was the brother to her father. He said that he knew that the Complainant was already married to O and that she knew her to have many boyfriends. He said that he was testifying against her as he did not want a curse for their family.

ANALYSIS AND DETERMINATION.

12. The court has perused the evidence as presented during trial as well as the submissions on board by the parties. The duty of this court is to re-evaluate afresh the same and come up with an independent finding. **See Okeno V. Rep. (1972) EA 32.**

13. The three ingredients in proving the sexual offences are now clear namely prove of the victim's age, prove of penetration as well as the identity of the perpetrator.

14. The age of the Complainant was well demonstrated by the production of the dental age assessment which was scientific and in my view not contested. She was proved to be 16 years of age and by extension corroborated by her father in his testimony.

15. On the question of penetration, the fact that she was found to be pregnant and as at the time of testifying she had delivered her baby was not contested. The P3 form produced attested to this.

16. The question is whether the Appellant was the perpetrator. He has denied the same and it appears blame has been laid on one Oscar whom the Appellants believed that she was already married to him as at the date of the case and that he was the father of the baby.

17. There was no eye witness to the incident and most importantly those who arrested the Appellant together with the Complainant were not called. In fact, the investigation officer was not called. Neither were the police reservists called. In the absence of them this court shall rely on the evidence of those who were called by both sides.

18. In the sexual offences the Evidence Act Section 124 provides that the court shall convict even from the evidence of a single witness provided that he is believable. It goes on to state that;

“Notwithstanding the provisions of [Section 19](#) of the Oaths and Statutory Declarations Act , where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

19. The drafters obviously anticipated such since invariably sexual undertakings are always secretive and sometimes getting eye witnesses may be onerous to the prosecution.

20. In that regard does the complainant's evidence and her character indicate that she could be believable? It appears to this court that she may not be taking cue from her cross examination as well as the defence evidence. She did not clear indicate where she engaged herself with the Appellant and as a matter of fact she did it so secretive that she admitted that she did not even tell anybody including her parents.

21. She said that she was already on contraceptives a matter which she readily admitted in court. She said;

“I'm not present (sic). I have an injection here. Touches the upper left arm, the injection here is to prevent pregnancy to myself.....the injection I put on my hand a family planning injection put in August 2017. Why is your referring to Oscar? He is not my friend. It is to prevent any pregnancy with any other person I may befriend.”

22. This explains partially the Complainant's character. She does not appear to have been a straightforward minor in my view. The above conclusion should also be considered in light of the defence witnesses who cast aspersions on her character generally especially the evidence of her uncle.

23. The proper recourse was for the Respondent to have undertaken a DNA exercise so as to clearly find whether the child belonged to the

Appellant or Oscar who featured prominently in the proceedings or someone else.

24. It is also noted that there was no evidence that the Complainant was school going except that of her father. No documentary evidence which in my view was very necessary.

25. In the premises, the Appellant should have been granted the benefit of doubt. In the absence of the arresting officers or the Investigating Officers it is not possible to ascertain whether the Appellant was with the Complainant in the house of O on that particular day. There was no evidence indicating that the Appellant was ever seen or found with the Complainant at any particular time or at all.

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

Dated, signed and delivered in open court at Kitale this 4th day of March, 2020.

H. K. CHEMITEI

JUDGE

4/3/2020

In the presence of:-

Ms Kagali for the Respondent

Appellant – present

Court Assistant – kirong

Judgement read in open court.