REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 53 OF 2016

(Appeal arising out of conviction and sentence of Hon. Cheruto C. Kipkorir (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 1292 of 2014 delivered on 12th July 2015)

ALEX KIMUTAI MAIYO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Alex Kimutai Maiyo, the Appellant herein, 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 diverse dates between December 2013 and 31st March 2014 within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of BKW (the Complainant), a child aged fourteen (14) 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 diverse dates between December 2013 and 31st March 2014 within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely the penis and the genital organ namely the vagina of BKW a child aged fourteen (14) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for relying on fabricated and incredible evidence to include the P3 form which he says was not corroborative. He challenged the trial court's reasoning on the age of the Complainant stating that it was not determined. He was aggrieved by the trial court's decision to convict the Appellant on the testimony of a single identification witness. He took issue with the fact that his defence was dismissed by the trial court without any reason being ascribed. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, both the Appellant and the Respondent (Prosecution) presented to court and relied on their written submissions in support of their respective rival positions. The Appellant submitted that the age of the Complainant was not conclusively ascertained on the contradictions between the P3 form and the birth certificate as well as the evidence of PW1 and PW3. He further argued that he was unlawfully detained in custody for 6 days without any lawful explanation. That in the absence of a voire dire, the evidence of the Complainant was incredible. Finally, the Appellant submitted that he has since rehabilitated. The Prosecution on the other hand argued that it had established all the ingredients in support of the charge and therefore the trial court's verdict should not be interfered with. This court shall consider the contrasting arguments in the appeal after briefly and succinctly setting out the facts of this case.

PW1, BKW, is the Complainant. She testified that she was a class eight (8) pupil at [Particulars Withheld] Academy. She was born on 4th October 1999 which was made reference to in her birth certificate marked PEx.1. She testified that she lived with her grandmother BLB, PW2. It was her evidence that as per the charge sheet in December 2013, she had sexual intercourse with the

Appellant for 4 days at his house when PW2 attended a funeral. She stated that the Appellant lured her with a promise to buy her books. PW2, on returning back home, was informed that PW1 and the Appellant were in a romantic relationship. She found PW1 with the Appellant. PW2 inquired about the relationship from PW1 who confirmed in the affirmative. PW2 took PW1 to hospital and later to the Assistant Chief. She warned PW1 and the Appellant against their relationship and even asked the Appellant to steer clear away from PW1 who was still a student.

PW1 testified that she had known the Appellant since 2012 and remained friends until December 2013 when they had their first sexual encounter. It was her evidence that the Appellant coerced her into the act. On 28th March 2014, in the absence of PW2 who had attended a funeral, PW1 was lured again by the Appellant. They went to his house and had sexual intercourse that night. PW2, who was in attendance of a funeral, was again informed that the Appellant and PW1 rekindled their relationship. She found PW1 together with the Appellant in his house. PW1 was taken to Kitale District Hospital and later to the police station where she was arrested together with the Appellant and later discharged. PW1 made references to the treatment note and the P3 form marked PEx. 2 and PEx.3 respectively. The documents marked for identification were further confirmed by PW2 in her evidence. PW2 recognized the Appellant as a neigbhour.

The Complainant was examined by Linus Ligare, PW3 on 1st April 2014 at Kitale District Hospital. PW3 testified that the Complainant (seventeen (17) years of age) decided to elope because her life was unbearable with her grandmother, PW2. It was his evidence that the Complainant remained a troubled child whose mother passed away in 2002. He identified the Appellant as the person the Complainant wanted to be married to. He stated that her hymen was broken and that her urine exhibited remains of pus. Treatment was administered to PW1. It was his advise that PW1 had premature sexual interaction and signed the P3 form. In his assessment, he relied on the treatment note produced in evidence.

PW4, P.C. Rose Sabul, the investigating officer took over from her colleague P.C. Fidelis Wanjiru. She testified that the Complainant was fourteen (14) years old when the incident occurred. It was her evidence that she was informed that the Appellant defiled the Complainant between December 2013 and March 2014. The Appellant was found together with the Complainant. She relied on the documents produced in evidence. Upon completion of investigations, it was established that there were sufficient grounds to charge the Appellant with the offence he was convicted of.

The Appellant gave a sworn statement. When placed on his defence, the Appellant stated that he was approached by two Kenya Police Reservists on 2nd April 2014 on his way to work. They then accosted him and took him into custody. He was informed that his evidence was required on an ongoing investigation. He was under the pretext that he had been arrested on account of a land dispute. He denied that he knew the Complainant and was not her neigbour. He further denied the contents of his statement previously written and recorded at the police station. He stated he was married to one Linnet and did not intend to marry the Complainant. He was the sole witness in his defence. The trial magistrate considered the evidence of the Appellant and that of the Prosecution. On the basis of the Prosecution's evidence which she found had met the required standard of proof, the Appellant was convicted and accordingly sentenced.

This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses **(See Njoroge -vs Republic [1986] KLR 19).** In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offence that he was charged with.

For the Prosecution to sustain the charge of defilement, it must establish that the following three ingredients to the required standard of proof:

1. Age of the Complainant

2. Penetration

3. Identification of the perpetrator

On the Complainant's age, PW1, the Complainant, testified that she was fourteen (14) years old at the time of the offence. Her

evidence was corroborated by PW2, her grandmother and further buttressed by that of the birth certificate in evidence. The Appellant challenges this finding on the basis that the P3 form and the evidence of PW3 contradicts that of PW1 indicating PW1 was seventeen (17) years old. This court finds that a birth certificate is the best evidence in comparison to any other form of document. This was the holding in **PMM Vs. Republic [2018] eKLR.** Be that as it may, and even if the Appellant's assertions were anything to go by, this court still holds that the Complainant was a minor. It was further apparent from the trial court proceedings that the Complainant "consented" to the sexual relationship with the Appellant. However, under our jurisdiction, a minor has no capacity to give consent to sexual intercourse. The evidence of the Complainant, the Complainant's grandmother coupled with the production of the Complainant's birth certificate was sufficient to prove the Complainant's age. This court finds no reason to disturb that finding.

The next ingredient is penetration. PW1's testimony was that she was in a intimate relationship with the Appellant who wanted her to be his wife. She further testified that they had sexual intercourse with the Appellant in December 2013 when she stayed at the Appellant's house for 4 days. She also had sexual intercourse with the Appellant on 28th March 2014. The Complainant "consented" to the sexual relationship with the Appellant. This was affirmed from the evidence of PW3. He further confirmed that on examination of the Complainant, she had a torn hymen and there was presence of pus. His conclusion was that there was evidence of sexual penetration. Furthermore, PW2 found the Appellant and the Complainant together at the Appellant's house on two occasions. The Prosecution established that indeed the Appellant and the Complainant were in an intimate relationship despite the Appellant being aware that the Complainant was a student.

The third element is the identification of the perpetrator. PW1 testified that she was in a romantic relationship with the Appellant for about 2 years. Prior to the Sexual intercourse in December 2014. She wanted to elope with the Appellant. She had also known the Appellant since 2012. PW2 also knew the Appellant as her neighbour. In fact on one occasion, he escorted PW2 to a funeral. PW2 had attended a funeral on 28th March 2014. PW2 further testified that she found the Complainant at the Appellant's house following rumours that they were in a romantic relationship. This was upon her return from the funeral. It was her evidence that the Appellant and the Complainant were taken to the police station. This was underpinned by the evidence of PW4, the investigation officer. It is evident that the Appellant was properly identified and was well known to the Complainant. This court thus finds that the Prosecution indeed established this element. There can therefore be no case of mistaken identity.

At trial, the Appellant failed to rebut the prosecution's evidence. He only gave an account of his arrest. In fact, he reneged his witness statement previously prepared at the police station. The grounds put forth in this appeal as well as the written submissions have been considered by this court. He states that his constitutional rights were violated when he was held in custody for 6 days after his arrest. He however failed to raise that issue at trial. This court further disregards the claim that the Complainant ought to have been subjected to a voire dire. The trial court was satisfied that the Complainant was a competent witness. This court finds that indeed the Prosecution established the ingredients of defilement to the required standard of proof beyond reasonable doubt. The Appellant's appeal against the conviction lacks merit. It accordingly fails and is hereby dismissed.

The Appellant was under **the Sexual Offences Act** sentenced to twenty (20) imprisonment by dint of the provisions of **Section 8 (3)**. The court meted out the mandatory minimum sentence imposed therein. The Appellant faulted the trial court's sentence for failing to consider the time he spend in custody during trial. This court notes that the Appellant was in remand from 7th April 2014 to 12th June 2015 when judgment was pronounced. The Appellant has further indicated that he has since rehabilitated. Albeit not attached in evidence, the Appellant has attained certificates in Welding Grade III and Agriculture. This court therefore shall interfere with the sentence imposed. The sentence is thus set aside and substituted with a term of **fifteen (15) years.** The same shall take effect from the date of the Appellant's conviction on 7th April 2014 when the Appellant was placed in lawful custody.

It is so ordered.

DATED AT KITALE THIS 11TH DAY OF NOVEMBER 2021.

L KIMARU

JUDGE