



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 17 OF 2020

(From original conviction and sentence in Sexual Offence No. 47 of 2018 of

Chief Magistrate's Court at Kitale Delivered by Hon. V. Karanja (SRM)

BRIAN SALACHA CHEPROT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **Brian Salacha Cheprot** was charged with the offence of **defilement** of a child contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 4th April 2018 at [Particulars Withheld] in Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate the vagina of **PCK**, (the complainant), a child aged 13 years. When the Appellant was arraigned before the trial Magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve twenty (20) years imprisonment. Aggrieved by this verdict, the Appellant file an appeal before this court.

In his Petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial Magistrate for relying on contradictory and uncorroborated evidence of the prosecution witnesses. The Appellant faulted the trial court for relying on medical evidence, which in his view, was not prepared in accordance with the law. He was aggrieved that his fundamental rights to fair trial were trampled at the time of his arrest. The Appellant challenged the conviction on the basis that the evidence of the complainant was not properly recorded by the trial court. He was aggrieved that his defence was not taken into consideration before the trial court reached the impugned verdict. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside sentence that was imposed on him.

During the hearing of the appeal, both the Appellant (who was acting in person) and the prosecution presented to court written submission in support of their respective opposing positions. This court has carefully considered the said submission. It shall revert to them after briefly setting out the facts of the case according to the prosecution witnesses;

The complainant testified as **PW3**. She recalled that at the material time she was aged thirteen (13) years. At the time she first testified before the court four months later, she was fourteen (14) years old. She testified that on 4th April 2018, as she was going to take school books to her friend, she met the Appellant washing clothes. The Appellant, who was her teacher, greeted her. She responded. The Appellant then pulled her inside his house. He removed her clothes and sexually assaulted her. The incident took place on the Appellant's bed. According to the complainant, after he was through, they heard a knock at the door. The Appellant's mother PW3 Angeline Cheptangan came into the house. PW3 wanted to beat the complainant. She ran out of the house. She was

later taken to hospital, examined and a medical report prepared.

PW3 testified that on the material day, she was informed by the complainant that she was taking school books to her friend. The route to the complainant's friend passed through the school. She realized that the complainant had disappeared in the school compound. She went to investigate. She found the school watchman who informed her that the complainant was in the Appellant's house. They both went into the house

and found the complainant inside the house. She realized that the complainant had been sexually assaulted. She took her to the hospital where it was confirmed indeed that she had been defiled.

PW1 John Koima, a Clinical Officer based at Kitale County hospital, testified that the complainant was taken to hospital on the same date of 4th April 2021 on allegation that she had been defiled by her teacher. On examination, he noted that she had an old looking hymen, and bruises on the labia wall. She was feeling pain and tenderness on examination. There was white discharge around the labia majora. Lab test on the urine revealed pus cells. There were spermatozoa on high vaginal swab. He reached the conclusion that indeed the complainant had been defiled. He produced the treatment notes and the P3 form as prosecution Exhibit No. 1 and 2 respectively.

The case was investigated by **PW4 PC. Charles Osienye**. He recalled that on 4th April 2018, he was on duty at Sibanga Police Patrol Base when a report was made that the complainant had been defiled by a teacher, the Appellant. The appellant had been taken to the police Patrol base by the complainant's mother and the school caretaker. He arrested the Appellant and placed him in custody. He instructed the complainant to be taken to hospital after issuing her with a P3 form. He produced the complainant's birth certificate as prosecution's Exhibit No. 3. The birth certificate indicated that the complainant was born on 7th March 2005. After concluding his investigations, he charged the Appellant with the offence that he was convicted.

When the Appellant was put on his defence, he denied committing the offence. He testified that on the material time, while he was washing his clothes, the complainant passed by and greeted him. Immediately on greeting him, she saw her mother. She entered his house and hid behind the curtains. The watchman saw the complainant enter the Appellant's house. He informed PW3, the complainant's mother. They both came into his house and found the complainant. She ran away. A report was made to the police on allegation that he had defiled the complainant. He denied that he had defiled the complainant. He was asked to pay a sum of Kshs 350,000/= in order for the complainant's family to withdraw the complaint. He did not have such kind of money to pay to the complainant's family. In

effect, the Appellant was saying that the charge laid against him was with a view to extorting money from him. He reiterated that other than the complainant running into his house, he did not have sexual intercourse with the complainant.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court in light of the Petition of appeal and the submissions made on this appeal, with a view to reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is conscious that it neither heard nor saw the witnesses as they testified (**See Njoroge – Vs- Republic [1980] KLR 19**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the Appellant's conviction on the charge brought against him.

For the prosecution to establish its case against the appellant on the charge of defilement, it was required to prove the age of the complainant, whether there was penetration and the identity of the perpetrator. In respect of the issue of age, the prosecution produced the complainant's birth certificate as prosecution's exhibit No. 3. The birth certificate indicated that the complainant was born on 7th March 2005. She was therefore aged thirteen (13) years at the time of the incident. She was therefore a child within the meaning ascribed to the term in **Section 2** of the **Children Act**. This court therefore holds that the prosecution established the age of the complainant to the required standard of proof beyond any reasonable doubt.

Penetration, is defined under **Section 2** of the **Sexual Offences Act** to mean “**the partial or complete insertion of the genital organs of a person into the genital organs of another person**”. In the present appeal, the prosecution relied on the doctor to prove that indeed there was penetration. According to the complainant, on the material day, the appellant pulled her into his house as she was passing by.

The Appellant was well known to her at the time. He was her teacher. The complainant narrated how the appellant locked her in the house, threw her onto his bed, and removed her clothes before forcefully having sexual intercourse with her. To use her words;

“I was wearing a skirt, he pulled it up and removed my pants, he put me on the bed. We were struggling and there was a knock at the door which he assumed. He removed his penis after opening his zip, he inserted into my vagina. I felt pain and mother appeared after he had finished. He took 5 minutes. He was my Social Studies teacher. He is the accused before the court. I was taken to the hospital.”

From the above narration, it was clear that the complainant’s testimony was credible and gave a blow by blow account of what transpired on the material day. If there was any doubt that the complainant was sexually assaulted, that doubt was removed when the complainant was examined by PW1 about five (5) hours after the incident. Spermatozoa was found in the complainant’s vagina upon a high vaginal swab being done. This court holds that the testimony of the complainant was corroborated with the medical evidence adduced by PW1. In the premises therefore, this court holds that the prosecution established that there was penetration to the required standard of proof beyond any reasonable doubt. The Appellant’s protestation that he did not touch the complainant despite her being found in his house with the complainant was disproved by medical evidence which established that indeed sexual intercourse had taken place a few hours prior to the medical examination.

The last issue is the identity of the perpetrator. As was clear from the evidence of the complainant and PW3, the appellant was well known to the complainant at the time of the incident. He was her teacher. He has interacted with the complainant prior to the incident in a teacher-student relationship. This court therefore holds that the identity of the perpetrator of the sexual assault was established to the required standard of proof. The Appellant was the perpetrator. The Appellant’s defence did not dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses.

As regards the Appellant’s complainant that his right to fair trial was infringed when he was detained for more than twenty four (24) hours prior to being brought to court, this court holds that such infringement did not affect the fairness of the trial as envisaged under **Article 50(2)** of the **Constitution**. In any event, the Appellant’s remedy lies in damages and not in having his legitimate conviction upset.

On sentence, the same was legal. This court cannot interfere with the same. The court shall only add that the appellant abused the position of trust that the society bestowed upon him by preying on an impressionable pupil placed under his charge. He deserve the custodial sentence that was imposed.

The upshot of the above reasons is that the appeal lacks merit. It is hereby dismissed in its entirety. The conviction and sentence is hereby confirmed. It is so ordered.

DATED AT KITALE THIS 16TH DAY OF DECEMBER 2021.

L. KIMARU

JUDGE



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