**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 01 OF 2017**

**KEVIN ABUGA ZABLON.....APPELLANT**

**=VRS=**

**THE STATE.....RESPONDENT**

**(Being an Appeal from the Conviction and Sentence of Hon. J. Mwaniki (PM) Keroka**

**Law Courts dated 19th February 2016 in Keroka Principal Magistrate's Court Criminal Case No. 996 of 2015)**

**JUDGEMENT**

The appellant was charged with Defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act. The particulars of the charge were that on the night of 5th July 2015 and 6th July 2015 in Masaba South District within Kisii County he intentionally caused his penis to penetrate the vagina of JO a child aged 9 years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of this charge were that on the night of 5th July 2015 and 6th July 2015 in Masaba South District within Kisii County he intentionally touched the vagina of JO a child aged 9 years with his penis.

The appellant pleaded not guilty to both charges but after hearing and evaluating the evidence, the trial magistrate found the appellant guilty on the charge of defilement, convicted him and sentenced him to life imprisonment.

Being aggrieved by the conviction and sentence the appellant preferred this appeal. The grounds of appeal are: -

**"1. That my lord I did not pleaded guilty on the charge and I firmly maintain the same.**

**2. That my lord the trial magistrate faulted both in law and facts when maliciously based the conviction on the purported testimony adduced in court by PWI without being circumspect that the evidence of the said witness was a mere flirt out and fabrication doctored with an intention to fix the appellant on what he was not a complicity.**

**3. That my lord the trial magistrate once again faulted both in law and facts when seemingly misdirected decision in faulting to the evidence properly to avoid misapprehension and assumption which end up drawing a wrong impression on the appellant**

**4. That my lord the trial learned magistrate similarly faulted both in law and fact by appreciating and relying on the flawed and substandard testimony to sustain the conviction given to the fact that the charges which were preferred against which attracts life sentence imprisonment it was imperative to the trial court to scrutinize and ensure the same are credible and doubtful.**

**5 That my lord, the trial learned magistrate made a crucial error when maliciously based the conviction on flimsy and glaring evidence which were adduced in court by the prosecution witnesses without circumspect that the same was unsafe and incredible not worth to rely upon by the by the court of law to secure the conviction.**

**6. That my lord, the trial learned magistrate finally faulted both in law and fact when erroneously objected the defense of the appellant without cogent reasons as provided by the law under section 169(1) of the CPC yet the same was remarkably comprehensive in casting considerable doubts to the strengths of the prosecution case.**

**7. That my lord, my overall effect is that may this appeal be allowed, conviction quashed and the sentence of life**

**imprisonment set a side and set the appellant to liberty."**

The appeal was opposed. The appellant canvassed the appeal by way of written submissions and the respondent orally. The appellant submitted that he was framed. He submitted that the distance from the market to his house was not proved and that the prosecution did not demonstrate how a standard 3 minor could have been sent to the market at 7pm. He contended that he was incapable of doing what is claimed to his cousin. He also discredited the prosecution's evidence saying that it was not possible to gag the complainant while defiling her. As for the medical evidence he pointed out that only a P3 Form but not the PRC which he submitted is essential in defilement cases was produced. He contended that no reasons were given as to why he was not taken to be screened for HIV. He further submitted that the complainant's age was not assessed and that there was inconsistency in the prosecution's evidence. He urged this court to re-evaluate the evidence.

Mr. Ochieng, Counsel for the respondent urged this court to find there was sufficient evidence to convict the appellant. He submitted that the complainant knew the appellant well and that her evidence was corroborated by other evidence. Regarding her age Counsel submitted that a baptism card which confirmed she was 9 years old was produced. Counsel stated that the evidence of the prosecution witnesses was flawless and cogent and agreed with the trial court that the defence was a mere denial. He stated that the appellant after committing the offence ran away and only returned after three weeks when he was arrested. On the sentence Counsel submitted that the same was what is prescribed for this offence. He urged this court to dismiss the appeal.

In reply the appellant reiterated that the complainant did not state where she was taking the soda. He wondered why the complainant's mother did not go to his house to look for the complainant when she heard her coughing. He contended that on the day it is alleged he committed the offence he was in Kisumu. He further stated that the complainant's family had said they would settle the matter at home. He reiterated that he was never examined to confirm if he committed the offence and stated that he was framed because he demanded to know why the land where his father was buried was sold. He stated that he did not know anything about this case.

As the first appellate court I have evaluated the evidence in the lower court noting that I did not hear or see the witnesses give evidence and making provision for that. It is my finding that the charge against the appellant was proved beyond reasonable doubt. The complainant vividly narrated how the appellant who she knew as Abuga called her as she was going to the market and gave her 100/= to buy him a soda. She obeyed and once at the market she bought a soda which she took the appellant. When she entered he bolted the door thereby detaining her. He then removed all her clothes and after removing his own clothes put her on the bed and defiled her repeatedly until morning. In the morning she got up and ran away. When she went home she told her grandmother that the appellant had taken the vegetables she had sent her to buy and that he had defiled her. The complainant knew the appellant very well because apart from being related they were neighbours. It cannot therefore be a case of mistaken identity. I believed her testimony. To begin with her uncle Pw2 confirmed that she did not return home after being sent to buy vegetables by her grandmother. Secondly, at the hospital the history she gave was that she was defiled by someone known to her. When the clinical officer examined her he confirmed she had been defiled as spermatozoa was noted in her vaginal canal. The clinical officer's testimony was that of an independent witness who had nothing to gain if he lied against the appellant. I find him a credible witness.

Whereas **Section 124 of the Evidence Act** makes it clear that no corroboration is required in cases such as this here there is more than sufficient corroboration. The appellant raised the issue of his father's land in cross examination and Pw2 answered him that it was him (the appellant) and his own mother that sold the land. Pw2 had no reason to fabricate evidence against him. To suggest that he ought to have been medically examined to confirm he had committed the offence would be asking for corroboration yet as I have stated such corroboration is not required provided the court believes the complainant and gives its reasons for so doing. Regarding the age of the complainant it was proved through a baptism card and her apparent age was also given as 9 ½ years by the clinical officer (Pw3) who filled her P3 Form as well as the officer who examined her at Masimba Sub-District Hospital. In any event what is material is not her exact age but the fact that she was less than eleven years old.

As for the allegation that he was in Kisumu when the offence was committed, that was never raised at the trial. It is my finding that it is an afterthought. If he had an alibi he should have raised it at the earliest stage of the proceedings. The appeal against the conviction has no merit. The sentence imposed is the minimum prescribed under Section 8 (2) of the Sexual Offences Act and is therefore lawful. The entire appeal is dismissed.

**Signed, dated and delivered in Nyamira this 29th day of March 2019.**

**E. N. MAINA**

**JUDGE**