REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 54 OF 2016

DANIEL OBIRIA MOSE.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence of Hon. J. Mwaniki – PM dated and delivered on the 19th day of September 2016 in the Original Keroka Principal Magistrate's Court Criminal Case No. 93 of 2014}

JUDGEMENT

This appeal was heard together with Nyamira HCCRA 66 OF 2017 filed by the appellant on 17th October 2017 upon being granted leave by my predecessor to file appeal out of time although he already had this appeal on 26th September 2016 through his Advocates S. M. Sagwe & Co.

From the record, the appellant was charged with defilement contrary to Section 8 (1) (3) of the Sexual Offences Act and the particulars were that on 19th January 2014 at Mochenwa Location in Masaba North District he intentionally caused his penis to penetrate the vagina of MOM a child aged 15 years.

He faced another charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act whose particulars were that on 19th January 2014 at Mochenwa Location in Masaba North District jointly with others not before court intentionally touched the vagina of MOM a child aged 15 years with his penis.

The appellant pleaded not guilty on both counts but after hearing and evaluating evidence from both sides the trial magistrate found the appellant guilty on the charge of defilement, convicted him and sentenced him to twenty (20) years imprisonment.

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

> **"1. The learned trial Magistrate failed totally to consider the evidence on record as a whole.**
>
> **2. The trial learned Magistrate erred in law and in fact by finding the appellant guilt for the offence charged and the evidence on record never supported the said charge.**
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> **3. The learned trial Magistrate failed to note that the evidence of the independent witnesses were contradictory.**
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> **4. The learned trial Magistrate evaluation of the whole evidence was wrong as a fact.**
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> **5. The learned trial Magistrate never considered evidence adduced by the Appellant in his defence.**
>
> **6. The learned trial Magistrate misdirected himself when evaluating the evidence on record before occasioning a miscarriage of justice."**

The appeal was canvassed through written submissions which I have considered carefully but as the first appellate court I have also considered and re-evaluated the evidence before the trial court so as to arrive at my own conclusion. This while bearing in mind that I did not see or hear the witnesses give evidence. I am satisfied that the charge against the appellant was proved beyond reasonable doubt. The complainant was alone when she was accosted by the appellant who was in the company of two other men. She narrated how they forcibly took her to a place where the appellant first interrogated her before the other two men pinned her to the ground and removed her under pant. The appellant then lowered his trousers to the knee and lying on her proceeded to insert his penis into her vagina and defiled her as the other

men waited upon him. Although **Section 124 of the Evidence Act** provides that the evidence of the victim of sexual offence is sufficient to convict where she/he is the only witness and so corroboration is not required, the evidence of the complainant in this case was corroborated by medical evidence. The medical notes produced as Exhibit 2 (a) indicate that she was seen at the Gesima Health Center at 9pm on the same day of the attack. The next day she was seen at Masaba District Hospital. Her dress was still soiled around the shoulders and her neck was tender. The clinician also noted that she had bruises on the knees. More importantly penetration was confirmed.

The complainant knew the appellant well as they were neighbours, a fact admitted by the appellant himself. There was considerable passage of time between the complainant's encounter with the appellant and the actual defilement. It is therefore my finding that the complainant had ample opportunity to see and to recognize the appellant who she already knew. I am satisfied that she was a credible and reliable witness and that this is not a case of mistaken identity. If there were any contradiction in the evidence of the prosecution witnesses, these were not fatal. As I have stated this could not have been a case of mistaken identity as the appellant stayed with the complainant for enough time for her to recognize who he was. To say that the appellant should have been taken for medical examination is to negate the provisions of Section 124 of the Evidence Act which gives the court power to convict on the evidence of the victim of the sexual offence provided the court is satisfied she is telling the truth and record reasons for that. I reiterate that I believed the complainant and the charge against the appellant was proved beyond reasonable doubt.

The prosecution produced a birth certificate (copy) which is not very clear on the year of birth. Be that as it may, in the P3 Form her apparent age was estimated to be 15 years and indeed the treatment notes also indicated that to be her age. It is now trite that a birth certificate is not the only proof of age **(see Michael Kiongo Waititu V Republic [2016] eKLR).**

The sentence of twenty (20) years imprisonment imposed by the court was therefore lawful and is in any case the minimum provided by the law. Accordingly, I find no merit in the appeal and the same is dismissed. Right of appeal to the Court of Appeal is explained.

Signed, dated and delivered at Nyamira this 14th day of March 2019.

E. N. MAINA

JUDGE