REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 04 OF 2019

JOSHUA NYAKUNDI MATARA.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

(Being an Appeal against the Conviction and Sentence of Hon. A. C. Towett – RM Nyamira dated

and delivered on the 11th day of December 2018 in the Original Nyamira Chief Magistrate's Court Criminal Case No. 852 of 2015)

JUDGEMENT

The appellant is serving a sentence of twenty (20) years imprisonment for Defilement of a girl aged fourteen (14) years. His appeal is against the conviction and the sentence. The grounds of appeal are: -

> **"1. That the Honourable Trial Court erred both in law and fact in its evaluation and analysis of the evidence tendered in Court by the prosecution and by not taking note that Prosecution evidence was unbelievable, shaky and insufficient, in the circumstances, to Warrant the Appellant's Conviction and Sentence.**
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> **2. That the Honourable Trial Magistrate erred both in law and fact by failing to properly consider and/or evaluate and analyse expert evidence tendered in Court which exonerated the Appellant and by proceeding to convict him on insufficient evidence tendered by the Prosecution.**
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> **3. That the Honourable Trial Court erred both in law and fact by not finding that the Prosecution failed to proof their case beyond any reasonable doubt in accordance to the Law and that there were glaring flaws, contradictions, discrepancies and inconsistencies in the prosecution's case.**
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> **4. That the Honourable Trial Court erred both in law and fact by not finding that the particulars of the offence were not proofed as required by law.**
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> **5. That the Honourable Trial Court erred both in law and fact by failing to properly reckon the underlying motive and/or antecedents of the matter before Court as purely a set-up or fabrication against the Appellant meant to buttress his complaint which he had lodged with the police against the witnesses who testified in Court to shut him up.**
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> **6. That the Honourable Trial Court erred both in law and fact by meting a manifestly harsh and cruel sentence against the Appellant considering the circumstances of matter."**

The appeal which was opposed was to be canvassed through written submissions but in the end only those of the appellant's Advocate were received. In brief Counsel for the appellant submitted that the charge against the appellant was fabricated and concocted; that the medical evidence adduced was shoddy and muddled and did not help in proving the charge; that preferring the alternative charge of committing an indecent act with a child is the clearest sign that the prosecution's case was anchored on uncertainty and that the prosecution left everything to the ***"god of chance or probability".*** Counsel submitted that this uncertainty is reflected in the judgement of the trial Magistrate who according to him did not give reasons for convicting the appellant on the main charge but not on the alternative charge. Counsel submitted that this omission resulted in the judgement being incomplete. Counsel further submitted that the evidence against his client was based on rumours, suspicion and suppositions of an affair between his client and the complainant and that a proper evaluation and analysis of the evidence would show that the evidence adduced fell short of the standard required and the conviction was not safe. Counsel for the appellant contended that the prosecution's evidence was unreliable, shaky, contradictory, inconsistent, distorted and lacking in probative value. Counsel contended that the evidence of the clinical officer who never carried a physical examination on the complainant coupled on his reliance on treatment notes and a Post Rape Care (PRC) Form which were not produced did not prove defilement. Counsel stated that the failure by the prosecution to call the investigating officer even after obtaining several adjournments is good reason that the case should fail. Counsel further stated that the complainant's admission that in 2013 she had sex with one Joseph Kaimenyi in Nakuru made her **a child in**

need of care and protection and she too should have been charged for going to the posho mill. Counsel stated that the child was hounded into falsely accusing the appellant so as to save her own freedom.

On the sentence, Counsel submitted that the same is manifestly harsh and cruel considering the age of the appellant. He contended that the same damns his whole life and has no rehabilitative value and only means that the appellant shall spend his entire life in jail. He prayed that the appeal be allowed.

I have considered Counsel's submissions carefully but as an appeal is in the nature of a retrial, I am duty bound to analyse and evaluate the evidence before the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses give evidence **(see Okeno v Republic [1972] EA 32).**

To sustain a conviction for defilement, the prosecution is required to prove the **age of the victim indicative that she is a child, penetration** and **the positive identification of the perpetrator**.

It is my finding that in this case all these elements were proved against the appellant beyond reasonable doubt. To prove the **age of the complainant** the prosecution produced a certificate of birth which revealed she was born on 1st December 2002. As a matter of fact, this offence having been committed on 19th July 2015 she was thirteen (13) years old which places her within the bracket of **Section 8 (3) of the Sexual Offences Act.**

On **whether there was penetration**, the complainant vividly narrated how the appellant who she knew very well as they were ***"lovers"*** invited her to his house at a posho mill at about 8.30pm and how after tethering the cow he joined her in the house where she was waiting. She stated that at around 10pm they retired to bed and they had sex after which her relatives and the Assistant Chief went there and found them. She told the court that initially the appellant refused to open the door but only opened when the Assistant Chief went there. **Section 124 of the Evidence Act** provides that there need not be corroboration in sexual offences provided the court believes the victim and records its reasons for doing so. Contrary to Counsel's submission the complainant in this case was very steadfast and consistent in her evidence. She remained unshaken even after rigorous cross examination by the appellant and even though her evidence did not require corroboration there was evidence from her brother (pw2), her uncle (Pw3) and Assistant Chief Peter Nyandiga (Pw4) that they indeed found her in the appellant's house. The complainant testified the two of them had sex. It is my finding that she knew what sex was having engaged in it with someone else in Nakuru. I believe she was telling the truth and that her evidence was reliable and trustworthy. The P3 Form and a Post Rape Care Form were produced in evidence. These are documents that were adduced in an attempt to look for corroboration for the victim's evidence even though it was not necessary. It is my finding that they corroborated her evidence which was that she did not sustain any injuries when the appellant inserted his penis into her. She also stated that she had had sex with the appellant before and he had used a condom on every occasion. That would explain why the examination did not yield any significant findings. From the evidence it is obvious that the sex was consensual and as such one would not have expected any injuries and as the appellant had used a condom there certainly would have been no infections. The complainant being a child was however incapable of giving consent to the sexual act. I am satisfied that penetration was proved beyond reasonable doubt and that there were no contradictions or inconsistencies in the prosecution's case and most certainly the defence which was a mere denial did not offer any rebuttal to the very cogent evidence tendered by the prosecution witnesses.

As for **identification,** this too was proved beyond reasonable doubt. The complainant knew the appellant well. According to her they were ***"lovers"*** – I quote the word ***"lovers"*** because at her age it was a misconception as she was not in a position to give consent to a sexual relationship with the appellant. On the material day she spent considerable time in the appellant's house – from 8.30pm to 10pm – as to be in a position to recognize him positively. The fact that she had had sex with another man may be evidence that she was a misguided child but that did not give the appellant the right to take advantage of her. She was a child and by engaging in sexual intercourse with her he committed an offence. Bringing an alternative charge does not weaken the prosecution's case. It is the standard manner of framing charges and I find that it has no effect on the case against the appellant. The trial Magistrate having convicted the appellant on the main charge need not have made any findings on the alternative charge and the omission to do so did not leave a lacuna in the case. **The appeal against conviction lacks merit and is dismissed.**

On the sentence, it is the minimum provided by the law. The trial Magistrate did not consider the appellant's antecedents and the circumstances of the offence as her hands were tied by the minimum sentence. This position has changed since the Court of Appeal decisions in **Christopher Ochieng v Republic [2018] eKLR** and **Evans Wanjala Wanyonyi v Republic [2019] eKLR** which are informed by the decision of the Supreme Court in **Francis K. Muruatetu & Another v Republic [2017] eKLR**. In line with those decisions and considering the circumstances of this offence, I find the sentence meted by the trial court harsh and excessive. Accordingly, the same **is set aside and in its place is substituted a sentence of ten (10) years imprisonment from the date the appellant was sentenced by the lower court**. The appeal shall succeed to that extent only.

Dated, signed and delivered in Nyamira this 26th day of September 2019.

E. N. MAINA

JUDGE