REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 14 OF 2016

EDWIN NYANTIKA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Being an appeal against the Judgement of Hon. J. Mwaniki – Principal Magistrate delivered on the 2nd day of November 2015 in the Original Keroka Principal Magistrate's Court Criminal Case No. 1345 of 2012]

JUDGEMENT

The appellant was on 2nd November 2015 sentenced to life imprisonment for defilement of a child contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act.

The particulars of the charge were that on 5th November 2012 at Bochana Location in Masaba North District within Nyanza Province, he unlawfully and intentionally committed an act which caused penetration of his penis to the anus of L A a boy aged 3 ½ years. He pleaded not guilty to the charge.

His appeal, filed through the firm of Nyariki & Co. Advocates is premised on grounds that: -

> **"1. The learned trial magistrate misdirected himself in law and fact by not sufficiently addressing his legal mind to the serious contradictions as to where the alleged incident took place and the time.**
>
> **2. That the learned trial magistrate erred in law and fact by not making a finding that there was no conclusive medical evidence that offence took place as the faeces was not subjected to lab test to proof the presence of spermatozoa.**
>
> **3. That failure to avail the clothes to be subjected to laboratory or DNA tests was fatal to the prosecution case.**
>
> **4. The learned trial magistrate erred in law and fact by not warning himself that a mere bruise at the did not amount to sexual molestation in the absence of ultra sound tests to show the inside of the rectum or evidence of inflammation.**
>
> **5. The learned trial magistrate misdirected himself in law and fact by not reaching a conclusion that the evidence as a whole and give the seriousness of the offence and the punitive sentence provided by law did not reach the threshold of beyond reasonable doubt."**

The appellant urges this court to quash the conviction and set aside the sentence.

The appeal was canvassed by way of written submissions which this court has considered very carefully together with the evidence in the lower court so as to arrive at its own conclusion as is required of the first appellate court. I have in evaluating the evidence appreciated that I did not hear or see the witnesses giving evidence and hence did not observe their demeanour.

Section 124 of the Evidence Act allows a court to convict on the evidence of the victim of a sexual offence even where no other evidence is tendered if it believes him. In this case there were other witnesses in addition to the complainant. They all attested to the truthfulness of the complainant who, young as he was, gave a vivid description of what the appellant did to him on that day. If I understood the evidence of his aunty (PPw4) and I am convinced I did, it was that she used to mind the child whenever his grandmother (Pw2) was away. On the material day, she was away at the market selling bananas and had as usual requested Pw4 to take care of the complainant when he came from school. According to Pw4, she too was in the shamba until 5.30pm when it started raining. She clearly stated that when the child (complainant) got to her house she observed that he was walking with difficulty which confirms the child's evidence that she did not witness the offence being committed. Pw4 also corroborated Pw2's evidence that the complainant had a bruise on his face and faecal matter and blood around his anus. She also confirmed that the child told them that the appellant had done bad things to him. This was also corroborated by clinical

officer Joel Ongaro (Pw3). His evidence was that he examined the child on 6th November 2012 and that he observed the child had a tender swollen face with bruises to the cheeks, a laceration on the anal region, loose sphincter muscles and faecal incontinence. He stated that he concluded that the child had been sodomised. This witness also examined the appellant and observed that he had recent bruises on the groin and penis. This evidence corroborates that of the child as well. The offence occurred in broad daylight at the home of the child. The child knew the appellant well as they were neighbours. I am satisfied therefore that there was no possibility of mistaken identity and that as the age of the complainant was not in dispute, the charge against the appellant was proved beyond reasonable doubt. The contradictions referred to by the Advocate for the appellant are in respect of the whereabouts of Pw4 at the time of the commission of the offence. She was clear as to where she was – in the shamba – and as I have stated even independent of her witness this court believed the complainant. He was only a child yet he was so clear regarding what the appellant did to him as to leave no doubt in my mind that he did it. The evidence of the other prosecution witnesses further strengthened his evidence and confirmed to this court that he was truthful and trustworthy witness and rendered the defence unbelievable.

I find no merit in the appeal on conviction and it is dismissed. The sentence imposed is the minimum provided under the law and is therefore upheld.

It is so ordered.

Signed, dated and delivered at Nyamira this 22nd day of November 2018.

E. N. MAINA

JUDGE