



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYAMIRA
CORAM: D.S MAJANJA J.
CRIMINAL APPEAL NO. 7 OF 2018

BETWEEN

SHADRACK NYAMWEGA CHARLES.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki, PM

dated 15th June 2016 at the Principal Magistrate's Court

at Keroka in Criminal Case No. 328 of 2012)

JUDGMENT

1. The appellant, **SHADRACK NYANWEGA CHARLES**, was charged and convicted for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the ***Sexual Offences Act***. The charge was as follows:

On the 4th day of March 2012 at [particulars withheld] Village in Masara South District within Kisii County intentionally caused his penis to penetrate the vagina of SKN a child aged 14 years.

2. At the hearing of the appeal, counsel for the State conceded appeal on the ground that the that the conviction was unsafe as the identity of the appellant was in doubt.

3. The key evidence against the appellant was that of the children, PW 1 and PW 2, who testified that on the material day, at about 6.30pm, as they were walking home, the assailant dragged PW 1 into the forest and proceeded to sexually assault her. Neither PW 1 and PW 2 knew the assailant before but they said they could identify him if they saw him.

4. According to the children's mother, PW 3, the villagers started searching for the assailant. After the appellant was caught by the Chief, he was paraded to the villagers amongst other people and identified by PW 1 and PW 2 as the person who sexually assaulted PW 1.

5. It is noteworthy that the Chief was not called to testify and neither was the investigating officer. It is

therefore difficult to tell on what basis the appellant was arrested and how the appellant was identified before being put in the parade with other villagers. This is a case where a properly conducted identification parade would have conclusively pointed to the perpetrator.

6. Although there was sufficient evidence to prove that PW 1 was subjected to an act of penetration, the evidence pointing to the appellant was unsatisfactory. I therefore accept the concession by the state that the conviction was unsafe.

7. I therefore allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at KISII this 18th day of DECEMBER 2018.

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.