REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 38 OF 2016

KENNEDY OKOTH BARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of

the Senior Resident Magistrate's Court at Winam

(Hon. C. N. Njalale RM) dated the 11th August 2016

in Winam SRMCCRC NO. 1112 of 2014]

JUDGMENT

The appellant was sentenced to fifteen (15) years imprisonment upon being found guilty and convicted of defiling a child of sixteen years contrary to section 8(1) as read with Section 8(4) of the Sexual Offences Act.

His appeal is against the conviction and sentence. His grounds are -

> **"1. That the trial court failed to establish the actual age of the victim given the fact that there were different versions of the same.**
>
> **2. That the trial court failed to observe that there were evidences directly pointing at a coached witness.**
>
> **3. That the trial court failed to appreciate that the evidence of identification was marred with contradictions to hence unsafe to base a conviction upon.**
>
> **4. That there was no medical evidence linking me with the offence.**
>
> **5. That the trial court failed to give my sworn defence due considerations even when the same remained unchallenged thus was able to warrant my acquittal".**

At the hearing of the appeal the appellant relied on written submissions, which though homegrown, I must admit are very impressive. He has submitted on all the 5 grounds.

The appeal was opposed with Mr. Muia, Prosecution Counsel maintaining that the charge against the appellant was proved beyond reasonable doubt.

As the first appellate Court it is my duty to re-evaluate the evidence afresh so as to arrive at my own conclusion while bearing in mind that I did not observe the demeanour of the witnesses. I have done this and I am satisfied that the charge against the accused person was proved beyond reasonable doubt.

The complainant narrated how the appellant called her as she was going to fetch firewood. She then gave a vivid description of what he did to her after leading her to a maize farm and removing her pant. This Court is satisfied that the appellant was telling the truth. Whereas Section 124 of the Evidence Act does away with the need for corroboration is Sexual Offences it is my finding that in this case there was corroboration. The complainant's brother J O O (PW3) actually caught the appellant red handed. This incident occurred at 3PM, in broad daylight, and both he and the complainant knew the appellant well. Indeed J (PW3) pursued the appellant but did not manage to catch him. He did however do so later that evening and took him to the police station. There is further corroboration in the medical evidence. The doctor who examined the complainant albeit the next day opined there was evidence of penetration. The result of this corroboration is that it goes to confirm that the complainant is a truthful and credible witness. The P3 form has the seal of the Hospital – Nyanza Provincial General Hospital – which is even more credible than a rubber stamp.

In his testimony the appellant conceded that he knew the complainant as they are neighbours. He however denied that he defiled her and stated that he was framed because of a dispute with her brother over Kshs,3,575/=. I have considered this defence and come to the conclusion that given the strength of the prosecution's case it cannot stand. The witnesses were very consistent and remained so even upon rigorous cross-examination by the appellant. The Doctor who is an independent witness also came to the conclusion that the complainant had been defiled. As I have stated the offence was committed in broad daylight and as both the complainant and her brother (PW3) knew the appellant well, a fact he admits, there was no room for mistaken identity and I am satisfied it is him who defiled her.

He has, in his submissions, taken issue with the P3 form but as I have stated there is no requirement for corroboration in this case: Provided this court believes the complainant it can convict on her evidence alone. I have stated that I believed her and that the evidence in the P3 form only goes to fortify that she was a credible witness and her evidence and that of her brother (PW3) is reliable. I have also stated that the seal appended thereto is more reliable than a rubber stamp and further state that the Doctor who produced the P3 form was competent to do so as she not only knew the doctor who filled it but was also familiar with her handwriting and signature. At the risk of repeating myself I do also find that even without the P3 form the conviction would still be safe.

As for the age of the complainant a birth certificate produced by her mother (PW2) confirmed she was sixteen years hence putting to rest the issue of her age and I need not say more.

The issue of the complainant's mental health does not arise. The Doctor who filled her P3 form while noting that she was epileptic and small for her age remarked that she was normal. The complainants evidence is very clear and does not betray any mental illness. She was truthful even to the extent of admitting that her brother told her to say the appellant defiled her. She was emphatic that even though her brother said so the appellant had defiled her and she was not saying so merely because her brother said so. I do not find this a contradiction at all. The investigations in this case were not shoddy. The investigating officer did what was required of him. He collected the evidence and had the appellant charged. There was no necessity to take the appellant for medical examination because that would have been tantamount to looking for corroboration by dint of Section 124 of the Evidence Act which is not necessary. There is evidence on record that upon delivery of the judgment which was typed separately the court heard evidence pertaining to sentencing, heard the appellant's plea in mitigation and even ordered a social inquiry report. It thereafter on 15th September 2016 sentenced the appellant. There is therefore no merit in the appellant's submission that the judgment of the trial magistrate does not conform to Section 169(2) of the Criminal Procedure Code.

In the end I find the appeal has no merit and dismiss it. The sentence imposed is the minimum provided for the offence and it is upheld.

Signed, dated and delivered at Kisumu this 30th day of May 2017

E. N. MAINA

JUDGE

In the presence of:-

Muia for the State

Appellant in person

Court Assistant – Serah Sidera