

The defence raised by the appellant was also considered.

In this court's opinion, there was sufficient evidence from the complainant, her grandmother (PW1) and the mason (PW4) establishing that the complainant was indeed sexually assaulted by way of being defiled. However, there was no medical evidence to confirm the fact of defilement. Therefore, the offence which was established by the foregoing witnesses was that of indecent assault as correctly found by the learned trial magistrate.

The appellant's defence was a denial and a suggestion that he was apprehended and charged for no apparent good reason. However, the defence was dismissed by the learned trial magistrate after making a finding that the evidence by the complainant (PW2) was sufficient and credible in establishing that she was sexually assaulted by the appellant.

The learned trial magistrate had the advantage of seeing and hearing the witnesses. She was better placed than this court in determining the credibility of the witnesses. Therefore, this court finds no room to interfere with the findings on credibility made by the learned trial magistrate and must also find that indeed the complainant was sexually assaulted by the appellant. His conviction was therefore sound and proper and is hereby upheld.

However, the sentence imposed by the learned trial magistrate was unlawful as conceded by the learned prosecution counsel.

The offence of indecent assault at the material time attracted a maximum sentence of five (5) years imprisonment with hard labour with or without corporal punishment. The appellant was handed a sentence of twenty (20) years imprisonment which was well above the sentence provided by law. This was in the year 2005, meaning that even if the correct sentence was imposed, it would have been completed by now. Nonetheless, the sentence imposed by the learned trial magistrate is hereby set aside and substituted with a sentence of five (5) years imprisonment with hard labour which has already been served thereby warranting the release of the appellant unless otherwise lawfully held.

The appeal thus succeeds on sentence but not conviction.

[Delivered and signed this 18th day of March, 2014.]

J.R. KARANJA.

JUDGE.