JOSEPH KINYUA NYAGA…….. APPELLANT

VERSUS

REPUBLI……..……..…RESPONDENT

JUDGMENT

1. The appellant herein was charged, tried, convicted and sentenced by the learned trial magistrate sitting in Hola, for the offence of defilement of a girl between the age of twelve and fifteen years contrary to section 8(1) (2) (sic) of the Sexual Offences Act.

2. The particulars of the charge were that on diverse date between 13th October, 2009 and 18th February 2010 in Bura Tana District, he defiled R.I.T. a girl aged 14 years. He now appeals to this court against both conviction and sentence.

3. He has raised six grounds of appeal, further expanded in his written submissions, which he relied on at the appeal.

Grounds 4, 5 and 6 attack the quality of evidence upon which his conviction as premised. Grounds 1 and 2 allege a violation of his Constitutional rights to prompt arraignment in court and a fair trial.

4. The State has opposed the appeal and supports the conviction on grounds that the evidence in the Lower Court was overwhelming.

5. Although the State did not directly address ground 1, a perusal of the charge sheet shows that the appellant was arraigned in court after about four days since arrest. Whether this delay constitutes a violation of the rights of the appellant in a matter to be perused in a suit for damages, rather than an appeal **(see JULIUS KAMAU MBUGUA VS REPUBLIC [2010]e KLR)**

6. I find it necessary to point out that the framing of the charge is not entirely satisfactory. The statement of the offence cites section 8(1) and (3) of the Sexual Offences Act, but omits the words “as read with” in between the subsections. This is clearly erroneous but does not render the charge sheet defective. There are two reasons for saying so. Firstly, the inclusion of the two subsections creating both offence and penalty thereof readily discloses the nature of the offence, regardless of the poor syntax.

7. Secondly, by virtue of Section 134 of the Criminal Procedure Code, a charge is “sufficient if it contains a statement of the specific offence…with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

8. A reading of the charge and the particulars leaves no doubt as to the nature of the offence, charged. It is superfluous in light of the ingredients of the offence described in the sections at hand for the particulars to contain elements of unlawfulness or intention. No prejudice has been occasioned to the appellant as it appears he clearly understood the nature of the charge facing him at the trial.

9. The third ground of appeal has equally no merit as it ignores the provisions of Section 7(1) (b) of the Criminal Procedure Code which donates the necessary jurisdiction to the trial magistrate of the rank of Resident Magistrate to impose the sentence now being challenged.

10. This leaves us with grounds 4, 5, and 6 which touch on evidence. It is necessary before embarking on a fresh examination of the evidence as I am obliged to do on a first appeal **(See OKENO VS REPUBLIC [1972] E.A.32)** to briefly restate the same.

11. The complainant R.I.T. (PW1) is a 14 year old girl who resided in Bura in the material period. Her father I.G.T. is a farmer and also operates a business at Bura. On 15-2-10 R.I.T's head teacher summoned him and informed him that she suspected R.I.T to be pregnant, and referred them to the doctor at Bura Health Centre where the pregnancy as confirmed.

12. When R. I. T. was questioned she told her father that the appellant, who was known to him, had had sexual intercourse with her in October, 2009. The matter was eventually reported to police who arrested and charged the appellant.

13. The appellant gave a sworn defence statement to the effect that in the month of October 2009 he was in Bura but travelled to Embu early February, 2010 and on return to Bura he was arrested over this case. He confirmed that he was familiar with R. I.

14. Upon a re-evaluation of the evidence on record, there can be no dispute that the complainant had engaged in sexual intercourse as a result of which she conceived and was 22 weeks pregnant as at 18-2-2010. To my mind the vexed question is who was responsible.

15. PW1 maintained that the appellant had sex with her on 13-10-09 in her parents' home. She freely admitted that she "accepted" to have sex with the appellant whom she knew well. This happened in day time and took two hours. She did not report to her father or anyone until the head teacher voiced her suspicion that R. I. T. was pregnant. Form these facts, I am persuaded to agree with the conclusion of the learned trial magistrate that "there was an intimate relationship between the complainant and the accused…kept as a secret…had it not been for the pregnancy, the same would not have come to light."

16. This finding effectively excludes any possibility that the complainant maliciously framed the appellant out of a grudge or ill will. It is evident that the family of the accused and that of the complainant were known to each other and in fact the appellant occasionally patronized I.G.T.'s business in Bura. I.G.T. told court that the appellant disappeared when the matter came out in the open.

17. For his part, the appellant admitted that he was in Bura during the material period but left in early February, 2010 supposedly to visit his ailing mother. But most telling was the fact that he did not expressly deny having sexual intercourse with the complainant in October, 2009.

18. I think the conduct of the appellant in some respects corroborates the evidence of the complainant, as does the medical evidence. It is therefore not accurate that the appellant was convicted on the uncorroborated evidence of the complainant. And even if no corroboration was found, the Lower Court was entitled under the proviso to Section 124 the Evidence Act to enter a conviction if convinced that the victim was telling the truth.

19. In his judgment, the trial magistrate carefully considered the evidence in chief of PW1 and in cross-examination, as well as her demeanor during her testimony and came to the conclusion that she was a credible witness. He believed that the complainant did not have sexual contact with any other person but the appellant. I cannot find any basis upon which to fault the findings of the Lower Court although I might add that the record of the evidence of PW1 should have contained a note as to the court's observation of her demeanor as stipulated by section 199 of the Criminal Procedure Code.

20. As correctly pointed out by the State Counsel, the complainant was aged about 14 years at the time of the offence and had no capacity to consent to sexual intercourse. She was defiled.

21. Upon re-evaluation of the evidence and considering the grounds of appeal raised by the appellant, I am satisfied that there is sufficient evidence to support the charge and the conviction is both justified and safe. The sentence is also legal.

22. This appellant's appeal has no merit and is dismissed in its entirety. I uphold the conviction and confirm the sentence.

Delivered and Signed at Malindi this 17th February, 2012

In the Presence of Mr. Kemo for State

Appellant present

Court clerk - Mungai

C. W. Meoli
JUDGE