REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 24 OF 2019

GEOFFREY OMUSE MOSES.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. N. Wairimu – PM Eldoret dated and delivered on the 17th day of January 2019 in the original Eldoret Chief Magistrate's Court Sexual Offence No. 51 of 2017}

JUDGEMENT

The appellant is serving a term of imprisonment for twenty (20) years for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act and another term of imprisonment for 10 (ten) years for attempted defilement contrary to Section 9 (1) (2) of the Sexual Offences Act the sentences however being ordered to run concurrently.

In the first charge, the particulars were that on 5th March 2017 in Waitaluk District within Trans-nzoia County, he intentionally and unlawfully caused his penis to penetrate the vagina of BN, a girl aged 12 years.

In the second count the particulars were that on the same day and place the appellant intentionally attempted to cause his penis to penetrate the vagina of RN a child aged 10 years.

Being aggrieved by the conviction and sentence, the appellant preferred this appeal. The same is premised on the eight grounds listed in the supplementary petition of appeal as below: -

> **"1.That the trial court erred in law and fact by failing to hold that the charge sheet was defective.**
>
> **2. That, the trial learned Magistrate erred in law and fact by failing to accord this case a fair trial.**
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> **3. That, the trial court erred in law and fact as it failed to hold that identification and recognition of the appellant was not conclusively proved.**
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> **4. That, the trial Magistrate erred in law and fact as he failed to hold that the evidence of penetration did not correspond to this case.**
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> **5. That, the trail court erred in law and fact by failing to observe that the prosecution did not prove its case beyond doubt.**
>
> **6. That, the trial court erred in law and fact by failing to hold that this matter was full of contradictory evidence.**
>
> **7. That, the trial court erred in law and fact by shifting the burden of proof from the prosecution side to the appellant.**
>
> **8. That the trial court erred in law and fact as it failed to hold that the investigations into this matter were shoddy, scanty and wanting."**

By the appeal the appellant prays that the conviction be quashed, the sentences be set aside and he be set at liberty forthwith.

The appellant canvassed the appeal by way of written submissions to which the Learned Counsel for the State replied orally.

As the first appellate court my duty is to re-analyse and evaluate the evidence in the trial court so as to arrive at my own independent

conclusion while bearing in mind that I did not, unlike the trial Magistrate, see or hear the witnesses.

The ingredients for the offence of defilement are **age, penetration** and **the positive identification of the perpetrator.** It is my finding that in the case against the appellant, all the three ingredients were proved beyond reasonable doubt. A birth certificate produced as exhibit 2 confirmed that BN the victim in count I was born on 16th August 2005 hence about four months short of her twelfth birthday at the time the offence was committed. There was also evidence that her cousin RN the victim in count II was younger than her. There were no records to confirm her birth date but Bosire Vincent (Pw4) the Social & Gender Based Violence Co-ordinator at Likuyani Sub-county Hospital and the trial Magistrate both estimated her age as 10 years which suffices being that proof of age is not confined to documentary evidence alone.

As regards penetration, the two children vividly narrated what befell them on the material day. This was after they played truant fearing that the teacher would cane them for being late. Their evidence was received by the court upon conducting a voire dire and satisfying itself that they were competent to give evidence albeit not on oath. The children vividly narrated how they wandered far away from their home on their way to their aunt's home and how they met a man who they did not know before but who they identified as the appellant and who offering to help them took them to an unoccupied house. They narrated how he then went and brought a mattress from a nearby house and put it on the floor and then lay on it with them but instead of letting them sleep he turned on the younger child and attempted to have carnal knowledge of her but when she began crying he turned on the older one. BN (Pw1), the older one told the court that when she too started crying the man threatened to throw them out of the house and since it was dark and there was a barking dog outside they got scared. She told the court that when the man started removing her pant she cried but he told her he would beat them. After that he did bad manners to her. A P3 Form produced in evidence confirmed that she was defiled. When she was examined a whitish discharge was noted around her vulva. It is my finding that whereas the evidence of a victim of a sexual offence requires no corroboration **(Section 124 of the Evidence Act)** in this case the evidence of the children received more than sufficient corroboration. To begin with, Pw3 the children's grandmother confirmed that the children did not spend the material night at home. She also confirmed that when the children finally returned home they narrated to her that they had spent the night in a man's house and that the man had sexually molested them. Secondly, Pw4, the Co-ordinator of Social and Gender Based Violence at Likuyani Sub-County Hospital confirmed he saw the two children and examined them on 16th March 2017 and confirmed the first one had been defiled. Thirdly, the investigating officer (Pw5) confirmed receiving the report and accompanying the children back to the scene. She testified that the children went and showed them the house where the ordeal had taken place. The evidence of the above three witnesses confirms that the children were truthful witnesses and that their evidence was trustworthy and reliable. From the evidence of the two children it had just started getting dark when they met the appellant and he took them to his house. He also spent the entire night with them and then escorted them to the road at 5am in the morning. They therefore had ample opportunity to identify him and I am satisfied that they positively identified him as the perpetrator of the offences. His unsworn evidence did not in any manner shake the very cogent evidence of the two children which as I have stated was corroborated by three other prosecution witnesses.

As for the defect in the charges, I note that the same was amended on 7th May 2018. Moreover, an error in the date is a defect curable under **Sections 214 (2) and 382** of the **Criminal Procedure Code** as no failure of justice to the appellant has been demonstrated. I am further satisfied from the record that the appellant received a fair hearing and his rights under Article 50 of the Constitution were in no way violated. The charges against him were proved beyond reasonable doubt and as the sentences meted by the trial court are lawful, I find no merit in the appeal and the same is dismissed in its entirety.

Signed and dated this 15th day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 21st day of January 2020.

H. A. OMONDI

JUDGE