



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 36 OF 2018

KEPHA OMWENGA ONDIEKI.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. N. Kahara - RM Keroka Law Courts

dated 19th December, 2017 in Keroka Principal Magistrate's Court Criminal Case No. 492 of 2017]

JUDGEMENT

The appellant was convicted and sentenced to twenty (20) years imprisonment for defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

Being aggrieved by the conviction and the sentence he filed this appeal. The appeal is premised on grounds that: -

- “1. The Learned Trial Magistrate erred in law and fact by convicting the Appellant for the offence of defilement.**
- 2. The Learned Trial Magistrate erred in law and fact by admitting evidence of complainant which was full of connections even the understanding of the same.**
- 3. The Learned Trial Magistrate erred in relying on the report of clinical officer who examined her and said there was defilement which had no evidence.**
- 4. The Learned Trial Magistrate erred in law and fact by relying on the evidence of PW2 whose evidence was hearsay.**
- 5. The Learned Trial Magistrate erred in relying on the evidence of PW3 who is wife to the Appellant while she was not at house.**
- 6. The Learned Trial Magistrate erred by not inquiring how investigation was done as the investigation officer was not called as a witness and no reason(s) given.**
- 7. The Learned Trial Magistrate was biased upon the Appellant.”**

By this appeal this court is urged to quash or set aside the sentence.

The appeal was canvassed partly by way of written submissions and partly through oral submissions. I have considered the rival submissions fully and also re-evaluated the evidence in the court below so as to arrive at my own independent conclusion. I have been careful to make provision for not having heard or seen the witnesses testifying. The victim in this case was 15 years old. She narrated how the appellant lured her from her grandmother's house and took her to his house where he turned her into his wife. She testified that in the one week they stayed together he had carnal knowledge of her. She vividly described how he would remove her clothes and underpant and insert his penis into her vagina. She stated that this happened every day for the entire week and it only stopped when the appellant's wife returned home and chased her away but not before biting her on the left hand. I believed the victim. This is because her evidence was corroborated by the rest of the witnesses. Her grandmother (Pw2) confirmed that she indeed disappeared from home for a whole week. Pw2 also confirmed that the girl was taken back home by the appellant's wife who went and handed her over to her grandfather (grandmother's brother) who testified as Pw3. Pw2 also testified that she took the girl to Masimba District Hospital after the police issued them with a P3 Form. Again this is

corroborated by clinical officer Jefta Arisi (Pw4) whose evidence was that he filled her P3 Form on 5th June 2017 and that he concluded there was evidence of defilement. A birth certificate confirming she was fifteen years old was produced in evidence.

The appellant although he gave sworn evidence only narrated what transpired on the day he was arrested. The prosecution's evidence was watertight and proved the charge against him beyond reasonable doubt. The fact that the investigating officer was not called did not water down the evidence and the appellant's wife was not a competent witness in this case and no adverse inference can be made for not calling her. Having perused the proceedings, I find no element of bias by the trial Magistrate and that ground must fail. On the whole I find the appeal against conviction has no merit and it is dismissed.

As for the sentence I find that given the age of the complainant and the circumstances of the offence the sentence of twenty years was just and reasonable and shall therefore not interfere with it. The upshot is that the entire appeal is found to be without merit and it is dismissed.

Signed, dated and delivered in Nyamira this 13th day of June 2019.

E. N. MAINA

JUDGE