REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 14 OF 2018

LEVIS NYANDIKA MAYORE.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. N. Kahara - RM Keroka dated the 1st day of July 2016 in the Keroka Senior Resident Magistrate's Court Criminal Case No. 502 of 2015]

JUDGEMENT

The appellant was charged with Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

The particulars of the charge are that on 1st May 2015 at [particulars withheld] in Borabu District within Nyamira County he intentionally caused his penis to penetrate the vagina of MA a child aged 14 years.

He faced an alternative charge of an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act whose particulars were that on 1st May 2015 at [particulars withheld] in Borabu District within Nyamira County he intentionally touched the vagina of MA a child aged 14 years with his penis. He pleaded not guilty to the charge but after hearing and evaluating evidence from the prosecution's five witnesses as well as the appellant's testimony, the court found him guilty on the principal charge, convicted him and sentenced him to twenty (20) years imprisonment. His appeal is on the conviction and the sentence.

In the petition he faults the trial magistrate for convicting him on what he describes as **"fictitious and imaginary evidence deeply shrouded in irregularities that diminished the prosecution's case; for basing the conviction on evidence by Pw1 which was incompetent as no age assessment was carried out; for not complying with the law hence prejudicing him who was a "mere novice" and for maliciously overlooking his defence without cogent reasons, yet the same was remarkably comprehensive as to cast doubt on the prosecution's case".** He has urged this court to quash the conviction and set aside the sentence.

The appeal is opposed. Parties proceeded by way of written submissions.

As an appeal is in the nature of a retrial, I have reconsidered and evaluated the evidence in the court below so as to arrive at my own independent conclusion while being careful to make provision for not having seen or heard the witnesses myself **(see Okeno Vs Republic [1972] EA 22.**

Section 124 of the Evidence Act provides that the evidence of the victim of a sexual offence alone is enough to convict the accused if the court believes the victim and records its reasons for so doing.

The victim in this case gave evidence as Pw3. She told the court that she was 14 years old and that she was a class 7 pupil at [particulars withheld] Primary School. She narrated how on the material day at about 4pm she was preparing to go to the market when some children told her she was being called by her aunt. Against her better judgement she decided to go see what her aunt wanted only to find the appellant at the place she had been told her aunt was. She testified that the appellant told her he wanted to speak to her. She refused but as she tried to leave he tripped her with his leg causing her to fall. He then pulled her up and after warning her not to scream forced her into a house then called someone who locked the door on the outside. He then pushed her into a bed and forcefully removed her skirt and undergarments before penetrating her vagina with his penis, while keeping his hand on her throat. After he was done he rudely ordered her to put on her clothes and then called another person to open the house. She immediately went home and reported the matter to her father (Pw1) who took her to Kijauri Level 4 Hospital. At the hospital she was examined by a clinical officer (Pw3) who confirmed that she had engaged in sexual intercourse and who advised them to report the matter to the police. They went to Matutu Police Post and made a report. The appellant was then apprehended by vigilantes and handed to the police. He was subsequently charged with this offence. The prosecution produced a birth certificate which proved the age of the victim as fourteen years. A P3 Form and treatment notes made upon examination of the victim at Kijauri Hospital were also tendered in evidence. I believed the complainant. Whereas her evidence does not require corroboration there is medical evidence that confirms that she was defiled. She identified the appellant as the perpetrator of that offence. In his testimony in defence the appellant admitted that he was in his house at around the time the complainant alleges he defiled her. He also admitted that he told someone to lock the door from outside and that he was arrested on the same day by people who went to his house with a girl who he knew as his neighbour. This further corroborates the evidence of the complainant rendering her evidence even more credible. The offence occurred in broad daylight and as the appellant was admittedly known to the complainant I am satisfied the prevailing circumstances were favourable to a positive identification. It is not correct that the verdict of the police was that the complainant had not been defiled. The investigating officer's (Pw4) evidence was that there was evidence the complainant had been defiled. The appellant's defence did not offer any rebuttal to the prosecution's case. The evidence against him was overwhelming. The appeal against conviction has no merit.

On sentence, it is my finding that despite the unconstitutionality of its mandatory nature **(see Jared Koita Injiri Vs Republic [2019] eKLR)** the sentence imposed was just in the circumstances of this case and the appellant should continue serving it. The appeal is dismissed in its

entirety. It is so ordered.

Signed, dated and delivered in Nyamira this 11th day of July 2019.

E. N. MAINA

JUDGE