REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 20 OF 2019

LUCAS NYANGWESO BICHANGE.....APPELLANT

VERSUS

THE STATE.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. W. Waswa – RM Nyamira dated and delivered on the 10th day of May 2019 in the original Nyamira Chief Magistrate's Court Sexual Offence No. 48 of 2018}

JUDGMENT

The appellant was tried, found guilty, convicted and sentenced to fourteen (14) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act.

The particulars of the charge were that on diverse dates between 8th and 18th September 2018 in Nyamira South Sub County within Nyamira County he intentionally and unlawfully caused his genital organ to penetrate the genital organ of RMA a child aged 14 years.

To prove the charge, the prosecution called six witnesses. Briefly their evidence was that on 18th September 2018 HN (Pw3), the complainant's mother, came out of her main house to go to the kitchen which doubled up as a bedroom for the complainant and her niece R (Pw4). She saw someone standing outside the kitchen and on asking who it was the person ran away. She raised an alarm and her husband and her son SN (Pw2) came out and gave chase and apprehended the man later identified as the appellant. The court heard that when the complainant was summoned she owned up to having sexual relations with the appellant. The complainant testified that that was not the first time the appellant had gone to their home and stated the two of them had sex on three occasions between 8th September 2018 and 18th September 2018. She narrated how the accused would pick her from home and take her to her uncle's house which was unoccupied and they would have sex. She stated that he had come to their home for the same reason when he was caught. Once the incident was reported to Nyamira police station the complainant was escorted to Nyamira County Hospital. Fred Omari(pW6) a clinical officer testified that he examined the complainant on 19th September and found she was two months pregnant. He did not see any spermatozoa but he noted that her hymen was missing. Convinced that he had committed the offence Sergeant Jerida Nyatichi (Pw5) charged the appellant with this offence. An age assessment ordered by the court revealed that the complainant was between 14 and 15 years old.

In his defence the appellant denied any wrong doing and contended that the charges were trumped up and the complainant had lied to the court. he stated that they were not together when he was arrested. He blamed his woes on persons whose land he had ploughed to build a road when he worked at the County government. He named those persons as the complainant's father, mother, brother and niece RG some of who were witnesses in the trial. The others were NM, NM, MO and SA. He stated that on the night he was arrested he had gone for bananas he had purchased from the complainant's grandmother,

When Counsel came before me for directions they consented to arguing the appeal through written submissions but by the time of writing this judgment only those of the appellant had been received.

Learned Counsel for the appellant submitted that the above evidence does not meet the threshold required to sustain a conviction. He also submitted that the charge is defective. On the charge sheet he argued firstly that the same lacked clarity because it lumped up different dates together hence offending Article 50(2)(b) of the Constitution. Secondly Counsel argued that no complaint that an act of defilement was committed had been lodged in respect to 8th,9th,10th all through to 17th September 2018and there was therefore no legal basis to include those dates in the charge. He contended that there was no formal complaint to the police in regard to those dates and pointed out that courts are strictly enjoined to follow the law. Still on the defect Counsel submitted that on 18th September there was no contact between the appellant and the complainant and for that reason the charge brought in respect to that date was a wild one. Counsel questioned how the appellant was expected to defend himself on such a charge.

On the merits, Counsel for the appellant submitted that the evidence was full of inconsistencies and contradictions which rendered it unreliable. He cited one such contradiction where the complainant negated her mother's evidence that she had confided that the appellant had removed her from church to go and have sex. Counsel submitted that the contradiction painted the two witnesses as liars. He argued that the appellant should have been given the benefit of doubt. Counsel further submitted that evidence by the complainant that she used to open the door for the appellant whenever he knocked and that the first time they went and had sex in her uncle's house proved that she conducted herself as an adult but not a child and the appellant ought not to have been convicted. In support of this submission Counsel relied on two persuasive cases: -

- **Martin Charo versus Republic Malindi CR APP No32 of 2015**
- **Wycliff Chakua Mchoki versus Republic Nyamira HCCRA No 28 of 2016**

Counsel urged this court to quash the conviction and set aside the sentence of the lower court.

An appeal is in the nature of a retrial and so I have a duty to evaluate and analyse the evidence in the court below so as to arrive at my own independent conclusion. I do so while bearing in mind that unlike the trial magistrate I did not see or hear the witnesses and so did not observe their demeanour.

The complainant told the court that the appellant defiled her three times between 8th and 18th September. She testified that the first time was on 8th September and that he gave her Kshs 100. They met again the next day and he defiled her but he did not give her a gift. She also claimed to have been defiled by him on 18th September. She stated that after the first time he started going to her home until he was caught by her mother. It is however clear from the evidence of the prosecution as a whole that on 18th September 2018 there was no contact between the complainant and the appellant sexual or otherwise. Because of a contradiction between her evidence and that of her mother (Pw3) and niece (Pw4) it is not very clear whether on 18th September she was in the kitchen where she used to sleep or in the main house studying. What is clear is that whereas the appellant was arrested after being sighted in the complainant's home he had not met with the complainant at all. It was the complainant's brother who gave chase and apprehended him. It is also apparent from the evidence that the complainant was only summoned to the scene after the appellant was caught and it was her interrogation that led to the charges preferred against him. I do not ascribe to the notion that a child who conducts herself as an adult deserves to be defiled and the two cases cited by Counsel for the appellant do not therefore persuade me. In my view the only legitimate defence would be that provided at Section 8 (5) of the Sexual Offences Act which in any event was not raised by the appellant. Be that as it may it is my finding that his conviction was not safe. I agree with his advocate that the prosecution's case was riddled with inconsistencies and contradictions as would raise suspicion that the witnesses were not telling the truth. The first inconsistency arises from evidence by the complainant that the appellant defiled her on 18th September. The question that arises is when that occurred yet according to her mother and niece she was in her parent's main house. Sergeant Jerida told the court that the complainant told her that the appellant had also defiled her on 15th and 16th but it is instructive that the complainant did not make any mention of these dates in her testimony. It is equally baffling that her niece (Pw4) denied ever seeing the complainant in their home prior to his arrest. Pw4 stated "I have never seen the accused at our home." This contradicted the complainant's evidence that they used to open the door for the appellant whenever he went there to get her. It is also perplexing and unbelievable that a mother would have dismissed her young daughter who disclosed that a man was making sexual advances towards her by telling her to report to her teacher. The evidence in this case clearly does not add up. Either the witnesses lied to the police or to this court. Whichever way one looks at it their evidence cannot be trusted. On his part the appellant gave a consistent account of what he had gone to do in that home and in my view he is entitled to the benefit of the doubt that is brought about by the contradictions in the prosecution's case. In the premises the appeal is allowed, the conviction is quashed and the sentence is set aside. It is ordered that he shall be set at liberty forthwith unless otherwise lawfully.

Signed, dated and delivered in Nyamira this 7th day of November 2019.

E. N. MAINA

JUDGE