REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 14 OF 2019

MAXMILLAH ACHELAT OJULO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.391C of 2017 of the Chief Magistrate's Court at Busia by Hon. T. Madowo–Resident Magistrate)

JUDGMENT

1. Maxmillah Achelat Ojulo, the appellant herein, was convicted for the offence of failing to protect a child from sexual exploitation contrary to section 15 as read with section 20 of the Children Act, CAP. 141 Laws of Kenya.

2. The particulars were that on the 15th October 2017 at Osajei Location, Teso North Sub County within Busia County, she harboured **ESA**. a child aged 13 years by means of deception for the purpose of exploiting the said **ESA**.

3. The appellant was convicted and was sentenced to serve one year imprisonment. She now appeals against both conviction and sentence.

4. She raised the following grounds of appeal:

a. That the learned trial magistrate erred in law and in fact by convicting her without sufficient evidence.

b. That the minors who were the perpetrators of the offence were not called to testify.

5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that the offence was proved to the required standards.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Section 15 of the Children Act states as follows:

> **A child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials.**

8. It is worth noting that section 15 of the Children Act is aspirational but not a penal section. It was therefore erroneous to charge the appellant under a section that does not create an offence.

9. The conviction of the appellant was grounded on the evidence of ESA. The proviso to section 124 of the Evidence Act states:

> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.** [Emphasis added]

I will interrogate the evidence of ESA and find whether the learned trial magistrate had the basis of believing her evidence.

10. In her evidence, ESA testified that she met with the appellant when she was going to fetch water and decided to go with her for she feared her mother. The source of her fear for her mother was because she had given the appellant three bags of maize which she had not paid for. Interestingly, the evidence of her mother was that when she enquired from ESA where some household items were, she did not respond to her but took a can and said she was going to fetch water. Apparently she was running away from home for she never returned. She never talked of missing bags of maize.

11. In her evidence, she gave contradictory evidence. At one point she said nobody did anything to her but later changed and alleged that the appellant not only locked her with her son who defiled her, but also caressed her breasts. This ought to have a raised a red flag on her credibility. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

> **The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

ESA has held herself out as such a witness.

12. The prosecution case had unexplained circumstances. The evidence on record was that E.S.A. was in the appellant's mother's home which was about 5 kilometers away from that of the appellant. There were other adults in that home but none of them was called as a witness.

13. Even if the appellant was correctly charged, the prosecution could not have sustained a conviction against her.

14. The upshot of the foregoing analysis of the evidence on record is that the conviction was unsafe. I accordingly quash the same and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA this 11th Day** of December**, 2019**

KIARIE WAWERU KIARIE

JUDGE