REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 19 OF 2019

WYCLIF MOGAKA ONDIEKI...APPELLANT

=VRS=

THE STATE...RESPONDENT

{Being an appeal against the Judgement of Hon. C. W. Waswa – RM Nyamira

dated and delivered on the 30th day of April 2019 in the original Nyamira

Chief Magistrate's Court Sexual Offence No. 12 of 2019}

JUDGMENT

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 were that on diverse dates between 2nd February 2019 and 4th February 2019 in Manga Sub-county within Nyamira County he intentionally and unlawfully caused his penis to penetrate the vagina of FK a child aged 14 years.

He pleaded not guilty to the charge but after hearing and evaluating the evidence adduced by the prosecution and the appellant, the trial Magistrate convicted him and sentenced him to ten (10) years imprisonment.

Being aggrieved the appellant preferred this appeal. From a perusal of his petition of appeal, the appeal was against the conviction only. However, at the hearing of the appeal, the appellant abandoned the grounds in the petition and relying on written submissions stated that he was only interested in having his sentence reduced and he had no problem with the conviction.

I have nevertheless as the first appellate court considered and evaluated the evidence in the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who gave evidence. It is my finding that the charge of defilement was proved beyond reasonable doubt. Evidence was adduced that the complainant was 14 years old. As was stated in **Nahayo Syprian v Republic [2017] eKLR:**

> **"The age of the victim in sexual offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. It can also be proved by medical age assessment; direct evidence of parents or guardian or by observation by the court. In this case the complainant stated that she was 10 years old and the clinical officer estimated the age to be about 9 years old. I am from this evidence satisfied that the age of the child was established at 9 years old going to 10 years."**

The complainant in this case testified she was fourteen years old and the clinical officer who examined her also estimated her age as 14 years hence conclusively proving her age which was accepted by the trial Magistrate. I am satisfied therefore that age was proved beyond reasonable doubt.

On penetration, the complainant vividly narrated how she met the appellant and how he convinced her to accompany him to his house. Apparently they were having relations before as she described him as her boyfriend. That she went missing from home was confirmed by her mother (Pw2) and father (Pw3). Her aunt (Pw4) also confirmed that it was she who took her back to her parents' house. Pw4 corroborated the complainant's evidence that she had been in contact with the appellant. It was her evidence that the appellant went to her house to get a phone he had given to the complainant. The P3 Form indicated there was penetration hence confirming the complainant's evidence that she and the appellant had sex in the two days she went missing. Whereas **Section 124 of the Evidence Act** removed the need for corroboration of the evidence of victims of sexual offences, it is my finding that there was more than sufficient corroboration in this case. The conviction was therefore sound and it is immaterial that no DNA was undertaken to confirm paternity of the child the complainant was carrying. Also for the issue of **Section 200 (3) of the Criminal Procedure Code** it is clear from the record that the trial was by one Magistrate who needed not to have complied with the Section.

On the sentence, the same was lawful as indeed the trial Magistrate considered that the accused was a first offender, his plea in mitigation, age and also the decision of the Supreme Court in the **Francis Karioko Muruatetu & another v Republic [2017] eKLR** case in arriving at the sentence which was less than that provided in the law. I see no reason to disturb such a well-considered sentence which in any event cannot be said to be harsh or excessive. Accordingly, the appeal is dismissed in its entirety.

Signed, dated and delivered in open court this 5th day of December 2019.

E. N. MAINA

JUDGE