REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.79 OF 2017

KIRIKA OLE NANYEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. R. M Oanda PM- PM dated the 3rd November 2017 at the Principal Magistrate's Court at Kilgoris in Criminal Case No. 124 of 2016)

JUDGMENT

1. The appellant Kirika Ole Nanyei was charged and convicted of the offence of defilement contrary to section 8 (3) of the Sexual Offences Act. The particulars of the offence were that on the 3rd of November 2015 at Magera Town in Nyamache District of Kisii county he intentionally and unlawfully caused his penis to penetrate into the vagina of M N a girl aged 15 years.

2. The appellant's grounds of appeal are that; his constitutional rights were violated, the 20 years meted on him is likely to ruin his life, the trial magistrate failed to consider his age and the age of the complainant when convicting him, the prosecution evidence was flimsy below the standard required and his defence was rejected without concrete reasons.

3. As this is the first appeal court, I am required to re-evaluate all the evidence and reach an independent conclusion bearing in mind that I neither heard nor saw the witnesses testify **(See Okeno v. Republic [1972]EA 32).**

4. Pw1 a girl aged 16 testified on oath that on the 30/11/2015 at 9am whilst in their home the appellate went to their home in a shuka and a Masai sword. The appellant got hold of her and placed her in a motorbike and took her away. He threatened to kill her if she resisted. They left the motor bike and boarded a taxi and went to Magena to a house where they spent the night. They had sex with the appellant. She stayed with him for 2 weeks and after the 2 weeks he left leaving her locked in the house. He did not return she called out for help and a lady opened the door for her. She was taken to hospital after being taken.

5. Pw2 a minor 13 years of age testified on oath after voire dire. He recalled that on the 30/11/2015 he was home with Pw1 who is his sister and a young child. He went to herd animals and on returning home that evening he did not find Pw1. He knows the appellant as one who herds animals. Pw1 returned on 1/1/2016.

6. Pw3 a clinical officer produced the P3 he told the court that on the 25/1/2016 Pw1's P3 was filled. The history was one of sexual assault by a male adult known to her. She has no injuries to the upper limps. The vaginal examination showed that the hymen was not intact some investigation on the lab urinalysis showed there was pus cells meaning she had an infection. She was pregnant. She had had sexual intercourse.

7. Pw4, Pw1's mother recalled that she had gone to work and on returning home she did not find Pw1. She went in search of Pw1 but did not find her. She reported to the chief. Pw1 was found on the 20/1/2016. Pw1 told them she had been abducted by Kirika by force and they went to Magena. Pw1 miscarried.

8. Pw5 the investigating officer confirmed that he received Pw4's report on 1/12/2015 that her daughter MN a girl aged 15 years old was missing. They began their investigations and on the 20/1/2016 Pw1 returned and she narrated how the appellant took her away. The appellant was arrested on the 25/1/2016.

9. The appellant in his defence testified that he was a casual labourer and that he was arrested on the 19/2/2016 and taken to the police station. That the case he knows is the land case. That the complainant are his neighbours. They had planted trees at the boundary. They used to quarrel often as their cows used to spoil the trees. They never wanted them to drive off the animals. His dad asked them to restrain their animals. They decided to go and report this. He did not do it. He was not taken to hospital. He was only taken to hospital at Kisii by the order of the court. The investigating officer said he did not see anything. When cross-examined by the prosecutor he replied that he did not know M N. she is a neighbour. He did not go with her to Magena.

10. I have considered the appellant's submissions and the prosecution's response.

11. In order to prove an offence of defilement under section 8 (1) of the Sexual Offences Act, the prosecution must establish that there was penetration. Pw1 testified that the appellant abducted her and took her to Magena where they stayed for 2 weeks. They had sex. Her evidence was corroborated by the medical evidence the vaginal examination revealed that Pw1's hymen was not intact and test results showed that she was suffering from an infection. Pw1's age was established as 15 as at 30/11/2015 her birth certificate was produced. Pw1 was rescued from the place the appellant had taken her and she returned home on the 22/1/2016 and she was examined on the 25/1/2016, 5 days later. The appellant was known to Pw1 and they were together for 2 weeks before the appellant abandoned her. The appellant in his defence stated that the complainants are his neighbours. The trial court did consider the appellant's defence. His defence that they had a dispute and that they had a land dispute in my view was an afterthought. He did not examine Pw1 nor Pw4 on the alleged dispute. I am satisfied that the evidence proves that the appellant defiled Pw1. The evidence on the dates was not fatal to the prosecution case.Pw1 evidence was that she returned home after 2 weeks. Pw4 and Pw5 testified that Pw1 returned home on the 20/1/2016. I find that the conviction was proper.

12. The appellant claims that in 2015 he was underage. The court record shows that when the appellant's age was assessed he was 17 years as at10/2/2016. The appellant was therefore underage when he committed the offence and therefore a minor and should have been sentenced as per the provisions of section 8 (7) of the Sexual Offences Act and section 191 (1) of the Children Act. At the time he was being sentenced he was 18 years. The trial court ought to have considered the fact that he was underage at the time he committed the offence. He was sentenced to 20 years in jail. The conviction was proper and I uphold it, but not the sentence. I therefore set aside the sentence of 20 years imprisonment. I have considered the probation sentence report tendered in this court on the 5th of December 2018. It recommends a non-custodial sentence a probation sentence. Section 191(1) provides that an offended can be placed on probation. I therefore sentence the appellant to serve three (3) years probation under the supervision and direction of the Probation Officer Kilgoris County**.**

Dated and delivered at Kisii this **13th** day of **December 2018**.

R.E.OUGO

JUDGE

In the presence of;

Appellant **In person**

Mr. Otieno **Senior Prosecution Counsel**

Rael **Court clerk**