REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 39 OF 2015

SHADRACK MAINA MWANGI ……APPELLANT

-VERSUS—

REPUBLIC …….…….. RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. V K KIPTOON -** Senior Resident Magistrate dated 18thJune 2014 in Nanyuki Chief Magistrate's **Court Criminal Case No. 123 of 2012**)

JUDGMENT

1. **SHADRACK MAINA MWANGI was**charged before the Senior Principal Magistrate's court, with the offence of defilement of a girl of 10 years **Contrary to Section 8 (1) (2) of the Sexual Offence Act Cap 62A.** He was also charged with an alternative offenceof indecent act with a child **Contrary to Section 11(1) of Cap 62A.** He was convicted as charged of the main count and sentenced to life imprisonment. He has now filed this appeal against that conviction and sentence.

2. The duty of this court as the first appellant court has been restated may time before. In the case of **MARK OIRURIMOSE V REPUBLIC [2013] eKLR** the court of Appeal reiterated that duty it sated that :

> *" it has been said over and over again that the first appellant court has the duty to revisit the evidence tendered before the trial court, afresh analyse it , evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them given evidence and to give allowance for that. The well-known case of **Okenovs Republic [1977]EA 32** which sets out that principle has been referred to in several decisions of this Court and of the high Court."*

3. Appellant by his written submissions faulted his conviction and sentence submitting that the prosecution's evidence was inconsistent, had gaps and was unreliable which tended to lower the criminal quality of proof.

4. The complainant JW stated in evidence she was 10 years old. After voir dire examination of JW the trial Magistrate proceeded to receive her evidence under oath.

5. JW stated that she was chased away from a private forest by a watchman where she and had gone with her two girls to collect firewood. This was on 23rd December, 2011. She returned to her home with her clothes being soaked in water. It seems her mother was displeased with her and

threatened to disciple her. That threat led her to sneak out of the house at 5p.m.

6. She knew the appellant, whom she called Shadrack, because he lived in same plot with them.

7. In her own words, this is what she said happened on 23rd December, 2011.

> "*I sneaked from home at around 5p.m. when she (**sic**) saw Shadrack who informed that she (**sic**) take me to our house so that he tells my mother not to beat me, we went with him, at the gate she (**sic**)told me that my mother was not there so we go to his house, she (**sic**)forced me to his house, at his house he served rice and meat and gave it to me, we ate, he told me to sleep with him, the house is one roomed but the front part has a shop. The bed is one, I slept in the bed, I slept with my clothes on, he joined me in bed having removed his clothes, we shared with him one blanket…"*

8. J W proceeded to describe how appellant defiled her in that room whose light was lit and while the music from the radio was blaring. The following morning JW stated that appellant threatened her with knife and said that he would kill her if she told anyone that he had defiled her. JW said that appellant told her that she should "*say that it was Mathenge orWaithaka, who had done bad things to her*."

9. J W noticed that she was bleeding from her genitalia.

10. J W narrated how on 31st Deceber, 211 at 5p.m. appellant took her and another girl called W to N and left them there. Appellant left saying he was going to the toilet and it was at 6.30p.m. It was then that M N (P W 3) found J W crying. JW told P W 3 that she had been left there. She spent the night at P W 3'S home until the following day when she was taken to her mother's home. It is then that JW informed her mother what the appellant had done.

11. Appellant submitted that the court should consider the evidence of J W with a view to the holding in the case: **MAINA VS REPUBLIC [1970] EA, 370** which referred to a decision made in 1953 as follows:

> "*It has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth then the fact that there is no corroboration need not stop his convicting.*

12. The Learned prosecution counsel Miss Kinyanyui quite rightly responded to this submission by referring the court to Section 124 of the Evidence Act CAP 80. That Section provides under its proviso that in Sexual Offences the court can convict on the evidence of the victim, if for reasons to be recorded in the proceedings the trial court is satisfied the victim is telling the truth.

13. But I hasten to add that in this case JW's evidence was corroborated by the evidence of the clinical officer, Samwe lWahome who examined JW, ten days after the offence, and concluded that there was penetration and that accordingly JW had been defiled.

14. Appellant's reliance of the case of **MAINA V- REPUBLIC (supra)**shows how times and perceptions have changed with time. Why would women's and girl's evidence have been singled out as more likely to be false or fabricated? The answer, I think lies in the different era when the case of MAINA (supra) was decided, that is in 1969.It is now 2016. Society has since gone

through many positive changes, and now evidence of women and girls, is subjected to normal test in cross examination and is not treated any different from that of the men and boys.

15. Appellant also submitted that the evidence of JW should be rejected because, to quote from his submissions:

> "*In this case, the victim (JW) paints a disposition of a truant and incorrigible child …. "*

16. In response I would state tat whether JW was a truant or not her rights under the law have to be protected by the court. It is not justification if that was what appellant implied, for her to be defiled.

17. JW while voir dire examination was conducted by the Learned Magistrate stated that she was 10 years old. The P3 form, produced as an exhibit by the clinical officer stated that JW's estimate age was 10 years. This evidence was not subjected to cross-examination by the appellant and for him to submit before this court that age of JW was not proved amount to an afterthought. Even in his sworn defence appellant did not question the age of JW. The submissions by appellant that JW's age was not proved to the required standard is rejected,

18. Having considered the prosecution's case, at the trial, the defence offered by appellant, which was a mere denial of the offence, and the submission's made at hearing of this appeal I find no basis to allow this appeal against conviction and sentence. There were no inconsistencies which can justify a different finding. Appellant's appeal is therefore dismissed.

Dated and Delivered at Nanyuki this 7th APRIL 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Njue

For state ……

For Appellant …….

Appellant ……

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE