



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 72 OF 2009.

S W ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of D.M. Ochenja – AG. PM in Criminal Case 3558 of 2007 delivered on 18th May, 2009 at Kitale.)

J U D G M E N T.

The appellant, **S W**, appeared before the Principal Magistrate at Kitale charged with attempted defilement, contrary to section 9 (1) read with section 9 (2) of the Sexual Offences Act, in that on the 13th December, 2007 in Trans Nzoia District, attempted to defile C N, a child aged ten (10) years.

After trial, the appellant was convicted and sentenced to serve ten (10) years imprisonment. He was however, dissatisfied with the conviction and sentence and preferred this appeal on the basis of the grounds contained in the petition of appeal filed herein on 3rd December, 2009. At the hearing of the appeal, the appellant appeared in person and presented written submissions.

M/s. Limo, Learned Prosecution Counsel, appearing for the state/respondent opposed the appeal and submitted that the evidence against the appellant was cogent. That, the complainant aged 10 years old was a step daughter of the appellant. That, the appellant was properly convicted and was found by PW2 while attempting to defile the complainant. That, the P3 form, a police document, was produced in court with the consent of the appellant whose grounds of appeal are unmerited.

Having considered the submissions by both sides, the duty of this court is to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, this court has considered the entire evidence adduced by the prosecution through the complainant, **C N (PW1)**, her mother, **E N (PW2)**, and the investigating officer, **P.C. George Wamae (PW3)**.

The unsworn statement made by the appellant in his defence has also been considered.

From the evidence, it is apparent to this court that the offence was established by the complainant's evidence as supported by that of her mother (PW2). The complainant said that the appellant, her step father, forced her into the house and removed her underpant. He held her by the neck and placed her on the beddings on the floor. He removed her cloths and left her naked. He then undressed, lay on top of her and defiled her.

Her mother (PW2) came looking for her. She (PW2) found her on the bedding on the floor while naked with the appellant on top of her defiling her.

The mother screamed and attracted people to the scene. The appellant was apprehended but managed to escape through a window.

The complainant was taken to the hospital for examination and treatment.

The investigating officer (PW3), recorded necessary statements and issued a P3 form which he produced (P. Ex. 1) in court and which showed that the complainant was not defiled but there was an attempt to defile her. The appellant was eventually arrested and charged with the offence.

His defence was a denial and an indication that he was arrested for drinking illicit liquor (changaa). He said that he lived with the complainant's mother (PW2) as husband and wife for six (6) years and that they parted in 2006. That, on the material date, he was drinking chang'aa with the complainant's mother when police officers arrived at the scene and arrested several people including himself. He was taken to Kapsara police post where he could not pay a sum of Ksh. 2,000/= and was taken to Kapsara Police Station after which he was arraigned with the present offence. He said that the complainant's mother (PW2) gave the police a sum of Ksh. 300/= so that he could be charged with the offence.

The appellant's defence was disbelieved by the trial court which noted that the case against the appellant was not fabricated.

The trial court further noted that the complainant's evidence was strong and credible and was corroborated by that of her mother (PW2).

Consequently, the trial court concluded that the prosecution case had been proved beyond reasonable doubt.

This court fully agrees with the findings made by the trial court as supported by the complainant's evidence and that of her mother.

The appellant's conviction by the trial court was therefore sound and is hereby upheld. The sentence meted out against the appellant was lawful.

In sum, this appeal is lacking in merit and is hereby dismissed.

[Delivered and signed this 20th day of March, 2014.]

J.R. KARANJA.

JUDGE.