



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 55 OF 2013.

MESHACK NYONGESA ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of R.M. Washika – AG. P.M. in Criminal Case No. 843 of 2010 delivered on 30th April, 2013 at Kapenguria.)

J U D G M E N T.

The appellant, **Meshack Nyongesa**, appeared before the Principal Magistrate at Kapenguria charged with defilement contrary to section 8 (1) read with section 8 (4) of the Sexual Offences Act, in that on the 18th July, 2010, at [Particulars Withheld] village West Pokot County, defiled R M, a girl aged seventeen (17) years.

Alternatively, the appellant was charged with committing an indecent act with the same child contrary to section 11 (1) of the Sexual Offences Act. There was a second count facing the appellant i.e. child trafficking contrary to section 13 (b) of the Sexual Offences Act, in that on 3rd October, 2010 at [Particulars Withheld] village West Pokot County, the appellant received R M, a child aged seventeen (17) years for the purpose of committing a sexual offence.

After a full trial, the appellant was convicted and sentenced to fifteen (15) years imprisonment on count one and ten (10) years imprisonment on count two, both sentences to run concurrently.

Apparently, the learned trial magistrate treated the alternative count as a separate second count and ignored the third count (as appears in the charge sheet) of child trafficking.

It was an error on the part of the learned trial magistrate to convict the appellant on both the main offence of defilement and the alternative offence of indecent act with a child.

The alternative count became irrelevant the moment the main count was found to have been proved beyond reasonable doubt.

Be that as it may, the appellant was dissatisfied with the conviction and sentence and preferred the present appeal on the basis of the grounds in the petition of appeal filed herein on 9th May, 2013. He appeared in person at the hearing of the appeal and relied on his written submissions in support of his case.

Mr. Chelashaw, learned Prosecution Counsel, appeared for the state/respondent and opposed the appeal by submitting that the complainant (PW1) gave an account of how she was defiled by the appellant and

that at later stage, she was found by PW2, PW3, PW5 and PW6 to be pregnant. PW4 also found her pregnant. That it was upon discovery of her pregnancy that she stated that she had been defiled by the appellant.

The learned Prosecution Counsel contended that the appellant did not deny the offence and only stated that he stayed with the complainant and was responsible for her expenses.

Further, the complainant was found to be 17 years old and as a minor her consent was immaterial. The Learned Prosecution Counsel submitted that the alternative charge was rendered obsolete after the first count was proved and therefore, the sentence on the alternative count was improper.

The submissions by the appellant and the respondent have been considered by this court whose duty is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of hearing and seeing the witnesses.

In that regard, this court has considered the evidence by the seven prosecution witnesses and the appellant's unsworn statement.

The prosecution witnesses included the complainant, **R M (PW1)**, a lecturer at [Particulars Withheld] Youth Polytechnic, **N C (PW2)**, a watchman at [Particulars Withheld] Youth Polytechnic, **R L (PW3)** a clinical officer, **Danson Litole (PW4)**, a lecturer at [Particulars Withheld] Youth Polytechnic, **M S (PW5)**, an orphanage Manager, **E W (PW6)** and the investigations officer, **P.C. Menjo Kipruto (PW7)**, of Kapenguria Police Station.

After considering the evidence by the foregoing witnesses in the light of the defence raised by the appellant, this court agrees with the learned Prosecution Counsel that the appellant did not deny having had sexual intercourse with the complainant.

Indeed, he did not deny that he impregnated her. His defence was essentially that he was staying with her and was responsible for her expenses. He thus inferred that she was his "wife" or that they stayed together as man and wife.

However, the complainant's evidence indicated that she was lured into the appellant's house by the appellant while she was undertaking a tailoring course at a polytechnic under the sponsorship of a children's home.

S (PW5), confirmed that the complainant was a student at the [Particulars Withheld] Youth Polytechnic and N (PW2) confirmed that she (complainant) went missing from the polytechnic after the fact was discovered by the watchman (PW3).

E (PW6), confirmed that the complainant was an orphan and had been taken in at that orphanage. She (PW6) produced a birth certificate indicating that the complainant was born in 1993.

The complainant testified that she had sexual intercourse with the appellant in his house on one occasion in the month of July, 2010 and in September, 2010, she tested positive for pregnancy. Thereafter, in the month of October, 2010, the appellant took her into his house.

The clinical officer at Kapenguria District hospital (PW4), examined the complainant and confirmed that she was defiled as a result of which she became pregnant.

From all the foregoing, it was apparent that the implication given by the appellant that the complainant was his "wife" was not tenable. The truth was that he lured her into his house after learning that she was pregnant following their sexual encounter. The fact that she willingly went into his house or that, she willfully consented to sexual intercourse was irrelevant for purposes of defilement.

The birth certificate (P. Ex. 2) indicated that the complainant was born on 26th September, 1993, meaning

that she was aged 17 years at the time of the offence. She was therefore a minor. Her consent to sexual intercourse was immaterial.

Consequently, the main charge of defilement was clearly established against the appellant and his conviction thereof was sound and safe and is hereby upheld.

The sentence imposed in respect of that main charge was lawful in terms of section 8 (4) of the Sexual Offences Act.

However, the conviction and sentence on the alternative count was unlawful. The conviction is hereby quashed and the sentence set aside.

With regard to the third count, there was no evidence in support thereof. Consequently, the appellant is found not guilty in respect thereof and is hereby acquitted.

Otherwise, the appeal respecting conviction and sentence on the main count of defilement is hereby dismissed for want of merit.

[Delivered and signed this 18th day of March, 2014.]

J.R. KARANJA.

JUDGE.