



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CRIMINAL APPEAL NO. 70 OF 2013.**

**ERUSTUS WANYONYI WANYAMA ::::::::::::::::::::::::::::::::::: APPELLANT.**

**VERSUS**

**REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT.**

*(Being an appeal from the original conviction and sentence of R.M. Washika – AG. PM in Criminal Case No. 1273 of 2012 delivered on 22nd May, 2013 at Kapenguria.)*

**J U D G M E N T.**

The appellant, **Erastus Wanyonyi Wanyama** (alias Erastus Olekukuya) appeared before the Principal Magistrate at Kapenguria charged with defilement contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act, in that on the 20th August, 2012 at around 2.00 p.m. at (*particulars withheld*) West Pokot County, defiled K.K, a girl aged fifteen (15) years.

Alternatively, the appellant was charged with indecent act with the same child contrary to section 11 (1) of the Sexual Offences Act.

After trial, the appellant was convicted on both the main and alternative counts and sentenced to twenty (20) years imprisonment on the main count and ten (10) years imprisonment on the alternative count, all to run concurrently.

It may be pointed out at this juncture that the conviction and sentence on the alternative second count was wrong. The conviction on the main count rendered the alternative count irrelevant.

Be that as it may, the appellant was aggrieved by the conviction and sentence and filed the present appeal on the basis of the grounds in the petition of appeal filed herein on 3rd June, 2013.

At the hearing of the appeal, the appellant appeared in person and relied on his written submissions.

The Learned Prosecution Counsel, **Mr. Chelashaw**, appearing for the state/respondent opposed the appeal and submitted that the complainant (PW2) was indeed defiled after the appellant took advantage of her when he found her on the way. That, she later realized that she was pregnant but did not disclose the offence until the pregnancy became noticeable. That, she was fifteen (15) years and at the time and identified the appellant as the person responsible for her pregnancy.

The Learned Prosecution Counsel, contended that the complainant was a minor and therefore consent was immaterial and that the appellant's defence which was a mere denial could not stand.

The Learned Prosecution Counsel noted that the sentence on the main count was correct but submitted

that there was no need for the trial court to convict and sentence the appellant on the alternative count.

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

Accordingly, this court has considered the evidence adduced against the appellant by the four (4) prosecution witnesses including the clinical officer, **Emmanuel Kapeitom (PW1)**, the complainant, **K.C (PW2)**, the complainant's father, **K.L (PW3)**, and the investigation officer, **C.I. John Kiringi (PW4)**.

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

From the evidence, it is the opinion of this court that the offence was not disputed and that the dispute centred on the alleged responsibility of the appellant for the same.

Indeed, the evidence by the complainant did establish that the complainant was defiled and became pregnant as a result. She said that she was at the time a primary school pupil and that it was on the 20th August, 2012, when the appellant defiled her. She further said that she knew the appellant as a shamba (garden) boy at her uncle's place. That, he found her on the way to buy vegetables and defiled her. That, she later found that she was pregnant and became scared such that she could not disclose the offence. She disclosed the offence and revealed the offender only after her father discovered the pregnancy.

The father (PW3) discovered that the complainant was pregnant when she took her to hospital. It was then that she disclosed that she had been defiled by the appellant whom he previously knew.

The investigating officer (PW4) revealed that the appellant had intended to marry the complainant while she was in school.

The appellant's defence was a denial and a contention that he was arrested and charged without good reason. He said that the complainant had indicated that she did not know him. However, this defence was thwarted by the complainant's evidence which showed that he was responsible for defiling her with the result that she became pregnant. She strongly indicated that he was a person very well known to her.

The learned trial magistrate considered the defence raised by the appellant and found that it was a sham and could not be upheld in the light of the complainant's evidence as corroborated by that of the other prosecution witnesses.

This court does not see any tangible reason to interfere with the aforementioned findings by the learned trial magistrate.

Consequently, the appellant's conviction by the learned trial magistrate respecting the main count is hereby upheld and the sentence confirmed since it was established without dispute that the complainant was aged fifteen (15) years at the material time of the offence.

However, as noted herein above, the conviction and sentence on the alternative count was wrong.

The same is hereby quashed and the sentence set aside. Otherwise, the appeal is dismissed.

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

**J.R. KARANJA.**

**JUDGE.**