



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 59 OF 2013.

REUBEN LOSIALIMA ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of R.M. Washika – AG. PM in Criminal Case No. 1250 of 2012 delivered on 8th May, 2013 at Kapenguria.)

J U D G M E N T.

The appellant, **Reuben Losialima**, appeared before the Principal Magistrate at Kapenguria charged with three counts viz:-

- I. *Defilement contrary to section 8 (1) read with section 8 (2) of the Sexual Offences Act, in that on the 21st November, 2012, at [Particulars Withheld] village West Pokot County, he defiled M C, a girl aged four (4) years.*
- II. *Indecent Act, contrary to section 11 (1) of the Sexual Offences Act in that on 21st November, 2012, at [Particulars Withheld] village West Pokot County, touched the vagina of M C.*
- III. *Child trafficking contrary to the counter-trafficking in persons Act, in that on the 21st November, 2012, intentionally harboured M C, a girl aged 4 years for purpose of sexual offences.*

After trial, the appellant was convicted on all counts and sentenced to life imprisonment for count one, ten (10) years imprisonment for count two and thirty (30) years imprisonment for count three. All to run concurrently. With due respect to the learned trial magistrate, the conviction and sentence on count two was wrong for the simple reason that the said count was essentially an alternative charge to the main count (one) of defilement. Therefore, having convicted the appellant on the main count, the alternative count two became irrelevant for a conviction or sentence.

Be that as it may, the appellant being dissatisfied with the conviction and sentences preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 14th May, 2013. He appeared in person at the hearing of the appeal and relied on his written submissions.

The learned prosecution counsel, **M/s. Limo**, appearing for the state/respondent opposed the appeal and submitted that the evidence by the complainant remained unshaken and that the appellant was previously known to the complainant.

On sentence, the learned prosecution counsel submitted that the sentence on the main charge of

defilement was sufficient such that sentences on the other two counts should have been held in abeyance.

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 prosecution evidence against the appellant led by four (4) witnesses including the complainant's mother, **E C (PW1)**, the child complainant, **M C (PW2)**, the clinical officer, **Danson Litole (PW3)** and the investigation officer, **PC Walter Kiprono Metto (PW4)**.

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

From all the evidence, it is the opinion of this court that there was no dispute with regard to the fact that the child complainant was indeed sexually assaulted on the material date. Despite her tender age, she narrated to the court the circumstances under which she was defiled having been sent by her mother to a posho mill. Her mother (PW1) confirmed having sent her to the posho mill and after a while she (PW1) saw her (complainant) crying and shivering.

She (PW1) learnt that the appellant had been chased and apprehended after offending the complainant. The complainant confirmed that she had been defiled by the appellant.

The clinical officer (PW3), examined the complainant and filled the necessary P3 form showing that an attempt was made to defile the complainant. The investigating officer (PW4), charged the appellant with defilement on the basis that there was partial penetration.

The defence raised by the appellant was a denial and an indication that he was arrested for nothing as he carried charcoal on a "punda" (donkey). He contended that he did not see the complainant on that date.

The learned trial magistrate disbelieved the appellant and convicted him on all three counts on the basis of the evidence by the complainant and the other prosecution witnesses.

Indeed, there was ample evidence from the complainant and the clinical officer (PW3) establishing that the complainant was sexually assaulted.

However, the medical evidence pinpointed a lesser offence of attempted defilement thereby indicating that the appellant's conviction on the main count of defilement was not supported by cogent evidence. Consequently, the conviction is hereby quashed and instead the appellant is found guilty of attempted defilement contrary to section 9 (1) of the Sexual Offences Act.

The life imprisonment sentence imposed on the first count is set aside and substituted for ten (10) years imprisonment.

As noted hereinabove, the conviction and sentence on count two was erroneous and is hereby quashed and the sentence set aside.

With regard to the third count, the conviction was unsupported by any evidence and was therefore improper. The same is also quashed and the thirty (30) years imprisonment sentence set aside.

In sum, the appeal with regard to the second and third counts is allowed but not with regard to the first count. The appeal with regard to the first count is dismissed with necessary attention regarding the offence actually proved (i.e. attempted defilement) and the sentence thereof.

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

J.R. KARANJA.

JUDGE.