



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL CASE NO. 98 OF 2012.

LOKUDAN LOTENG.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence of R.M. Washika – SRM

in Criminal Case No. 1021 of 2011 delivered on 29th August, 2012 at Kapenguria.)

J U D G M E N T

The appellant, **Lokudan Loteng**, appeared before the Senior Resident Magistrate at Kapenguria charged with defilement, contrary to section 8 (1) read with section 8 (2) of the Sexual Offences Act, in that on the 3rd December, 2011, in West Pokot County defiled S C, a child aged ten (10) years.

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

After a full trial, the appellant was convicted and sentenced to life imprisonment on the main count. He was also wrongly convicted on the alternative count which was treated as count two but was not sentenced in respect thereof.

Having convicted and sentenced the appellant on the main count, the alternative count became obsolete and could not be acted upon by the trial court in terms of conviction and sentence.

Be that as it may, the appellant was dissatisfied with the conviction and sentenced and preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 4th September, 2012.

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

M/s. Limo, the learned prosecution counsel, opposed the appeal on behalf of the state/respondent by submitting that there was sufficient evidence to convict the appellant. That, the appellant defiled the complainant (PW1) who previously knew him, and her evidence remained unshaken and was found to be truthful by the trial court. That, the doctor (PW3) confirmed that the offence was indeed committed and that, after the same the appellant disappeared from the scene.

The Learned Prosecution Counsel contended that the appellant was rightly convicted and that the sentence imposed by the trial court was lawful.

The Learned Prosecution Counsel disagreed with the appellant's allegation that there was no proper translation during the trial and urged this court to dismiss the appeal.

Having considered the appeal in the light of the supporting grounds and the rival submissions by both sides, the duty bestowed upon 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.

In that regard, the case for the prosecution was briefly that, on the material date at about 5.00 p.m., the child complainant, **S C (PW1)**, went to fetch water when she was followed by the appellant who was their herdsman cum shamba boy. He pulled her into a forest and put her down after which he defiled her. She reported the incident to her mother, **S B (PW2)**, who in turn reported it to the complainant's father and then to the police.

P.C. George Njiru (PW4), investigated the case and in the process caused the complainant to be examined by a clinical officer at Kapenguria District Hospital, **Rotich Gerald (PW3)**. The clinical officer completed and signed the necessary P3 form indicating that the complainant was indeed defiled.

The appellant was eventually arrested and charged with the present offence.

In his defence, the appellant denied the offence and contended that the allegation against him was a lie.

The learned trial magistrate considered all the foregoing evidence and arrived at the conclusion that the complainant was defiled as alleged and that the appellant was positively identified as the offender.

In this court's opinion, there was undisputed and sufficient evidence establishing that the offence was committed. This came from the complainant herself as well as her mother (PW2) and the clinical officer (PW3).

The bone of contention was the alleged identification of the appellant by the complainant. This court notes that the offence occurred during the day at about 5.00 p.m. and that the appellant was a person previously known to the complainant as their herdsman cum shamba boy, a fact confirmed by the complainant's mother (PW3). In the circumstances, the complainant's evidence of identification was reliable enough and more so, considering that the appellant was no stranger to the complainant. He was thus identified by recognition in clear conditions.

The defence raised by the appellant was unsustainable in view of the complainant's cogent and credible evidence against him and even though she was the only material witness to the offence and a victim, her evidence was found to be truthful by the trial court.

On matters of credibility of witnesses, the trial court was in a better position than this court to make findings in that regard for it saw and heard the witnesses. It is therefore the holding of this court that the appellant's conviction was proper and lawful such that the grounds of appeal lack basis and relevance.

The allegation that the court translation did not translate the proceeding in a proper way was not supported by the trial court record which clearly showed that the translation was done in the Pokot language which the appellant understood.

With regard to the sentence, the complainant was aged ten (10) years at the time of the offence and section 8 (2) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child aged eleven (11) years or less shall upon conviction be sentenced to imprisonment for life.

The sentence of life imprisonment imposed upon the appellant by the trial court on the main count was lawful.

Consequently, this appeal is devoid of merit and is hereby dismissed in its entirety.

However, the appellant's conviction on the alternative count was erroneous and is hereby quashed.

[Delivered and signed this 30th day of May, 2014.]

J.R. KARANJA.

JUDGE.