



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL APPEAL NO. 20 OF 2014

E W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from original conviction and sentence of W. WACHIRA AG. PM

at Lodwar on the 7th February, 2014 in Criminal Case No. 271 of 2013]

J U D G M E N T

Appellant, E W, was charged with defilement, contrary to section 8(1) read with section 8(4) of the Sexual Offences Act, in that on diverse dates between 25th December, 2012 and 5th April, 2013 Turkana Central, he defiled MT E, a child aged sixteen (16) years.

After a full trial before the principal magistrate at Lodwar, the appellant was convicted and sentenced to fifteen (15) years imprisonment. He was aggrieved by that outcome and preferred the present appeal on the basis of the grounds in the petition of appeal dated 14th February, 2014. He appeared in person at the hearing of the appeal and presented written submissions in support of his case.

The Learned Prosecution Counsel, M/S Limo, appeared for the State/Respondent and opposed the appeal by submitting that the findings of the trial court were correct. That, the appellant was properly convicted and sentenced. That, the age of the child was proved and therefore the sentence was lawful.

That, the investigations were properly conducted and revealed that the appellant had taken away the child and lived with her as his wife. That, consent was immaterial as the fact of defilement was established. That, it did not matter that the appellant was H.I.V positive and in any event, the issue was not raised in the trial.

The Learned Prosecution Counsel called for the dismissal of the appeal.

This court has taken into consideration the grounds of appeal, the submissions by both sides and has re-visited the evidence adduced during the trial bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

With regard to the act of defilement, no dispute arose. There was sufficient and credible evidence from the complainant, **M T E (PW1)**, which described in detail the circumstances under which she was removed from school and taken to Lodwar where she lived with a male person as his wife for a period of

about four (4) months. She engaged in sexual intercourse with that person during the period. The age assessment report (P. Ex.2) revealed that she was sixteen (16) years old at the time but pregnancy was overruled after an examination by a clinical officer, **Oliver Chumo (PW2)**.

A social worker, **Makena Glory (PW3)**, reported the matter to the police after the complainant and another minor were rescued after being found by an area chief cohabiting with a male person.

With regard to the identification of the offender, there was sufficient evidence from the complainant, the social worker (PW3) and the investigating officer, **IP Nobert Makokha (PW4)**, implicating the appellant whose defence was a mere denial and an indication that he was arrested and charged for nothing.

The defence was however, clearly resolved and discredited by evidence from the prosecution which in effect established that the appellant removed a minor from school for them to cohabit as husband and wife during which time they engage in sexual intercourse. The complainant was a minor. The appellant was criminally culpable for the sexual acts with her, with or without consent.

In cases of defilement, the element of consent is immaterial.

The appellant's conviction by the learned trial magistrate was therefore sound and proper. The sentence of fifteen (15) years imprisonment was proper and lawful.

In the upshot, this appeal is dismissed for want of merit.

J. R. KARANJA

JUDGE

22/10/2014

[Delivered & signed this 22nd day of October, 2014].