



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Criminal Appeal 72 of 2004**

**BENARD KIPROTICH RUTTO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**BERNARD KIPROTICH RUTTO** was arraigned before the Resident Magistrate at Kapsabet on 11.3.2004, where he was charged with the offence of defilement contrary to section 145 (1) of the Penal Code.

The particulars of the offence were that on 31/1/2004 at [*particulars withheld*] in Nandi South District of the Rift Valley Province he had carnal knowledge of a named girl who was under the age of 13 years then.

After a full trial in which the young girl (PW1) and her mother (PW2) and three others gave evidence, he was placed on his defence. He gave a sworn statement. He was found guilty of the lesser offence of attempted defilement and was sentenced to serve 10 years imprisonment.

Being dissatisfied with the conviction and sentence, Kiprotich, whom I shall now refer to as “the appellant”, has now preferred this appeal which is based mainly on the following grounds inter alia:

1. That the trial Magistrate erred in both law and facts by basing the conviction on fabricated evidence.
2. That the trial Magistrate erred in both law and facts by disregarding his defence.
3. That the trial Magistrate erred in both law and fact by basing the conviction on contradictory evidence which was not in any event corroborated.

The State opposes the appeal.

I have, as is expected of me, this being the first appellate court, re-evaluated the evidence on record, with a view to establishing whether this appeal is meritorious, bearing in mind the fact I did not have the benefit of seeing the demeanor of the complainant, her witnesses as well as the appellant.

Be that as it may, the brief facts of the case are that the appellant lived with his brother and his family. He is the minor’s paternal uncle. PW1 testified that at around 8.00 a.m. on 31.1.2004, while her parents

were away, the appellant sent her to collect his jacket from the store, where he usually slept. He followed her to the store and threw her on the bed. She screamed but he threatened to kill her. He then removed her under pant and defiled her. She heard her mother calling out to him and it was at that point when she saw her mother peeping into the store, that the appellant left her, broke out of the store and disappeared from the home, only to be arrested two months later.

It was the evidence of PW2 that as soon as her daughter heard her talk, she called out her name, and that she saw the appellant wake up and struggled to put on his trousers after which he managed to escape from the scene. The Medical Officer of Health (PW5) who examined the minor found her to be in general fair condition and that she had not been defiled.

The appellant's defence had been that the complainant and her family did not want him to stay with them, and that there was no truth in the allegations.

The learned trial Magistrate considered the evidence for the prosecution as well as the defence at length and found him guilty of the lesser offence of attempted defilement.

I have also re-evaluated the evidence on record and I find that only did PW2, who had seen the appellant lying on top of the minor give evidence which corroborated the minor's evidence, and that in the circumstances, the evidence for the prosecution was sufficient to found a conviction for the lesser charge of attempted defilement. Miss Oundo urges the Court to find, and rightly so, that misconduct upon being caught red-handed by the complainant's mother was inconsistent with that of an innocent person. The fact that he had his trousers off as he lay on top of the child and further the fact that he disappeared and was only apprehended after three months, is a sign of guilt.

I do therefore find that the case was proven beyond any reasonable doubt, and that the conviction was proper, and I would have no reason to set it aside.

He also appeals against sentence. As stated earlier he was, sentenced to serve 10 years imprisonment. The law provides for imprisonment with hard labour for life for offences of this nature. Having weighed the evidence on record, and considered the fact that he is the paternal uncle of the complainant, I find that the sentence was not harsh or excessive in the circumstances.

The appeal is hereby dismissed for lack of merit, save that the sentence of ten (10) years is set aside and replaced with a sentence of ten (10) years with hard labour.

Dated and delivered at Eldoret this 12<sup>th</sup> day of April 2006.

**JEANNE GACHECHE**

**JUDGE**

Delivered in the presence of:

Miss Oundo for the State

Appellant in person