



**REPUBLIC OF KENYA.**

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

**CRIMINAL APPEAL NO. 92 OF 2011.**

**D. B.:.....APPELLANT.**

**VERSUS**

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

***(Being an appeal from the original conviction and sentence of M.N. Gicheru – CM. in Criminal Case Number 97 of 2011 delivered on 14th July, 2011 at Kitale.)***

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

The charge against the appellant, **D. B.**, was that of defilement contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act, in that on the 1st January, 2011, at [particulars withheld] village Trans Nzoia County, he defiled M A A, a girl aged fourteen (14) years. After pleading not guilty before the Chief Magistrate at Kitale, the appellant was tried, convicted and sentenced to ten (10) years imprisonment.

He was however, dissatisfied with the conviction and sentence and therefore filed the present appeal on the basis of the grounds in his petition of appeal filed herein on 20th July, 2011. He appeared in person at the hearing of the appeal and relied on his written submissions in support of his case.

M/s. Limo, learned prosecution counsel, appeared for the state/respondent and opposed the appeal by submitting that the complainant was aged 14 years and was related to the appellant. That, she was confronted by the appellant who held her by the neck before defiling her. Thereafter, she reported the matter and was taken to hospital.

The learned prosecution counsel contended that the appellant was rightly convicted for attempted defilement as there was no medical evidence to establish defilement and that the sentence imposed upon him was lawful.

Both the submissions by the appellant and the respondent having been considered, the duty of this court is to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In summary, the prosecution case was that on the material date at about 8.00 p.m., the complainant **M A**

**(PW2)**, accompanied by her cousin's **M A (PW3)** and J, left their home for a New Year celebration vigil at their local [particulars withheld] Church. They left their mother **P A (PW1)**, behind. They stayed at the church upto midnight and thereafter left for their home. On the way, they met the appellant who engaged in a confrontation with them. M and J ran away after which the complainant was held by hand and neck by the appellant. He took her to a nearby market where he found two bars closed. He threatened her before knocking her down and defiling her. Her screams did not attract anybody and she was only released by the appellant when a motor cycle with bright lights appeared at the scene. She went home thereafter.

On returning home, the complainant informed P (PW1) that she had been defiled by the appellant. Prior to that, she (PW1) had been informed by M and J that the complainant had been left behind after being held by the appellant.

The matter was reported to **P.C. Terry Mungai (PW5)**, of the Gender Office Kitale Police Station. She carried out necessary investigations and later preferred the charge of defilement against the appellant.

**Kirwa Labat (PW6)**, a clinical officer at Kitale District Hospital examined the complainant and completed the necessary P3 form which he produced together with an age assessment report showing that the complainant was 14 years old.

The clinical officer indicated that it was not possible to determine if the complainant had been sexually assaulted due to her menses.

In his defence, the appellant denied the charge and stated that he was arrested on 9th January, 2011 while at his place of work. He was at the time employed at a hotel called Nyakinyua. He said that he was taken to Kitale police station before being arraigned in court. He contended that he did not defile the complainant with whom he had familial ties. He mentioned that he was initially arrested on 1st January, 2011 but was released and re-arrested on 9th January, 2011.

From all the foregoing evidence, it is apparent to this court that there was sufficient evidence from the complainant and to some extent the clinical officer (PW6) showing that the complainant was indeed subjected to a form of sexual assault. She said that she was defiled but the medical report did not support that allegation although it indicated that she was defiled. The learned trial magistrate believed the complainant and acted on her evidence to find that she was defiled but for lack of medical evidence in support thereof, the learned trial magistrate found that there was an attempt to defile the complainant.

This court would have no reason to interfere with the findings of credibility of the complainant made by the learned trial magistrate. Consequently, this court agrees with the learned trial magistrate that the complainant was indeed defiled but for lack of sufficient medical evidence, the lesser offence of attempted defilement prevailed.

With regard to the identification of the offender, the defence raised by the appellant was a denial but this was shattered by the complainant's evidence coupled with that of M (PW3). Besides, the appellant was related to the complainant and there was no indication whatsoever that he may have been implicated by the complainant without good cause. His conviction by the learned trial magistrate was sound and proper and is hereby upheld by this court. The sentence imposed upon him was lawful and in accordance with section 9 (2) of the Sexual Offences Act.

In sum, this appeal is not merited and is dismissed in its entirety.

**[Delivered and signed this 4th day of March, 2014.]**

**J.R. KARANJA.**

**JUDGE.**