



**REPUBLIC OF KENYA.**

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

**CRIMINAL APPEAL NO. 97 OF 2013.**

**HILLARY ROTICH.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(Being an appeal from the original conviction and sentence of R.M. Washika – PM. in Criminal Case No. 1060 of 2012 delivered on 27th August, 2013 at Kapenguria.)*

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

The appellant, **Hillary Rotich**, was charged with defilement,. Contrary to section 8 (1) read with section 8 (2) of the Sexual Offences Act and in the alternative, with indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

It was alleged that on the 26th September, 2012, in West Pokot County, the appellant defiled S C, a girl aged eleven (11) years or indecently caused his sexual organ to come into contact with the sexual organ of the girl.

After pleading not guilty before the Principal Magistrate at Kapenguria, the appellant was tried, convicted and sentenced to life imprisonment on the main count and to ten (10) years imprisonment on the alternative count.

The sentence on the alternative count and the conviction thereof were unlawful as the appellant had already been convicted on the main count of defilement thereby rendering the alternative count insignificant.

Be that as it may, the appellant was dissatisfied with the conviction and sentence and preferred the present appeal on the basis of the grounds enumerated in the petition of appeal dated 30th August, 2013. He appeared in person at the hearing of the appeal and relied on his written submissions in support of the appeal.

The Learned Prosecution counsel, **M/s. Kiigi**, appeared for the state/respondent.

In opposing the appeal, the learned prosecution counsel submitted that the appellant was properly convicted as the evidence against him was sufficient.

That, the appellant defiled a girl aged eleven (11) years who previously knew him and was therefore able to identify him. That, the complainant's testimony was corroborated by medical evidence.

The Learned Prosecution Counsel contended that the appeal lacks merit and called for its dismissal.

Having considered the submissions by both sides together with the grounds of appeal, the duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the opportunity of seeing and hearing the witnesses.

In that regard, the prosecution case was based on the facts that on the material date at about 1.00 p.m., the complainant **S C (PW1)**, was alone collecting firewood in a forest when she was accosted and defiled by the appellant whom she knew to be a herdsman at her uncle's place. He forced her to lie down and after removing her clothes and blocking her mouth went ahead to defile her.

Thereafter, she (complainant) went home and informed her sister what had happened to her. She disclosed to her father, **N K K (PW2)**, that the appellant was the culprit.

The father questioned the appellant who denied the fact.

**P.C. Walter Kiprono Menjo (PW3)**, based at Kapenguria police station investigated the matter and in the process arrested the appellant.

**Danson Litole (PW4)**, a clinical officer at Kapenguria District hospital examined the complainant and confirmed that she was aged eleven (11) years and that she had indeed been defiled.

In his defence, the appellant denied the offence and contended that he was innocent.

The learned trial magistrate considered the foregoing evidence and found that the complainant was defiled and that the person responsible was the appellant. In arriving at that conclusion, the learned trial magistrate relied heavily on the complainant's evidence which she found reliable vis-a-vis the appellant's evidence in defence which was found to be a mere denial.

In this court's opinion, the evidence by both sides did not raise any dispute with regard to the fact of defilement of the complainant. Indeed, the complainant as supported by the clinical officer (PW4) established as much.

The actual bone of contention was the alleged involvement of the appellant in the offence. He denied the fact without much elaboration. However, the obligation to prove the case lay with the prosecution and this was discharged primarily by the complainant's evidence which showed that she was defiled in broad daylight such that it was not difficult to identify her assailant whom she clearly said was the appellant. She actually recognized him since he worked as a herdsman at her uncle's place. His defence that he did not commit the offence was substantially rebutted.

Consequently, this appeal is devoid of merit. The appellant was properly and lawfully convicted by the learned trial magistrate. The sentence meted out against him for the main count was lawful as it was established that the complainant was aged eleven (11) years at the time of the offence.

However, the sentence on the alternative count was unnecessary and unlawful. It amounted to a double punishment of the appellant for a single charge. With respect, the Learned trial magistrate must take note of that notorious mistake which always emanates from her court.

The sentence of ten (10) years imprisonment imposed on the appellant on the alternative count is hereby set-aside. Otherwise, the appeal be and is hereby dismissed.

**[Delivered and signed this 7th day of October, 2014.]**

**J.R. KARANJA.**

**JUDGE.**