



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

**CRIMINAL APPEAL NO. 9 OF 2014.**

**NATHAN BARASA ::: APPELLANT.**

**VERSUS**

**REPUBLIC ::: RESPONDENT.**

*(Being an appeal from the original conviction and sentence of W. Washika – SRM in Criminal Case No. 161 of 2011 delivered on 7th August, 2013 at Kapenguria.)*

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

The appellant, **Nathan Barasa**, was convicted and sentenced to serve fifteen (15) years imprisonment by the Principal Magistrate at Kapenguria for the offence of defilement, contrary to section 8 (4) and section 19 (b) of the Sexual Offences Act. An additional sentence of ten (10) years imprisonment was imposed under section 19 (b) and a further sentence of ten (10) years imprisonment for the alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

The sentences were ordered to run concurrently with the sentence under section 19 (b) of the Sexual Offences Act being held in abeyance.

The particulars of the main count were that on the 14th February, 2011, in West Pokot county, the appellant defiled R C Y, a girl aged sixteen (16) years. In the alternative, he allegedly touched the sexual organ of the said girl.

Being dissatisfied with the conviction and the sentence, the appellant filed the present appeal on the basis of the grounds in the petition of appeal dated 13th February, 2014. he appeared in person at the hearing of the appeal and relied on his written submission in support of the appeal.

The Learned Prosecution Counsel, **M/s. Limo**, opposed the appeal on behalf of the state/respondent.

Learned Counsel orally submitted that the appellant was properly convicted for defiling a girl aged sixteen (16) years but that the sentence on the alternative count was erroneous as the appellant had already been sentenced on the main count. Learned Counsel however urged this court to dismiss the appeal.

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

Accordingly, the prosecution case was briefly that the complainant **R C Y (PW1)**, was at the material time aged sixteen (16) years and a pupil in a primary school. On the material date at about 7.00 p.m. she

had gone to a nearby river in search of the Aloe Vera plant. When she met the appellant in a bush. She knew him as a local brick baker called Barasa. He threw her to the ground, covered her mouth with his hand and defiled her. Thereafter, he went away. She ran to her home and reported the incident to her mother who later took her to hospital.

The mother, **P Y (PW2)**, confirmed that the complainant reported the incident to her and identified her attacker as having been the appellant who was later found at Konyao trading centre and arrested.

**J L (PW4)**, the complainant's father, reported the matter to the area chief **Philip Angirotum Wapale (PW3)**, who referred him to the hospital and the police. He (PW4) took the complainant to the hospital. He indicated that the complainant was an impered child due to an earlier illness.

**P.C. Wilson Ndirangu (PW5)**, investigated the matter and preferred the present charges against the appellant while **Dr. Makali Michui (PW6)**, examined the complainant and established that she had been defiled, was mentally handicapped due to epilepsy and that she was aged approximately fifteen (15) years.

In his defence, the appellant contended that he was “fixed” by his employer. He said that he lived in Uganda and that the complainant who was of sound mind passed near where he worked at a time when he was demanding pay from his employer. He had not been paid and was therefore demanding money. He never received the pay but continued working while demanding for the same. Amid threats and within a week, the police called and told him that he had defiled a girl. He questioned his employer and then realized that he had been “fired”.

From all the foregoing evidence, it was apparent that the fact of defilement of the complainant was not disputed and was indeed established by the complainant's own evidence coupled with that of the doctor (PW6).

The only dispute and this point for determination was whether the appellant was the person responsible for the offence. His defence was a denial and an indication that he was implicated by his employer who failed and/or refused to pay him for work done. Apart from saying that the complainant was herding donkeys and in the process passed through where he worked, he did not explain what relationship (if any) she had with his employer. This however, confirmed that he knew her.

Indeed, the complainant (PW1) stated that she knew the appellant as a brick maker in their area. He was not a stranger to her. She also said that he was the person who sexually offender her. She reported the matter to her mother immediately thereafter and identified him as the culprit. Her evidence was found to be credible and since the learned trial magistrate had the opportunity of seeing her, this court would not fault the trial court's findings based on credibility and would agree that the appellant was indeed identified as the person responsible for the offence of defilement against the complainant. His conviction by the learned trial magistrate in that regard was proper.

It is however, noted that in the charge sheet, the first count refers to the offence of defilement contrary to section 8 (4) of the Sexual Offences Act and to the offence of Prostitution of Person with mental disabilities contrary to section 19 (b) of the Sexual Offences Act.

These are two different offences in a single count thereby amounting to duplicity and therefore a none fatal irregularity in the charge curable under section 382 of the Criminal Procedure Code.

It would therefore follow that the applicable charge was that of defilement rather than that of prostitution of person with mental disabilities.

The appellant's conviction and sentence on the later charge was thus unlawful and so was the sentence for the alternative count which was rendered obsolete after the appellant's conviction on the main count of defilement.

In the end result, the conviction and sentences on the offence under section 19 (b) of the Sexual offences Act and the alternative count are hereby quashed and set aside.

The conviction and sentence on the main charge of defilement contrary to section 8 (1) read with section 8 (4) of the Sexual Offences Act is hereby upheld. It is to that extent that this appeal is dismissed.

**[Delivered and signed this 1st day of October, 2014.]**

**J.R. KARANJA.**

**JUDGE.**