



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 21 OF 2015**

**(FORMERLY KITALE HCCRA NO. 52 OF 2015)**

**EDWIN LOKWAPUS ..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal arising from original conviction and sentence dated 9.4.2015 by Hon. H. O. Barasa, P. M in Kapenguria PM criminal case no. 498 of 2012)**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**RULING**

### **Introduction**

1. The appellant herein was charged with **attempted defilement contrary to section 9(1) [as read with section 9](2) of the Sexual Offences Act, No. 3 of 2006**. It was alleged that on the 30<sup>th</sup> day of April 2012 at 1830hrs in Chepareria Location in West Pokot County, he intentionally attempted to cause his penis to penetrate the vagina of A.C, a child aged 10 years. The appellant pleaded not guilty and the case went to trial during which the prosecution called four witnesses.

2. At the close of the prosecution case, the court put the appellant on his defence, having found that the prosecution had established a prima facie case against the appellant. The appellant gave sworn evidence. He did not call any witnesses.

3. After hearing both sides to the case, the learned trial court concluded that the prosecution had proved its case against the appellant beyond any reasonable doubt and proceeded to find him guilty as charged, and convicted him. The appellant was sentenced to 10 years imprisonment.

### **The Appeal**

4. Being dissatisfied with the whole of the judgment, the appellant brought this appeal on a date that is not clear. The date stamp reads 11<sup>th</sup> February 2015 as well as 23<sup>rd</sup> April 2015. The reason for this discrepancy is not apparent on the face of the record. In his initial petition of appeal, the appellant set out five substantive grounds in which he complained that the case against him was not proved to the required standard to warrant a conviction; that the evidence adduced by the prosecution was insufficient; that investigations into the case were poor; and that the appellants defence was dismissed for no good reason.

5. At the hearing of the appeal, the appellant was granted leave to file amended Petition of Appeal in which he raised the following additional complaints: - That there was no corroboration of the evidence on record; that crucial witnesses were not called to testify; that the evidence adduced did not support the charge; that failure by the prosecution to have the appellant medically examined was fatal to its case. The appellant urged this court to overturn the judgment of the learned trial court and in lieu thereof to give a verdict of not guilty, quash the conviction and set aside the sentence.

### **Hearing of the Appeal**

6. At the hearing of this appeal, M/S J. Kiptoo, Prosecution counsel conceded the appeal on grounds that the medical report presented to the

court had unexplained alterations with the effect of changing the date from 2014 when it was prepared to 2012 solely for the purpose of using it for this case against the appellant. Counsel also submitted that the injuries which the doctor spoke about in his evidence did not tally with the details indicated in the medical report. Finally counsel submitted that the case against the appellant appears to have been instigated by the father of the complainant due to land-related grudges between the two families, and that in fact that appeared to have been the reason why crucial witnesses like the boy known as Kemoi who allegedly reported the incident to the complainant's father was never called as a witness.

### **Issues, Analysis and Determination**

7. I have now carefully reconsidered and evaluated the evidence on record. I have also considered the grounds of appeal, the submissions and the law as is required of me. Generally see ***Okeno versus Republic [1972]EA 32.***

8. The issue that I must now determine is whether the prosecution proved its case against the appellant beyond any reasonable doubt, or whether as submitted by prosecution counsel, this appeal ought to be allowed.

9. In my considered view the evidence adduced by the prosecution did not meet the threshold of proving the case against the appellant beyond any reasonable doubt. A.C, who testified under oath as PW1 after being taken through a *voir dire* examination stated that she went to the appellant's canteen at about 6.30pm on the material day, and on entering the canteen, the appellant grabbed her, pulled her inside and tried to remove her clothes after closing both the door and window to the canteen. By that time too, according to PW1, the appellant had removed his long trouser and remained dressed in sports shorts. The appellant then pulled PW1's panty halfway and exposed his penis to her and wanted to insert it in her vagina. PW1 resisted as she also screamed for help. PW1 then heard the fall of a stone on the roof of the canteen, allegedly thrown thereon by a boy whose name was Kemoi. At that time, there were other children, K included, playing outside the canteen.

10. Soon thereafter, PW1's father P.K, PW2, went to the canteen, pushed the door open and confronted the appellant. After PW1 explained to PW2 what the appellant had tried to do to her, PW2 apprehended the appellant and took him to the police station. Later PW1 was taken to the hospital for examination and treatment. PW1 stated in part of her evidence in chief that there were children playing outside the canteen when the appellant was trying to defile her, but later, she stated, "**There was no one at the canteen when he tried to rape me.**" One detail PW1 did not give is whether the appellant removed his short or pulled it down in order to expose his penis to her.

11. PW2's evidence was that at about 6.00pm on 30<sup>th</sup> April 2012 he was in his house when a young boy by the name K ran and reported to him that a child was screaming inside the appellant's shop. PW2 rushed to the canteen where he found young children throwing stones onto the roof of the canteen. He pushed the door open and saw the appellant on top of PW1 and wearing only his sports shorts. PW2 also stated that the appellant's penis was exposed and on seeing PW2, the appellant got up, charged at PW2 and a fight ensued. As PW1 ran out and escaped, other people came to the scene and assisted PW2 to apprehend the appellant and take him to the police station where PW2 reported the incident. Later PW1 was taken to Kapenguria District Hospital where she was examined and treated for scratch marks. According to PW2's testimony he and the appellant are first maternal cousins.

12. I have juxtaposed the testimonies of PW1 and PW2 and found their narrations at variance with each other. At no point did PW1 state that the appellant put her down and lay on top of her. It is also not clear how, being behind a closed door and window, PW1 could tell that it was Kemoi who was throwing stones on the roof of the canteen. Lastly, both PW1 and PW2 do not explain how the appellants' penis was exposed when he was said to be wearing sports shorts. The evidence of these two witnesses has clearly created doubt in my mind and I would agree with prosecution counsel that this appeal ought to succeed on the basis of irreconcilable contradictions in the evidence of PW1 and PW2. In any event, PW1 does not make mention of a fight between PW2 and the appellant, contrary to what PW2 alleged.

13. PW3 Danson Litole of Kapenguria District Hospital testified that he saw PW1 on 30<sup>th</sup> April, 2012 with complaints that someone had tried to defile her. PW1 had pains on the neck, abdomen and on the right ear. He filled the P3 form which he produced as Pexhibit 1. The age assessment report was produced as Pexhibit 2. Under PART II of Pexhibit 1, paragraph 2 thereof, it was indicated that PW1 was assaulted and suffered injuries to her neck, ear (right) and lower abdomen. In my humble view these injuries do not agree with the description of the encounter as given by PW1. Further, according to PW2, PW1 suffered scratch marks without pinpointing which part of the body had the alleged scratch marks. These two witnesses were either exaggerating a situation or they spoke of what did not take place.

14. PW4, number 97945 PC (W) Patricia Molo of Kapenguria Police Station testified of what PW1 and PW2 told her. There is no indication from her testimony that she carried out any investigations into the allegations. I would thus agree with the appellant that this case was very poorly investigated. I also agree with prosecution counsel's submission that there was a grudge between the appellant and PW2. The appellant stated that two months prior to the alleged incident, PW2 had beaten him. That piece of evidence by the appellant was not controverted by the prosecution.

### **Conclusion**

15. For the reasons hereinabove given, I find this appeal to have merit. The same is allowed, conviction quashed and sentence of 10 years imprisonment set aside. Unless otherwise lawfully held. The appellant shall be released from prison custody forthwith.

16. Orders accordingly.

**Judgment delivered, dated and signed in open court at Kapenguria on this 27<sup>th</sup> day of March 2019.**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of**

.....For appellant

.....For respondent

.....Court assistant