REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 13 OF 2017

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 2 of 2016 the Principal Magistrate's Court at Kapenguria)

ROMANOS MWETICH:: APPELLANT

VERSUS

REPUBLIC:: RESPONDENT

JUDGMENT

ROMANOS MWETICH, the appellant herein, was charged in the lower court with two main counts and one alternative count to the first count as follows:-

First Count; **Defilement contrary to section 8(1) as read with Section 8(3) of the Sexual offences Act Number 3 of 2006.**

The particulars of this offence are that on the 13th day of August, 2016 at [particulars withheld] Market, within West Pokot County, the appellant did cause his penis to penetrate the vagina of A.C a child aged 12 years.

The Alternative Count is of **Indecent Act with a child, Contrary to Section 11(1) of the Sexual Offences Act Number 3 of 2006.**

The particulars hereof being that on the 13th day of August 2016 at [particulars withheld] Market, within West Pokot County, the accused intentionally and unlawfully touched the breasts and the buttocks of A.C a child aged 12 years.

The Second Count is of **Failing to Register as a Kenyan Citizen, contrary to Section 14(1) of the Registration of Persons Act cap 107 Laws of Kenya.**

The particulars of this offence being that on the 14th day of August 2016 at Kapenguria Police Station, within West Pokot County, the appellant was found having failed to register as a Kenyan Citizen having attained the age of 18 years.

The prosecution case is that on 13.8.2016 at about 3.00pm, PW-2 sent her daughter, the PW-1 in this case, who by then was aged 15 years, to take cattle to the cattle dip. PW-1 went and on her way home saw the appellant. He is a person she had not known before. He called her, held her hand and dragged

into a maize farm. He threatened to kill her if she screamed, and led her into a certain house. Therein he sexually abused her by inserting his genital organ into hers. She screamed for help and the screams attracted Kenya Police Reservist who rescued her. The appellant was arrested and escorted together with the complainant to Chepararia AP's camp. The AP's escorted them on the very same day to Kapenguria Police Station. The father to the complainant was informed about the incident and he called PW-2 informing her about it. Both parents went to Kapenguria Police Station. PW-4 investigated the case. He recorded witness statements and escorted the complainant on 15.8.2016 to Kapenguria District Hospital for age assessment and filling of her P-3 form.

Mr. DansonLitole examined the complainant. He assessed her age as 12 years. He then noted that her hymen was open, of which he indicated was a sign of actual penetration. The appellant was then charged with the offences indicated at the onset of this judgment.

In his defence he gave unsworn testimony and called one witness. His defence is that he did not commit the offence and was just mistaken for the real culprit. On 13.8.2016 he was on his way to the shopping centre when he met some people who alleged that someone had wronged them. They held him and took him to the AP's camp. He was booked and later on charged.

His witness who is a teacher at Paramatai Primary School was arrested on 13.8.2016 and taken to the AP's Camp. He found the appellant there and it was alleged the appellant was arrested in DW-2's lodging. DW-2 told them the appellant had not been to his lodging. The complainant was also at the AP's camp and DW-2 was being accused for allowing the appellant and the complainant into the lodging. He denied it and he was released. He maintained that the two were not in his lodging. He never saw them there. The trial magistrate evaluated the evidence and found the appellant guilty of the offence in count 1. She convicted him and sentenced him to serve 20 years imprisonment. He was however acquitted of the other counts.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the following grounds:-

1. That he was convicted in absence of evidence of crucial witnesses.

2. That the prosecution had violated his constitutional rights.

3. That the prosecution case was contradictory and generally lacked merit to sustain a conviction.

4. That the law was breached in his conviction.

5. That the evidence did not warrant a finding of guilty.

Briefly, the appellant submissions is that *voire dire* was not conducted before PW-1 offered her evidence, and the trial court did not determine whether she was a child of tender years as required by virtue of **Section 19 of the Oaths and Statutory Declaration Act, Chapter 15 Laws of Kenya.**

The counsel for the appellant as well submitted that the evidence of PW-1 was not corroborated, and the trial court did not comply with the provisions of **Section 124 of the Evidence Act**, in that no reasons were recorded in the proceedings to the effect that the court was satisfied that the alleged victim was telling the truth.

On evidence, the appellant submitted that it is not clear where the incident exactly took place; the alleged KPR officers who arrested the appellant were not called as witnesses; the complainant's age was not settled in evidence, and the clinical officer's evidence does not establish penetration beyond reasonable doubt. The appellant therefore avers that the appellant's conviction is unsafe and urges this court to reverse it.

The state prosecutor conceded to the appeal on the grounds that the age of the victim was not well established. The complainant stated that she did not know the date she was born. Her mother said she was 15 years old, while the age assessment report indicated she was 12 years old. Age, of which is a vital element for the offence of defilement, was not well established.

The other ground is that it is not clear of the place the defilement took place. The complainant said she was dragged into a maize farm and later taken to the appellant's house. On cross-examination she however said she was taken into a certain house. The evidence of the I.O (investigating officer) however talks of a lodging.

The victim was rescued by KPR officers who were not called as witnesses. She, the state prosecutor, averred that the case was not proved beyond reasonable doubt as could have been a frame up.

In making a finding in this matter, I have evaluated the evidence on record, the lower court finding, grounds of appeal and the submissions by both sides. On evaluation of evidence and the right finding, both parties into this appeal do agree.

On the age of the victim there is surely confusion. The charge sheet indicates that she was aged then 12 years old. In her evidence-in-chief she said she was 12 years old and was in class 6 at [particulars withheld] Primary School. She could not tell her exact date of birth. Surprisingly, she even did not state the month nor the year she was born. She gave no basis at all for her assertion that she was 12 years old. Her mother, the PW-2 in this case said in her evidence in-chief that she was aged 15 years. On cross-examination she alleged she was born in the year 2002. She however gave no date and month and produced no document in support. The age assessment indicates she was 12 years old, compatible with 2004 as the date of birth. The question which then arises is; how old was the victim by the time of the alleged offence? The trial court in its determination on this issue held that:-

> "***Despite the contradictions regarding the victim's age the court finds that the same, although a crucial issue, is nonetheless not prejudicial to the prosecution case since the victim's age, whether it be twelve or fifteen years, still falls within the purview of section 8(3) of the Sexual Offences Act. Since the assessment is just an estimate, the court finds that the child is aged fifteen as stated by her biological mother who is best suited to know when her child was born. Although PW-2 did not adduce in evidence any documentary proof in support of her contention, the court finds that it is proved that the child was born in 2002 and thus was aged about fourteen years old as at the material date."***

While the holding by the court on the age of the victim sounds logical, there is danger in it given the different ages given by various witnesses. Given that the girl (victim) and the doctor gave a different age of 12 years, this called for anyone else holding it differently to adduce tangible and convincing evidence. Mere statement by the mother that she was born in the 2002 is not enough in my own view. She should have stated the date and month if possible and if not so explain why she was able to remember the year and not the rest. She should also have stated whether she was certain of the said year or was guess work. The investigating officer should have made effort, given the contradictions, to obtain a document from the mother, registration office or even school to send light on the age. The court had no founded basis of holding that she was between 12 and 15 years and then settled on 14 years. What one may ask at this point is, given the evidence on record, what makes it certain that she was not below 12 years and above 15 years? Surely there's nothing. As expressed by the trial court it is crucial for the prosecution to ascertain the age of a sexual offence victim as the age differentiates between the offence of rape and defilement and the sentence which the offence should attract. Failure by the prosecution to ascertain the age is fatal to the prosecution case.

It is true as alleged by the appellant and the respondent that crucial witnesses were not called. These are the KPR officers who allegedly arrested the appellant in a lodging with the victim, presumably "**red handed**." The question is why were such obviously crucial witnesses not called. No explanation is given, and the court is invited to make a finding that if called their evidence would have been adverse to the prosecution case. DW-2's evidence is that the victim and the appellant were not in his lodging though

he was arrested on allegation that he had allowed them therein. His evidence was not adequately challenged by the prosecution and raises the question as to where the offence took place. Was it in maize farm, lodging room or any other room? The available evidence does not help in answering this question. The investigating officer, it would appear did not even visit the scene or attempted to follow the victim's alleged route up to the point where the offence allegedly took place in order to assist the court and corroborate her evidence. He did a shoddy job of only recording statements and sending complainant for medical examination. All criminal cases deserve serious investigation for the standard of proof is high, "**beyond reasonable doubt**." Lack of proper investigations raises doubts in this case as to where exactly the offence took place.

Complainant's evidence is very brief and lack crucial details, vital in convincing that she was entirely truthful. We don't know what happened of the cows she had taken to the cattle dip. One wonders whether the victim and the complainant at 3.00pm met no one as he dragged her up to the lodging or his house. It is questionable whether there was no one in the premises where she was taken. It would have been interesting to know what exactly attracted the KPR officers; the brief evidence by the complainant and the portrayed scenario suggest she had consented to the act; and that is why probably KPR officers arrested both of them. While a minor is not capable of giving consent to sexual matters, she needs be truthful in court. **Under section 124 of the Evidence Act** the court in relying on her uncorroborated evidence, ought to have recorded reasons in the proceedings which satisfied it that the victim was telling the truth. The court never did so and it is not convincing that her evidence is based on what truly transpired.

Her evidence that she was penetrated is not corroborated by any other evidence. There is no evidence as to when her hymen was broken. The complainant never said she was a virgin before then, and it is the appellant who broke her virginity. There is no evidence that she felt pain or bled. There is no evidence of blood stained clothes, blood stains at the scene or around genitalia of either the victim or the appellant. The P-3 form does not give the age of the allegedly broken hymen and the court can't just assume it was on 13.8.2016. Apart from the broken hymen no any other evidence, save for the allegation by the complainant, that there was penetration. PW-3 stated during cross-examination that riding a bicycle cannot break hymen of which is wrong.

In the case of ***Queen versus Manuel Vincent Quintanilla, 199 ABQB 769***, a Canadian case of which was relied on by the ***Court of Appeal in PKW versus Republic, HCCRA no. 331 of 2008***, it was observed that:-

> ***"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen."***

Having weighed the foregoing considerations it's evident that the prosecution did not proof the offence against the appellant beyond reasonable doubt. He therefore ought to have been acquitted. I accordingly quash the conviction and the sentence. He should be set free unless otherwise lawfully held.

Judgment read and signed in the open court in presence of the appellant, Madam Chebet holding brief for MsOpondo for the appellant and Madam Kiptoo the state prosecutor, this 31st day of January, 2018.

S. M. GITHINJI

JUDGE

31.1.2018