



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 9 OF 2017

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 699 of 2015 of the Principal Magistrate's Court at Kapenguria)

E K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

E K, the appellant herein was charged in the main count with the offence of **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 diverse dates between January and April, 2015 within West Pokot County, the appellant intentionally caused his penis to penetrate the vagina of V C, a girl aged 15 years.

In the alternative he was charged with the offence of **Indecent Act, contrary to section 11(1) of the Sexual Offences Act number 3 of 2006.**

The particulars of this offence are that on the diverse dates between January and April 2015 within West Pokot County, the appellant unlawfully and indecently assaulted V C, a girl aged 15 years by touching her private parts.

The prosecution case is that PW-2 in this case is the father to the complainant while PW-4 is the mother. The appellant was their neighbour at **[particulars withheld]**. The complainant who gave evidence on 29.6.2015 told the court that she was schooling at [particulars withheld] Mixed, in class 6. She was born in the year 2000. She never told the court her age though the trial magistrate while swearing her stated she was 15 years old, and after the swearing indicated she looked about 15 years sharp. The father indicated she was born in the year 2001 and was going 16 years. The mother indicated she was born in December, 2000 and her birth certificate was at home.

According to the complainant, the appellant, E K was her boyfriend. Between January and April they had sex together many times, mostly in the forest. She explained that he removed her inner pants, removed his, and touched her breasts and buttocks. She allowed him to do that in March, 2015. She got pregnant. By the time she gave evidence she was two months pregnant. She had not slept with any other man. The father said he used to be told that the appellant used to visit his (PW-2's) home on Saturdays. The complainant also used to get home from school late. One Sunday he found the appellant with the complainant in a nearby forest and the appellant escaped. In April the complainant continued with the trend of getting home late. The father went to school to find out the reason for it. Complainant was called and stated the appellant was obstructing her on the way home. He warned the appellant and the complainant about it. PW-4, the mother, also stated the complainant used to get home late. She used to see the complainant and the appellant together either walking or standing by the roadside. They had a sexual relationship.

One day while PW-2 was on his way back home he saw the complainant ahead. He followed her. He saw the appellant blocking her. He got annoyed and proceeded to report the issue at Ortum Police Station. On 22.5.2015 the appellant was escorted to Ortum Police Post by members of the public, in company of PW-4 and the complainant. He was re-arrested and the girl was referred to hospital for medical check-up. She was examined by Dr. Mulobe at Sigor Sub-County Hospital. She had no physical injuries and was sober. Her hymen was broken and was 10 weeks, 6 days pregnant. The doctor concluded that she was defiled. Her age was assessed and indicated to be 16 years old then. The age was assessed by a clinical officer namely Litole. Kenneth Koskei gave evidence on their behalf and produced both the P-3 form and the age assessment report.

The appellant was then charged with the stated offences.

The appellant in his brief defense stated that he lives at Ortum. The offence was not true. On 24.5.2015 he was at Tamkal. He was called by

PW-2. He boarded a vehicle to [particulars withheld] where he met him. He was taken to the police station on allegation that he had defiled the girl. He was then arrested and charged.

The trial court evaluated the evidence, held that the complainant was aged 16 years and that the offence in the main count was proved by the prosecution beyond reasonable doubt. He was convicted of it and sentenced to serve 20 years imprisonment.

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

1. He pleaded not guilty during trial.
2. The elements of the offence of defilement were not proved beyond reasonable doubt.
3. Prosecution witness's evidence was incredible.
4. His defense was not properly weighed.
5. His trial was not fair.
6. Investigations were not properly done.
7. Crucial witnesses were not called by the prosecution.

In his submissions the appellant stated no tangible evidence was adduced to show he was man friend to the complainant. He gave example of a photo. He also alleged the complainant gave birth and DNA was not conducted to show he was the father of the child. No birth certificate was produced to confirm the complainant's age and the P-3 form and age assessment report were produced by a medical officer who did not examine the complainant and make them.

The state prosecutor conceded to the appeal. She averred that the age of the complainant was not properly established. She, the complainant said she was born in the year 2000; the father said it was in August 2001; while the mother said it was in December 2000. The court relied on age assessment report which placed her at 16 years. The discrepancies were not cleared. She further stated that penetration was not established. There is no evidence that the appellant is the one who impregnated her.

The issues for determination in this matter are:-

1. The age of the victim.
2. Penetration of the victim's genital organ (vagina) by the appellant's genital organ (penis).
3. Identification and or recognition of the appellant as the perpetrator.

The age of the victim in sexual offences is of paramount importance as it differentiates between the offences of Rape and of Defilement under sections 3(1) and 8(1), 8(2), 8(3) and 8(4) respectively. For the offence of Rape, consent is a recognized defense in law while it is not for the offence of defilement. Sentence in defilement is also determined by the age of the victim.

On 29.6.2015, the trial magistrate before he had heard any evidence in the matter, indicated, "**PW-1 V 15 years old girl sworn states as follows in Swahili,**" We do not know the source of this information. It could have been from the girl or the prosecutor or any other party. The source is not indicated in the proceedings. The magistrate went further to observe that, "**The young girl looks it about 15 years sharp.**" Here the trial magistrate was very precise in his observation by use of the word "**sharp**" while we all know age assessment by mere observation can have a very wide error margin.

The girl herself said she was born in the year 2000. She gave no other details on the date and month. She also did not indicate her age. We know our age not because we witnessed when we were born and taken note of it, but because we were either told about it, read it in some documents and or was assessed by some experts and communicated to us. As such one can make a mistake of his or her age where the source of such information is not disclosed and established to be authentic. The best evidence in relation to age of a person is a Birth Certificate. In absence of it, the parents would know, more so the mother. However, problems arise when those who should know, contradict each other as in this case.

The mother who gave evidence as PW-4 said the victim was born in December, 2000. The father who was PW-2 said she was born in August, 2001. The girl herself said she was born in the year 2000. The contradiction between the month and year given by the mother and the father of the victim shows that either one of them lied in court or both, about it. In a court of law one is expected to say of what he or she is certain of. If not certain, should say so. The mother said the Birth Certificate was at home. The prosecution and or the court should have called for it to clarify on the issue.

The trial court in its judgment did not resolve this issue. Though in the proceedings the court had indicated the girl was aged 15 years and looked about it sharp, in the judgment it held she was 16 years old and did not explain how it settled on that. Age assessment indicated she was 16 years old. PW-5 did not state or disclose how the age was assessed. Even with the current advancement in scientific medical knowledge, age assessment on persons is still a problem experienced in the entire world. Methods mostly applied are interviews, documentation, physical examination, sexual maturity assessment, dental observation and radiological tests. Radiographic methods

addressed to evaluate the degree of skeletal or dental development is said to be the most accurate parameter to estimate the chronological age of children. The use of the words “**to estimate**” makes it clear that medical methods in use raise questions about accuracy and reliability. They are, to say the least, imprecise. They have an error margin of 2 years and cannot be considered as conclusive evidence of age.

For the reason, in the case of ***B versus Merton LBC, Case No. Co/881/2003 London WC 2A 2LL***, in the United Kingdom, the court tried to run away from medical reports in determination of disputed age of alleged children, in favour of social workers trained in that regard, assessment reports. However the Supreme Court in the case of ***A versus Croydon*** made it clear when it stated that medical reports have a margin of errors of 2 years, they cannot be considered as conclusive evidence of age and should only be taken into consideration with all the evidence presented ***de-facto***. The two cases were civil and not criminal. In civil cases the issue may not be as complex as in criminal cases. This is so as in civil cases the standard of proof is on balance of probabilities and to the court of paramount consideration is the best interest of the child. In criminal cases the standard of proof is beyond reasonable doubt. This means the court must be certain. The benefit of doubt, where it exists, goes to the accused person. The big question is, how can the court be certain?

As I had expressed earlier, Birth Certificate, Clinic Card and any other reliable and undisputed document, can ascertain the age. In its absence, the age given by the parents, if uncontradicted by any other evidence is also reliable evidence as they are the most appropriate persons who would know the age of their child. The complainant herself, if can establish how she's certain of her age, and the court has no reason to doubt it, the evidence is also reliable. Any other evidence need be treated with a lot of caution. Medical evidence would require a disclosure of the procedure applied, and the margin of error disclosed by the witness for the court to determine where to place it. An incorrect medical age assessment, where even a correct one have a margin of error of 2 years, can if relied on, give rise to grave consequences against an accused person charged under ***Sexual Offence Act number 3 of 2006***.

In this particular case the age given of the complainant by those who would know it was contradictory. Age assessment did not disclose how it was carried out and ascertained that she was 16 years old. The one who did it is not even the one who was called as a witness. Given the foregoing circumstances, the fact is that the age of the complainant was not ascertained. She could have been an adult or a child. She consented to having a sexual relationship with the appellant, whom she called her boyfriend. If she was an adult, she had capacity to consent and the appellant committed no offence. In this case the appellant is entitled to the benefit of doubt on the complainant's age issue. It's accorded to him. The appeal has merit. It is allowed, the conviction and sentence are quashed. He is set free unless otherwise lawfully held.

Judgment read and signed in the open court in presence of the state prosecutor and the appellant, this 14th day of March, 2018.

S. M. GITHINJI

JUDGE

14.3.2018