



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 37 OF 2017

LEPELAL LOLORKEK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence dated 20/01/2017 in Nanyuki CM Criminal Case No 1129 of 2014 – E Ngigi, SRM)

J U D G M E N T

1. The Appellant **LEPELAL LOLORKEK** was convicted after trial in count I of *early marriage* contrary to **section 119(1) (h)** of the **Children Act, 2001** and in count II of *defilement* contrary to **section 8(1) and (3)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in count I that on diverse dated between 12th April and 21st May 2014 in Laikipia County, he intentionally and unlawfully married one **M M**, a child aged 13 years. In count II it was alleged that on the same diverse dates and at the same place, he intentionally and unlawfully caused his penis to penetrate the vagina of the same child.

2. On 20/01/2017 the Appellant was sentenced to **three (3)** and **twenty (20)** years imprisonment respectively, the sentences to run concurrently.

3. The Appellant has appealed against both conviction and sentence. He was undefended at trial. He lodged his appeal in person though at the hearing thereof he was represented by counsel appointed for him by court. I cannot find on the court record any amended petition of appeal filed by counsel. There is only the petition filed by the Appellant from prison. The grounds of appeal set out therein are:-

1. That the trial court erred in law in convicting him without any evidence.

2. That he never defiled the complainant but married her with consent according to the customs and traditions of his tribe.

4. The Appellant's learned counsel argued the appeal both orally and by way of written submissions. He raised many grounds not contained in the Appellant's petition of appeal. This was without leave of the court and contrary to the provisions of **section 350(2)** of the **Criminal Procedure Code**. Be that as it may, I shall determine the appeal as canvassed by both learned counsels.

5. I have considered the written submissions filed by the Appellant's learned counsel and the oral submissions of both counsels, including the cases cited.

6. The offence charged in count I of *Early Marriage contrary to section 119(1)(h) of the Children Act* is unknown to law. That provision of the Act does not create any penal offence at all, let alone one called *Early Marriage*. The entire section 119 of the Act merely provides for circumstances in which a child is in need of care and protection. It does not create any offence.

7. In our law any criminal offence must be expressly and specifically created by statute and a penalty for the same prescribed by law. That was not the case in respect to the purported offence in count I. The conviction in respect thereof cannot stand. It is quashed and the sentence of three (3) years imprisonment imposed upon the Appellant set aside. It is so ordered.

8. In respect to count II, it is the duty of this court as the first appellate court to review and assess the evidence presented to the trial court and arrive at its own conclusions regarding the same. Due allowance must however be given for the fact that this court did not see and hear the witnesses testify.

9. The offence of defilement is created by **section 8(1)** of the **Sexual Offences Act** in the following words -

“8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Subsections (2) to (4) of section 8 prescribe the punishments for defilement which are dependent on the age of the child defiled.

10. It is immediately obvious that the **age of the child** concerned will be an issue in any trial for defilement. The **age** is one of the ingredients of the offence. It is not enough merely that the child be below the age of 18 years as defined in section 2 of the **Children Act**.

11. Penetration is the other main ingredient of the offence of defilement. It is defined in **section 2** of the **Sexual Offences Act** as follows -

“**Penetration** means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

12. The issues in the trial of the Appellant for count II therefore were -

(a) Whether the complainant’s age was proved beyond reasonable doubt.

(b) Whether penetration of the complainant’s genital organs by the genital organs of another person was proved beyond reasonable doubt.

(c) If such penetration was proved beyond reasonable doubt, whether it was the genital organs of the Appellant that had penetrated the genital organs of the complainant.

13. The complainant testified under oath as PW1. This was after a *voire dire* examination by which the court was satisfied that she understood the nature of the oath.

Age of the Complainant

14. Apart from the complainant’s statement that she was 14 years old when she testified, and the Clinical Officers observation in the police medical report form (P3) that she was that age, there was no independent proof of her age. Her own statement of her age was obviously hearsay, just as the clinician’s observation. There was no birth certificate or other proof of age produced in evidence. The age-assessment report produced in evidence by PW4 was not signed by its maker. It had only the hospital rubber-stamp for authentication. This was not sufficient. A written report by any person ought to be authenticated by the hand of that person. The age-assessment report was not so authenticated and was of no probative value.

15. Although there can be instances where the trial court can properly make observations regarding a complainant’s apparent age, non-the-less, where age is an ingredient of the offence that must be proved beyond reasonable doubt, it is best to leave the matter to the prosecution to produce the necessary proof, particularly when the age of a person can now be established by a scientific test. Non-expert observations by the trial court cannot and should not substitute proof beyond reasonable doubt by the prosecution.

16. In the present case, and upon my own appraisal of the evidence, I am not satisfied that the age of the complainant was established beyond reasonable doubt.

Penetration

17. There was the testimony of the complainant that the Appellant had sexual intercourse with her for a whole week after purportedly marrying her under Maasai customs. Medical evidence by PW3 was to the effect that the hymen was perforated with signs of frequent sexual intercourse (no visible injuries, no tears, no blood or other discharge seen). Laboratory tests were negative for venereal infections.

18. The Appellant himself denied that he had sexual intercourse with the complainant all the time she had been in his house as his wife. He said he did not as much as caress her, let alone have sexual intercourse with her. One would be forgiven for asking what then he was marrying her for!

19. In the circumstances of this case the trial court was entitled to believe the testimony of the complainant that indeed the Appellant had sexual intercourse with her for the entire week she was in his home as his wife. However, having found that the age of the complainant, which was one of the main ingredients of the offence of defilement, was not proved beyond reasonable doubt, as it should have been, the Appellant’s conviction cannot be allowed to stand. The requisite standard of proof will not be lowered merely because of the unfortunate circumstances of this case where a female child is removed from school and married off to a man old enough to be her father. It is not clear why the statute did not create other ancillary criminal offences connected with such removal from school and marrying off of children so that the problem can be combated not merely from the perspective of defilement of and indecent acts with children.

20. In the result the Appellant’s appeal is allowed in its entirety. The convictions in both counts are quashed and the sentences meted out set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 24TH DAY OF JULY 2018

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 26TH DAY OF JULY 2018