



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 1 OF 2016

(In the matter of an intended appeal from conviction and sentence of PM's court at Kapenguria in criminal case number 383 of 2014)

K N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

K N the appellant herein, was charged in the lower court with five counts of **defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act number 3 of 2006.**

The particulars of the offences are that on each night between 10th and 15th of February, 2014 within West Pokot County, the appellant unlawfully did cause his penis to penetrate the vagina of (S.C) a girl aged 15 years.

A count is preferred for each night, respectively.

The appellant also faced one alternative count of **Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act number 3 of 2016.**

The particulars of this offence are that between the nights of 10th and 15th of February, 2014 within West Pokot County, the appellant did cause his penis to come into contact with the vagina of (S.C) a girl aged 15 years.

The evidence adduced in the lower court by the three prosecution witnesses is that in the year 2014 the complainant in this case was a pupil in class 7 at [particulars withheld] Primary School. She was then aged 15 years. She was living at the place with her uncle, while her parents were living at [particulars withheld] Village. In the month of January, 2014 her father visited her in her uncle's place. He requested her to visit home. In the month of February, 2014 she visited her parents' home. On 9.2.2014 in the evening about 10 men visited the place. Among them was the appellant herein. Complainant sensed danger and was determined to escape. Her father encouraged the men to get hold of her. She ran away and the men pursued her. They got hold of her and forcefully took her to the appellant's homestead. There were other people in the said homestead. They quarreled her, telling her she'll stop going to school as she was then married to the appellant. The women present urged her to accept the appellant as her husband. The complainant did not accept their pleas. She was determined to continue schooling and eventually become a teacher. From 10th February, 2014 to 15th February, 2014 she was sleeping in the same house and in the same bed with the appellant. The appellant forced her into having sex with him in

each of the said nights. On 16.2.2014 she was sent to buy vegetables and that is when she seized the opportunity and escaped. She went back to her uncle's place.

On 19.2.2014 she reported the case at Marich Police Station. PW3 investigated the case and had the appellant arrested.

On 20.2.2014 the complainant was examined at Sigor District Hospital. PW2 examined her and found that she had a vaginal discharge. He noted (FGM) scars and laceration on the vagina. Urinalysis test revealed presence of pus cells, a sign of an infection. HIV test was negative. Pregnancy test was positive. He concluded that the complainant had penetrative intercourse. He thus filled the P-3 form. Her age was also assessed and confirmed that she was then aged 15 years.

The appellant was then charged with the offences carried in the charge sheet.

In his defense, he stated that in his community once a girl is circumcised she is ready for marriage. The complainant was circumcised and he married her. He paid 10 heads of cattle and 20 goats as dowry. He lived with her for 2 years. She was not a pupil. In March, 2014 she killed one of his goats and he questioned her about it. She got angry and left the matrimonial home. She went to her uncle's place. The appellant followed her there and was arrested.

The lower court evaluated the evidence and found the appellant guilty on all the five counts. He was consequently convicted and sentenced to serve 20 years imprisonment on each count; sentences to run concurrently.

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

- 1. He pleaded not guilty to the offence**
- 2. He was not issued with copies of witness statements**
- 3. He was sick during the trial**
- 4. The trial magistrate did not consider that it was a family issue**
- 5. He was a first offender**
- 6. He was not conversant with Swahili and the translation was not clear**
- 7. His request for recalling witnesses was denied.**

The state opposes the appeal on the grounds that the witness statements were given; The case was fully heard and the appellant well participated showing he well followed the proceedings; He never told the court that he was unwell; It does not matter whether it was a family issue so long as it amounts to an offence; and that a retrial is not in favour of justice in the matter.

I have considered the raised issues and have as well re-evaluated the entire evidence in the case.

The complainant in this matter offered detailed, consistent, compelling and highly logical evidence of which was not shaken by the appellant during cross-examination, which leaves no ground on which it's truth can be doubted. Her evidence was well corroborated by the evidence of PW-2 to the effect that she was penetrated, was 15 years old then and was pregnant.

The ingredients of the offences were well spelt out as were indicated in the case of *Dominic Kibet Mwareng versus Republic (2013) KLR*, that:-

- a) The age of the complainant of which must be below 18 years
- b) Proof of penetration
- c) Positive identification of the assailant.

The defense confirms the truth in the prosecution case as the appellant conceded that he was married to the complainant as per their customs. The consideration was not the age of the girl in such marriage but whether she was circumcised. However as was well pronounced by the trial court, an outlawed custom cannot form basis of a defense in a criminal matter.

The language of the court as indicated in the proceedings was Swahili of which was well interpreted to the appellant in Pokot, a language he understood. He well participated in the trial which shows he was aware of what was said and happening throughout the trial. He cannot turn around now to claim that he did not understand. He did.

Having gone through the entire evidence and well evaluated it, I do conclude that the appellant in bringing up the appeal was simply trying his luck, not knowing that legal positions are determined by the established facts and the applicable laws. Neither is in his favour. The appeal is accordingly dismissed.

Judgment read and signed in the open court in presence of the Appellant and the State Prosecutor this 30th May, 2017.

S. M. GITHINJI

JUDGE

30.5.2017