REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 15 OF 2016

CORAM: S. M. GITHINJI

(*From original conviction and sentence in criminal case number 18 of 2016 of the Principal Magistrate's Court at Alale*)

WILLIAM LOCHERO ……..…….……...…APPELLANT

VERSUS

REPUBLIC …….……...RESPONDENT

JUDGEMENT

The Appellant herein was charged in the main count with the offence of **attempted defilement contrary to section 9(2) of the Sexual Offence Act number 3 of the year 2006.** The particulars of this offence being that on the 20/3/2016 at[particulars withheld] Village, West Pokot County, the appellant intentionally attempted to cause his penis to penetrate the vagina of (S.C) a child aged 12 years.

In the alternative the appellant faced a charge 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 20/3/2016 he indecently touched the buttocks of (S.C), a girl aged 12 years.

The prosecution case is that (S.C), the complainant in this case, who gave evidence as PW-1 was on 20.3.2016 schooling at [particulars withheld] Primary Boarding School in class 5. PW-3 was also a pupil in the said school in class 8, while PW-4 was teaching in the said school. On the material day PW-4 sent pupils to a nearby river to fetch water. The river is 150 metres away from school. The pupils did so, after which PW-1 went back to clean her clothes, while PW-3 and another girl also followed to fetch water to bath the following morning.

After PW-1 had fetched water from the river, at 4.00pm, the appellant approached and grabbed her. He fell her down, removed her skirt and touched her. She screamed. She ran towards the school. She met with PW-3 in company of another girl called M. PW-1 told them that there was somebody who attacked her. The appellant ran after the three girls who all ran back into the school. PW-4 witnessed the three girls running back to the school and the appellant pursuing them. PW-4 asked the appellant what was happening and he responded that he wanted C to be his wife. The appellant threw stones at the teacher (PW-4). The school boys witnessed the incident. PW-4 summoned them to chase and arrest the suspect. They did so and took him to the school. He was locked in and police called. The police went for him. He was taken to Alale Police Post.

On 21.3.2016 PW-5 investigated the case. He visited the scene where he noted that the soil was disturbed as well as the grass, indicative of struggle.

PW-2 examined PW-1 on 23.3.2016 at Alale Health Centre, she filled the P-3 form, PRC form and made an age assessment report. She only noted in PRC form that she had a bruise on the left elbow. The age was assessed as 14 years. The appellant was then charged on this very same day with the offences.

After the five prosecution witnesses were heard he was placed on his defence. He gave a brief sworn statement in his defence. It is as follow:-

> **"I stay at [particulars withheld] area. I know the complainant herein. This teacher of that school and I see her in school the complainant. The offence is true. They came to collect water. They removed the wire fence of the water area. I did not do anything to any one of them. They turned all round against me saying I had intended to defile the complainant then placed this on me."**

Judgment was read on 15.4.2016 and the appellant was sentenced to serve 10 years imprisonment on 18.4.2016. The appellant dissatisfied with the outcome, appealed to this court against the conviction and sentence on the following grounds:-

1. That he pleaded not guilty to the charge.

2. That the investigations did not unearth the truth of the matter.

3. That hearsay evidence was relied on.

4. That prosecution evidence was not corroborating.

5. That he was not furnished with proceedings of the case.

6. That key witnesses were not called.

I have evaluated the evidence in the case, considered the raised grounds of appeal and the submissions by both sides. All the raised grounds as was rightly submitted by the state prosecutor did not hold water, save for ground 5, and if taken to mean that the appellant was not furnished with witness statements in the case, rather than the proceedings.

However the state prosecutor noted some errors of facts made by the trial magistrate in his judgment and urged the court to find a way of resolving them, probably by ordering a retrial. Before I get to that, I have noted that the way ***voire dire*** was conducted and recorded is wanting. The examination is supposed to be a question and answer process between the child and the court for the purposes of establishing whether the child possesses intelligence to:

1. Understand the nature of oath

2. Know the difference between telling the truth and lying

3. Prepare the child to testify truthfully

4. Observe, remember and verbally describe event;

In the case of ***Kivevelo Mboloi versus Republic Criminal Appeal number 34 of 2013,*** the court observed that it is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.

In this appeal what was recorded in ***voire dire*** is that:-

> **"S. C I am 12 years old. I am in class 5 [particulars withheld] Primary School. I go to**

Catholic Church. I know I am in court. I am aware I am supposed to say the truth nothing but the truth."

The questions were not recorded as were put to the child of which is wrong.

The offence allegedly took place on 20.3.2016. The appellant was charged on 23.3.2016. He pleaded not guilty to both counts. The state prosecutor said he had 5 witnesses and was ready to proceed. The trial commenced and all were heard, inclusive of the defence case on that very day. While such speed may be admirable given that justice delayed is justice denied, the court had a duty to ensure that the appellant was not prejudiced by such highly speedy trial.

Article 50(2) (c) (g) (j) of the Constitution of Kenya 2010 states that:-

(2) ***Every accused person has a right to a fair trial, which include the right –***

(c) to have adequate time and facilities to prepare a defence

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

The magistrate in this case did not ask the appellant whether he had all the facilities he required in the matter to prepare his defence, including time for such preparation. He as well was not asked whether he intended to hire an advocate to represent him. Equally he was not asked whether he was ready on that day to proceed. The omission to ascertain that the appellant's right to a fair trial under Article 50 had been met before commencing proceeding, on the very date of the plea, highly prejudiced him.

The magistrate ended up making various undesirable errors of fact in his judgment. The most glaring one is that he did not convict the appellant. The judgment towards the end reads:-

"**The differentiation in the age of the child in my view did not in any way affect the evidence rendered by the prosecution that the accused attempted to defile the complainant. Judgment read and delivered in open court in the presence of the accused the court prosecutor and court assistant."**

Appellant was not found guilty, convicted and sentenced in accordance to provisions of section 215 of the CPC.

The appellant was charged with a main count and an alternative count. The magistrate did not make it clear of which offence he sentenced the appellant. Such can only be assumed from the statement that,

"……..the age of the child in my view did not in any way affect the evidence rendered by the prosecution that the accused attempted to defile the complainant."

Nothing was stated at all about the alternative count like for example,

"**Having found the accused guilty of the offence in the main count, I make no finding in relation to the alternative count,"**

of which is the normal practice given such circumstances. The trial magistrate in his judgment stated in relation to the evidence of PW-1 that,

"she screamed overpowered him took to her heels."

PW-1 in her evidence stated,

"**I screamed M came by the accused ran away,"**

she never said she overpowered him anywhere of which is a mistake of fact by the trial court. The trial magistrate also indicated in the judgment,

"**The accused chased her to her school"**

There is actually no evidence showing that accused reached the complainant's school. Further, the magistrate in the judgment indicated that:-

"**The accused on reaching at the complainant's school met with FL a teacher in the school and shouted at him demanding to have his wife the complainant herein.**"

PW-4 in relation to the same stated,

"**I asked him (accused) what was happening, he told me he wanted C to be his wife"**

Surely, "**to be his wife**," and "**his wife**" have different meanings.

On accused's defence, the magistrate wrote:-

"**The accused said that he only scared them when they were fetching water which he had drilled but denied attempting to grab the complainant"**

The accused had not talked of water which he had drilled in his defence. This is surely a mistake of fact.

The girl said she was 12 years old as well as the charge sheet. However the age assessment report indicated she was 14 years old. The magistrate probably to be on the safe side stated she was a girl below 15 years old. While that may be correct, it would have been better to settle on the age issue. PW-2 who assessed the age did not give a probable age, but clearly stated that she was 14 years old.

PW-1indicated in her evidence in chief that the appellant removed her skirt and touched her. However in the judgment the magistrate indicated that the appellant attempted to remove her skirt, of which is another error of fact.

Considering the foregoing errors, it is vivid that this case started wrongly and ended the same way. It gives credence to the statement that, "***Justice hurried is justice barried.***" In hearing and deciding cases the judicial officer should move at a safe speed. In this case the appellant was not accorded a fair hearing. The "**conviction**" and sentence are quashed. I do agree with the state prosecutor that it is a good case for retrial. I accordingly order retrial before another magistrate.

Judgment read and signed in the open court in presence of the State prosecutor and the appellant, this 30.5.2017.

S. M. GITHINJI

JUDGE

30.5.2017

Deputy Registrar to give a mention date in court for retrial.

S. M. GITHINJI

JUDGE

30.5.2017