



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL APPEAL NO. 83 OF 2015**

**DAVID KIPROP KORIR.....APPELLANT**

**- VERSUS -**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence***

***in Bomet Cr case NO. 20 of 2014 – Hon P. Achieng -PM)***

**JUDGMENT**

The appellant was convicted and sentenced to 10 years imprisonment for the offence of attempted defilement Contrary to Section 9(1) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 28<sup>th</sup> day of June 2014 at [particulars withheld] Chepalungu Bomet county, intentionally and unlawfully attempted to penetrate with his penis, the vagina of C C a child aged 13 years.

The prosecution in this case called six witnesses in support of their case. The appellant tendered a sworn statement.

This is the first appellate court. It has a duty to evaluate and to reconsider the evidence on record so as to arrive at its own conclusion while bearing in mind that it did not have the opportunity to hear and observe the demeanour of the witnesses.

The complainant was as per her evidence in chief aged 13 years and a standard six pupil at [particulars withheld] Primary School. She testified that at about 7.30 p.m. on the 28<sup>th</sup> day of June 2014 she had left her uncle's home on her way back when the appellant ambushed her by grabbing her by the neck, undressed her and defiled her by doing bad things to her. She had to scream but the appellant strangled her. The appellant was found by one J who separated them.

Joseph (PW2) testified to have found the accused having sex with the complainant and separated them. He tried to run away but they managed to arrest him and took him to police station. The complainant was taken to hospital for examination and treatment.

Julius Magut (PW5) a clinical officer did examine the complainant. He found her external genital organs normal with no bruises or lacerations. Her hymen was intact.

When called to his defence the appellant told the court in his sworn statement that he had a land dispute with J an uncle who wanted to sell their land to the parents of the complainant.

**Analysis**

The evidence by the complainant is that she was defiled. That the appellant undressed her and defiled her. When she screamed he strangled her. The evidence by the clinical officer is to the contrary. There is no evidence of there having been any struggle between the complainant and the appellant. There were no soiled clothes as the act is said to have been done in the bushes. There were no marks or bruises on the body of the complainant.

On the genital organs there were no bruises, lacerations no tears and the hymen was intact. The Doctor found no evidence of forceful penetration.

The learned trial magistrate did not give much weight to the sworn statement of the accused which was to the effect that there existed a grudge between him and his uncles over a land dispute.

**Age assessment**

There is a letter dated 28<sup>th</sup> November 2014 indicating the age of the complainant to be below 18 years.

There is no evidence from the parents of the complainant as to her age. There is no birth certificate or ante natal card produced. This creates uncertainty as to the age of the complainant. This court has held on numerous occasions that proper age assessment is a very crucial factor on sexual offences whose punishment is pegged on it.

Any doubts arising from the prosecution case ought to be resolved in favour of the appellant. This case was not proved beyond reasonable doubt. The conviction was not safe.

The appeal has merit. It is allowed. The conviction is quashed and sentence set aside.

The appellant is set at liberty unless lawfully held.

Judgment delivered dated and signed this 25<sup>th</sup> day of October 2017 in open court and in the presence of learned counsel for the prosecution Miss Keli learned counsel for the defence Mr. Motanya.

Court assistant- Wambany.

**M. MUYA**

**JUDGE**

**21/11/17**