REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 14 OF 2016

(From original conviction and sentence in criminal case number 474 of 2015 of the Principal Magistrate's Court at Kapenguria)

TOROITICH LEMTUKEI……..... APPELLANT

VERSUS

REPUBLIC.……RESPONDENT

JUDGEMENT

TOROITICH LEMTUKEI was charged in the Lower Court with two counts; the first one being of **attempted defilement of a girl contrary to Section 9(1) as read with 9(2) of the Sexual Offences Act No. 3 of 2006.**

The particulars of this offence are that on the 25th day of March, 2015 between 15 and 19 hours within Pokot County, the Appellant attempted to cause his penis to penetrate the vagina of S C, a child aged 15 years.

In the second count he was charged with the offence of **assault causing actual bodily harm, contrary to Section 251 of the Penal Code.**

The particulars hereof being that on the 25th day of March, 2015 between 18.00 and 19.00 hours within Pokot County, the Appellant unlawfully assaulted S C, thereby occasioning her actual bodily harm.

The prosecution case is that the complainant who gave evidence as PW-1 was born in the year 2000 and on 25/3/2015, the day of the alleged offences, she was aged 15 years. She was a pupil at [particulars withheld] Primary School, in class 8. She was living with her mother, the PW-3 in this case at [particulars withheld] village. On 25/3/2015 the complainant got home between 6 and 7 p.m. from school. She was asked to go to the river for water. She went and while fetching water she heard someone speak, urging her to finish fast and get to where he was. She looked up and recognized the person as Toroitich. This man, Toroitich, held her by the hand and insisted that he wanted her at that particular time. He held her by the blouse of which got torn. She tried to escape but was unable to. He held her from the back, tying his hands around her waist. He fell her down. She attempted to escape and he held her by the throat, saying he wanted to turn her face up. She firmly resisted and used her entire force to push him. As they struggled he passed his fingers by the side of her pant and got them into her vagina. She jumped off, into the river and screamed for help. Her cousin who is the PW-2 in this case heard the screams from where she was alongside the road, nearby. She rushed to the scene. She found the Appellant holding the complainant to the ground. When he saw her he released the complainant and took to his heels. PW-2 also screamed and attracted member of the public. PW-3 who is the mother to the complainant was also attracted to the

scene by the screams. They chased after the Appellant and arrested him.

On 26/3/2015 the complainant was examined by PW-4 at Kapenguria District Hospital. The Clinical Officer noted that her blouse was torn, she had bruises on the neck and cheeks. There was pain on the abdomen, visible bruises on both hands, and painful thighs. She was treated for the injuries and the degree of injury classified as harm. The P3 form was produced in court as an exhibit.

PW-5 commenced investigation of the case on 26/3/2015. By the time he was through he had made his mind to charge the Appellant with the offences in the charge sheet. The Appellant defense is that on the alleged day of the offence he worked in the land till 7.00 p.m. and got back home at Chemori village at 9.00 p.m. He slept and the following Monday he was arrested for an offence he did not commit. He called two witnesses in his defense who alleged that they were with him in the land. DW-2 stated just as the Appellant that they worked till 7.00 p.m. and got back home at 9.00 p.m. DW-3 however said they worked till 5.00 p.m. and got back at 9.00 p.m.

The Trial Magistrate evaluated the evidence and found the Appellant guilty on both counts of attempted defilement and assault. He however only sentenced him on the first count and was mute on the other one. Appellant was sentenced to serve 10 years in jail.

The Appellant dissatisfied with the said conviction and sentence appealed to this court on the following grounds:-

1. He pleaded not guilty at trial.

2. ***The evidence relied on by Trial Court was hearsay.***

3. ***He was not examined by a medical officer in relation to the alleged offence.***

4. ***Age of the victim was not established by any document.***

5. ***His defence was not weighed.***

The Appellant in his written submissions raised issues with differing dates given by the prosecution witnesses. He averred that the complainant said the offence took place on 28/3/2015, while the P3 was filled on 26/3/2016. He wondered how the victim could have been examined before commission of the offence. He further alleged that the court shifted the burden of proof to him when it observed that his defence was an afterthought.

On corroboration, the Appellant took issue with the fact that the victim was not subjected to *voire dire* and no reason was given for the omission. PW-3's evidence is alleged to amount to hearsay and that PW-2 and PW-3 are related to the complainant. Other independent witnesses were not called.

The Appellant as well averred that the charge sheet shows he was arrested on 30/3/2016, while the evidence reveals he was arrested the same day of the alleged incident by members of the public.

On his defense which is an *alibi*, he alleged that it was not challenged and the prosecution did not call for any evidence in rebuttal. He relied on the cases of:-

i. ***Victor Mwendwa Mulinge -vs- Republic (2016) eKLR and,***

ii. ***Elias Kiamati Njeru -vs- DPP (2015) where the finding in the case of Kiarie -vs- Republic (1984) KLR was relied on.***

On the foregoing grounds he submitted that the prosecution had failed to prove the charge beyond reasonable doubt, and urged this court to set aside both conviction and sentence, and allow the appeal.

The state prosecutor opposed the appeal on the grounds that the evidence of PW-1 is clear on what the Appellant did to her which amounts to an offence of attempted defilement. The Appellant was arrested immediately after the commission of the offence and the question of mistaken identity does not arise. The girl was aged 15 years and a birth certificate was produced of which shows the Appellant was given a fitting sentence for the offence.

I have re-evaluated the evidence adduced, considered grounds of appeal, Lower Court judgment and submissions by both sides.

The Appellant herein was known to PW-1, PW-2 and PW-3. The evidence of PW-1 to some extent is corroborated by the evidence of PW-2. The Clinical Officer also corroborated the evidence that she had injuries. Nothing in the evidence suggest that the witness had a cause to fix the Appellant. What PW-1 narrated the Appellant did to her leaves no doubt that he wanted to penetrate her genital organ, namely vagina, with his genital organ, namely penis. He said he wanted her then and forcefully laid her down, reached her genital area with his fingers through the side of her pant, as she vehemently struggled against his action. The Appellant only gave up and escaped when PW-2 appeared. The evidence by these witnesses was not off-set or shaken during cross-examination. The Trial Court had no reason to doubt it's truth.

I agree with the Appellant that the complainant stated the offence was committed on 28/3/2015. However looking at the rest of the evidence it is clear it was on 25/3/2015 as stated in the charge sheet. PW-2 talked of 25/8/2015 as well as PW-3. PW-4 examined her on 26/3/2015 while PW-5 commenced investigation on 26/3/2015. The dates flows well in evidence save for the date given by the complainant of which was obviously an understandable error. A mistake in date is not strange where witnesses give evidence days, months and sometimes years after an incident took place. Even the Appellant himself has mistaken the date on the P3 form of which in submissions is indicated as 26/3/2016 instead of 26/3/2015. The same has happened on the date of his arrest in the charge sheet of which he says is 30/3/2016 instead of the correct date 30/03/2015. This demonstrates anyone can make a mistake even where they are relying on available documents, leave alone on mere memory. So long as such a mistake is firmly corrected in the proceedings and the position settled, it is not a big deal in determination on whether or not the witnesses were truthful.

Appellant raised an issue on his defense. The Trial Court by merely saying his defense is an afterthought it did not shift the burden of proof on him. The Appellant did not state in his evidence that he was with his two witnesses in the land. They did not disclose the work they were doing there and in which land. His defense was very brief and in want of details. The same applies to his witnesses evidence. The 3rd one even contradicted them on the time they left the land. The defense is flimsy and self made story. It is not real. Nobody can be in two places at the same time. He was well seen at the scene by 3 prosecution witnesses and was arrested as he was escaping from the scene. The prosecution position tilts the scale of truth heavily on this issue against his *alibi* defense. The defense case was therefore correctly dismissed.

The Magistrate found him guilty on both counts and sentenced him on one. This was an error. The correct position is however that the assault incident was incidental to commission of the offence of attempted defilement, and should not therefore have been considered as an independent count, but probably as an alternative count. The Trial Court should have found this before proceeding to sentence him on the more serious charge of attempted defilement. However by not doing so nothing was lost in terms of doing justice as at the end of it all the position arrived is safe.

The sentence arrived at was in accordance to the law. I accordingly find the appeal in want of merit and is hereby dismissed.

Judgment is read and signed in the open court in presence of Ms Chebet for the Appellant and Ms Kiptoo for the state, this 20th day of December, 2017.

S. M. GITHINJI

JUDGE

20.12.2017