



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 137 OF 2013

DICKSON MUCHIRA KARANI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (B.J. Ndeda) at Gichugu, Criminal Case

No. 599 of 2008 dated 2nd December, 2008)

JUDGMENT

1. The appellant herein, **DICKSON MUCHIRA KARANI** was charged with attempted defilement contrary to **Section 9 (1) (2)** of the **Sexual Offences Act No. 3 of 2006** in the Principal Magistrate's Court at Gichugu **Criminal Case No. 599 of 2008**. The particulars of the offence were that on 1st day of June, 2008 at around 18.30 hours at in Kirinyaga District within the then Central Province attempted to have carnal knowledge of C W a girl under the age of 18 years.
2. The prosecution called a total of five witnesses in support of the said charge against the Appellant. The brief facts of the case from the proceedings at the trial court indicates that the complainant, a school going girl said to be in Form II was from school at around 6.30 p.m. when she was accosted by the Appellant in an attempt to rape her. She however, screamed and people ran to her rescue and chased and apprehended the Appellant and later escorted him to the Police from where he was taken to court. The trial court found him guilty and sentenced him to 20 years imprisonment as the learned trial magistrate did not find him remorseful for the offence.
3. Aggrieved by both conviction and sentence he filed this appeal on the following grounds:
 - (i) ***That he pleaded not guilty to the charge.***
 - (ii) ***That the learned trial magistrate erred in law and fact by finding that the prosecution case had been proved despite his strong defence.***
 - (iii) ***that the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant.***
4. The Appellant also filed further grounds as follows:
 - (i) ***That the trial magistrate misdirected herself by holding that the complainant was able to identify the appellant when she did not know him before.***

- (ii) *That the age of the complainant was not ascertained.*
- (iii) *That the trial magistrate erred by relying on evidence of a single witness.*
- (iv) *That his defence was not considered.*

5. At the hearing of the appeal, the Appellant relied on his written submissions. He submitted that the prosecution's case against him was not proved to the required standard.
6. He faulted the evidence taken from P.W.1 – the complainant before *von dire* examination was done to ascertain if she understood the basis for telling the truth. In his view, the trial magistrate made an error by having the witness sworn straight away when she was testifying on a charge of defilement which implied that she was a minor.
7. The Appellant also faulted the finding of the trial magistrate arguing that she misdirected herself by holding that the Appellant tied the victim to a coffee stem when no such evidence was tendered.
8. It is further submitted that the trial court erred by not considering the issue of age of the victim. He faulted the prosecution for not adducing any evidence in terms of birth certificate or any other document to establish the age of the complainant. He also submitted that the prosecution's case rested on the evidence of a single witness who told the court that he did not know the Appellant very well. He pointed out that no medical report was tendered to prove that there was a struggle during the commission of the offence.
9. Finally he submitted that his defence was not considered which demonstrated that he was innocent and the fact that he had been assaulted by one Muchiri and that he had been framed and victimized.
10. The State through Mr. Sitati opposed this appeal contending that the five witnesses called tendered overwhelming evidence against the Appellant.
11. On the issue of identification, the Respondent submitted that the complainant positively identified the Appellant and mentioned him by name which she indicated was "Gichira", a name by which the Appellant was known in the village. Mr. Sitati further pointed out that the offence took place at 6.30 p.m. a time that was possible for one to be clearly seen and identified. He further pointed out that the fact that the Appellant was arrested immediately after the act within the same vicinity strengthened the prosecution case and the question of identification.
12. Mr. Sitati conceded that the learned trial magistrate may have misdirected herself when she found that the complainant was tied to a stem but said that the fact was minor and did not form basis of conviction and the finding did not prejudice the Appellant in any way.
13. On the question of age of the complainant, the State responded that in cases of attempted defilement, age is not material so long as the court is satisfied that the victim is under 18 years old. He submitted that the victim was in Form II and the trial court must have taken judicial notice that she was under 18 years old.
14. Mr. Sitati in response to the Appellant's contention that the trial court relied on evidence of a single witness, stated that the law (**Section 124 Evidence Act**) allows a court to rely on evidence of a single witness so long as the court is satisfied that the witness is telling the truth. He added that the evidence relied on by court was corroborated by witnesses who testified before the trial court and pointed out that the exhibits produced which was a torn skirt worn by the complainant on the material date gave more weight to the prosecution case.
15. The State contested the Appellant's submissions that his defence was not considered saying that the defence was not substantiated. He faulted the Appellant's submissions that he was assaulted saying that no P3 or OB number was tendered to prove the allegations at the trial court.
16. On the question of lack of *von dire* examination of the complainant, Mr. Sitati responded that the complainant was not a child of tender years saying that *von dire* examination is only conducted in relation to witnesses under the age of 10 years. He relied on the case of **KIBAGENY ARAP KORIR -VS- R (1959)E.A. Pg 92** to support his submission that there was no need for *von dire* when the complainant was old enough to give sworn evidence.
17. I have considered this appeal, the grounds and the written submissions by the Appellant. I have also considered what he orally submitted at the hearing of this appeal. I have also considered the response by the State.

I will begin with the issue of *von dire* examination of the complainant. The proceedings do not show that the complainant was a child of tender years to require *von dire* examination. Although the age of the complainant was not given which is an issue I will address later in this judgment, it is obvious that the trial court never saw the need. The witness gave sworn evidence and the Appellant got the opportunity to cross-examine her. I do not see any prejudice at all that the Appellant alluded to the fact that *von dire* examination was not done. I agree with the State that a trial court can take judicial notice of a fact that a witness is old enough to give sworn evidence. Where the court is in doubt, then *von dire* examination is conducted particularly in situations where you have minors of tender years giving evidence.

18. I also find that the evidence tendered at the trial court was sufficient particularly, as pointed out by the State, the offence took place at 6.30 p.m. The victim though she told the trial court that she did know the Appellant very well, she knew him enough to know his name which she gave as "Gichira" when she reported the incident to the father. The fact that the Appellant was arrested immediately when

people came to the rescue of the complainant after hearing screams from her really strengthened prosecution case at the trial and weakened the Appellant's defence that he was not involved. I do find that the trial court was correct to conclude that the complainant positively identified the Appellant and there was no doubt that there was an attempted rape in view of torn and soiled skirt which was produced at the trial court as P. Exhibit 1.- A finding of fact by trial court.

19. This court upon evaluation of the evidence tendered before the trial court finds that the prosecution proved beyond reasonable doubt that an offence of attempted rape had been committed. I agree with Mr. Sitati that the wrong finding of the trial court that the victim had been tied on a stem of tree during the commission of the offence did not form the basis of conviction by the trial court. The complainant told the trial court that she fell down as she attempted to flee from the Appellant after noticing danger and that she held onto a coffee stem as the Appellant tried to drag her further away. The trial court misdirected itself that the victim was tied onto a stem when she in fact told the court that she held onto the stem and screamed for help. That misdirection in my view did not alter the finding of the trial which was based on the total weight of the evidence tendered which as I have said was beyond reasonable doubt.

20. Perhaps the only issue which was not well addressed by the trial court was the age of the complainant. I do not agree with Mr. Sitati's contention that age is immaterial in offences of the nature that faced the Appellant. Defilement in law in itself is defined under **Section 8 (1)** of the **Sexual Offences Act No. 3 of 2006** as an act causing penetration with a child. And a child is defined under **Section 2 (1)** as a person under 18 years of age as indicated under **Section 3** of the **Children's Act**. It therefore follows that attempted defilement must involve a child under 18 years old. The charge that faced the Appellant at the trial court clearly indicated that the complainant, **C W** was a child under 18 years of age. It was therefore important and crucial to establish the age of the victim in order to found a conviction. The prosecution totally failed on that score as no evidence at all was even suggested to establish the age of the victim. The trial court also did not state whether it took judicial notice of the age of the victim in sentencing or not. It would be unfair and prejudicial to assume that the

trial court must have taken judicial notice that the girl was in form II and therefore must be under 18 years. The law itself under **Section 9 (3)** of the **Sexual Offences Act** provides a defence to an accused person who has reason to believe that a victim is over 18 years old may be by virtue of physical appearance or any other attribute. Ascertaining the age of victims of defilement cases is therefore important and crucial for the interest of justice.

21. This Court finds that the prosecution failed to do justice for the victim at the trial and in view of the evidence tendered and the finding of this Court over the same in order to met out justice to both the complainant and the Appellant, this Court shall invoke the provisions of **Section 186** of the **Criminal Procedure Code** and convict the Appellant under **Section 4** of the **Sexual Offences Act** which is a lesser offence of attempted rape assuming that the complainant was over 18 years as the age was uncertain.

From the foregoing, this appeal partly succeeds to the extent

that I find that conviction of the Appellant under **Section 9 (1)** of the **Sexual Offences Act** was unsafe. The conviction of the Appellant

under that section is therefore quashed and the sentence of 20 years is

set aside and in its place a conviction against the Appellant under **Section 4** of the **Sexual Offences Act No. 3 of 2006** is entered. He is sentenced to serve eight (8) years imprisonment for the offence. The period he has been in prison during the pendency of this appeal shall be calculated accordingly so that he can serve the remainder of the term. It is so ordered.

Dated and delivered at Kerugoya this 22nd day of July, 2015.

R. K. LIMO

JUDGE

22.7.2015

Before Hon. Justice R. Limo J.,

Court Clerk Willy Mwangi

Appellant present

Sitati for State present

Dickson Gichira present in person

COURT: Judgment dated, signed and delivered in the open court in the presence of Appellant in person and Sitati for State.

R. K. LIMO

JUDGE