



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 4 OF 2012

(Being an appeal from the conviction and sentence in Criminal Case No. 150 of 2011, Garsen by Hon.Kituku, Senior Resident Magistrate on 13th January 2012)

ABDULLAH DIBA DUBA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with two main counts of child Trafficking contrary to section 13(c) of the Sexual Offences Act No. 3 of 2006 and Defilement of a girl contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was accused of Compelled Indecent act contrary to section 6(9) of the Sexual Offences Act NO. 3 of 2006.
2. The trial Magistrate acquitted the Appellant of the offence of child trafficking but convicted him of the offence of defilement. The Appellant was sentenced to serve a jail term of 15 years thus this appeal.
3. The particulars of the offence are that the Appellant was convicted of were that on diverse dates between 3rd July, 2011 and 7th July, 2011 at [Particulars withheld] village in Mpeketoni Division within Lamu County unlawfully caused his penis to penetrate into the vagina of the complainant, then 15 years.
4. The complainant, Pw1 informed the trial Magistrate that she was 16 years old and a pupil at [Particulars withheld] primary school. According to Pw1, she had known the Appellant since her childhood.
5. Sometime in April 2011, the Appellant met Pw1 and informed her that he wished to marry her. The Appellant gave the complainant, Pw1, his mobile phone number while Pw1 gave him her aunt's mobile number.
6. According to Pw1, she agreed to marry the Appellant in July 2011. The Appellant then took her to his home and they had sexual intercourse for three nights. However, accompanied by the police officers, the complainant's brother visited the Appellant's home and arrested both the Appellant and Pw1.
7. The Clinical Officer, Pw5, stated the she examined the complainant on 11th July 2011 and found that she was aged 16 years. On further examination, he found that the complainant's hymen was broken and her urine had infection. When he examined the Appellant, he found that his urine was also infected.
8. In his defence, the appellant admitted that the complainant stayed in his home for three days and that she used to sleep in his mother's house.
9. The Appellant's counsel submitted that the failure by the Magistrate to conduct a voire dire examination on the complainant rendered the conviction of the Appellant unsafe. Counsel stated

- that although the Magistrate found that the complainant was not truthful, he still convicted the Appellant on the evidence of the complainant alone.
10. The state counsel did not respond on the issue of the failure to conduct *voire dire* examination but reiterated the evidence which was given in the lower court. The state counsel submitted that this court should confirm the conviction and sentence that was meted out by the lower court.
 11. This being the first appellate court, I am required to re-evaluate the evidence that was tendered in the lower court, assess it and make my own conclusion. (**Okeno Vs R (1972) EA 322**).
 12. The learned Magistrate found as a fact that the complainant disappeared from her home on 3rd July 2011 and a report was made to the police. The complainant was found at the appellant's house. Having analysed and re-assessed the evidence on record I am in agreement with that finding.
 13. The learned Magistrate however found that the complainant was not truthful in her testimony because firstly, she had said that it is the appellant who picked her from her home to his home which was not the case. The Magistrate relied on the evidence of the arresting officer, Pw4, who informed the court that in his investigations, he found that it is the complainant who went to the Appellant's home voluntarily.
 14. Secondly, the Magistrate was of the view that the complainant had lied when she stated that she spent the three nights in the same house with the Appellant and his wife and children but later on changed the story and stated that she slept with the Appellant alone. Indeed, the said contradictions by the complainant as observed by the learned Magistrate are on record. However, the complainant was found in the house of the Appellant when she was arrested and the doctor who examined the Appellant and the complaint found as a fact that Appellant had infection in his urine which he had sexually transmitted to the complainant. The evidence by Pw1 was therefore corroborated with the doctor's evidence.
 15. The Appellant's advocate submitted that the Magistrate should have conducted a *voire dire* examination in view of the fact that the complainant was a child of 16 years.
 16. *Voire dire* examination is only conducted by the trial court where the court is dealing with a child of "tender years". In the case of **Johnson Muiru -vs- Republic (1983) KLR 445**, the Court of Appeal stated that the matter of whether a child is of tender years or not is a matter of the good sense of the court where there is no statutory definition of the phrase.
 17. I am not persuaded that a child of 16 years can qualify to be defined as "a child of tender years" unless it is manifestly so. In any event, the evidence of the complainant was corroborated by the doctor's evidence. The failure by the Magistrate to conduct *voire dire* examination cannot be said to be unsafe in the circumstances of this case.
 18. Consequently, and for the reasons I have given above, I dismiss the Appellant's appeal.

Dated and delivered in Malindi this 28th day of **March**, 2014.

O. A. Angote

Judge