



REPUBLIC OF KENYA



KENYA LAW
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**Kiarie v Republic (Criminal Appeal 203 of 2007)
[2008] KEHC 3897 (KLR) (Crim) (24 September 2008) (Judgment)**

Peter Kimani Kiarie v Republic [2008] eKLR

Neutral citation: [2008] KEHC 3897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL 203 OF 2007**

**JB OJWANG, J
SEPTEMBER 24, 2008**

BETWEEN

PETER KIMANI KIARIE APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgement of Senior Principal Magistrate Mr. K.W. Kiarie dated 26th October, 2006 in Criminal Case No. 1394 of 2006 at Kiambu Law Courts)

Exempting a complainant who was a victim of a sexual offence from testifying due to her tender age cannot be a sole ground to overturn a conviction.

The appellant challenged his conviction and sentence on the ground that the trial court had wrongly acceded to the prosecution's request to exempt the complainant from testifying due to her age. The instant court held that evidence that the prosecution had adduced provided a proper basis for the conviction entered by the trial court. Further, it held that trial court's decision to exempt the complainant was a proper exercise of discretion, and thus, the relevant ground of appeal could not stand.

Reported by Moses Rotich

Criminal Law - attempted defilement - appeal against conviction and sentence - proof beyond reasonable doubt where proof was solely dependent on witnesses testimonies - whether the sentence imposed was harsh and excessive- Penal Code (cap 63), sections 144(2) and 145 (1).

Evidence - child evidence - essence of a complainant's evidence - trial magistrate exempting the complainant from testifying as she was too young - whether it was an error of law and fact - whether the appellant had been convicted on the basis of uncorroborated evidence - whether the exemption of complainant who was a victim of a sexual offence from testifying due to her tender age could be a sole ground for overturning a conviction.



Brief facts

The appellant had been charged with the offence of attempted defilement of a girl contrary to section 145 (1) of the Penal Code. It was alleged that on January 8, 2004 the appellant attempted to have carnal knowledge of the complainant a girl under the age of sixteen years. According to the prosecution's case, the appellant was found in a partially-constructed house with the complainant, while holding her against his body and, when asked to account for that state of affairs, he threatened to cast a stone at his interlocutor. When the girl was asked what was happening, she said that the man had removed her clothes and was telling her bad things. The appellant was arrested, and charged and convicted of the offence. The appellant appealed claiming that proof beyond reasonable doubt had not been attained by the prosecution and further that the appellant had been convicted on the basis of uncorroborated evidence. During the trial, the court had exempted the complainant from testifying due to her age.

Issues

Whether the exemption of a complainant who was a victim of a sexual offence from testifying due to her tender age could be a sole ground for overturning a conviction.

Held

1. The trial court had properly exercised its discretion when it exempted the complainant from testifying due to her age. The trial court's decision had rested on the quality of the testimonies of the prosecution witnesses. The appellate court also found such evidence to be candid and truthful, and thus, providing a proper basis for the conviction entered by the trial court.
2. The sentence imposed by the trial court was not in any way excessive.

Appeal dismissed.

Citations

Statutes

Kenya

Penal Code (cap 63) sections 144(2); 145(1) — (Interpreted)

Advocates

Ms Gateru for the respondent

JUDGMENT

1. The appellant was charged with the offence of attempted defilement of a girl contrary to s 145(1) of the *Penal Code* (cap 63, Laws of Kenya). The particulars were that, on 8th January, 2004 at [Particulars Withheld] Village in Kiambu District of Central Province, the appellant attempted to have carnal knowledge of CN, a girl under the age of sixteen years.
2. In respect of the same alleged acts, the appellant faced the alternative charge of indecent assault contrary to s 144(2) of the *Penal Code*. And the facts in this regard were that, the appellant had unlawfully, indecently assaulted CN aforesaid, by removing her underpants and touching her vagina.
3. The prosecution case was that the appellant herein was found in a partially-constructed house with the complainant, while holding her against his body and, when asked to account for that state of affairs, he threatened to cast a stone at his interlocutor. TNG (PW1), the complainant's mother, had returned home to find many people at her gate, drawn there by the outrage over attempted defilement of the complainant by the appellant.
4. SKM (PW3) testified that at 3.00 pm on the material date, as he passed by an incomplete construction on his way to the shop, he saw a man who was munching something which he was also giving to



the complainant, a child of tender years who, on this account, was unable to testify on matters that occurred two years earlier. PW3 went up to the shops, and, at 4.00pm, as he passed by the same uncompleted house-structure, he did not at first see anyone; but when he peered into the house, he saw a man holding a girl-child against himself. PW3 went closer, and asked the man – the appellant herein – what he was up to. The appellant disengaged from the child, and confronted PW3 with a stone. PW3 was forced to run to a nearby house, where he saw a lady, called out to her, and reported what he had just witnessed. The two of them then approached the partially-built house together, and they saw the complainant coming out. In PW3’s words:

“We asked the girl what was happening. The girl said that the man had removed her clothes and was telling her bad things.”

5. PW3 thereupon started looking around for the suspect; he met PW2, ZNG, and the two started looking for the suspect together. They ended up reporting the matter to Kikuyu Police Station; and the same night members of the public arrested the suspect, and took him to the Police station. PW3 recognised the man arrested as the one who had been holding the complainant in the partially-completed building, earlier in the day; and that man was the appellant herein.
6. The appellant’s defence had fallen short of addressing the identification testimony from the prosecution witnesses. The appellant said there had been a quarrel between him and PW3, and that the contentious issue was nothing lustful.
7. The learned Magistrate did not believe the appellant. He concluded that, had PW3 not interrupted the appellant, “he would have defiled the girl.” The court found that the prosecution had proved their case against the appellant beyond any reasonable doubts; found the appellant guilty as charged; and convicted him.
8. The appellant’s grounds of appeal are as follows:
 - (i) that the complainant’s evidence was not taken – and this was an error of law and fact;
 - (ii) that proof beyond reasonable doubt had not been attained by the prosecution;
 - (iii) that the appellant should not have been found guilty of attempted defilement, when he had been accused of indecent assault;
 - (iv) that the sentence awarded was harsh and excessive;
 - (v) that the appellant had been convicted on the basis of uncorroborated evidence.
9. The appellant appeared before the court with written submissions, and made only cursory oral submissions. He contested the bona fides of the prosecution witnesses, on the ground that they all belonged to one family living with him in the same neighbourhood where harmony was not the mark of their social relationship. He noted in this regard, that PW3 was the aunt of the complainant. The appellant contested the veracity of the testimony that the alleged offence had taken place during the day, because there is nothing said of “children who were playing with the complainant when the incident took place.”
10. Learned counsel Ms Gateru contested the appeal, and supported both conviction and sentence. She urged that the testimonies of PW1, PW2 and PW3 were consistent, and showed that the appellant had attempted to defile the complainant.



11. On the issue as to the complainant not giving testimony, the record shows that an application had been made by the prosecutor, that she be not called. In the words of the prosecutor:

“The complainant is six years old. When the incident occurred she was four years old, and cannot testify on the events.”

And the learned magistrate ruled:

“The complainant is exempted from testifying due to her age. She appears too young to testify.”

12. I would regard the trial court’s decision as a proper exercise of discretion, and thus, the relevant ground of appeal cannot stand.

13. The trial court’s decision, in my assessment, rested on the quality of the testimonies of the prosecution witnesses. Just as the learned magistrate did not doubt the truthfulness of the accounts rendered by the witnesses, so do I find such evidence to be candid and truthful, and thus, providing a proper basis for the conviction entered by the trial court.

14. I would not consider the sentence imposed by the trial court to have been in any way excessive, and I affirm the same.

15. Accordingly, the appeal is dismissed; the conviction is upheld; and the sentence is affirmed.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person

