REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 18 OF 2015

(From original conviction and sentence in criminal case number 885 of 2010 of the Principal Magistrate's Court at Kapenguria)

(Formerly Kitale HCCRA No. 42 of 2014)

WILLIAM KIBET……. APPELLANT

VERSUS

REPUBLIC …….…… RESPONDENT

JUDGEMENT

WILLIAM KIBET the Appellant herein was charged in the lower with a main charge of **Assault Causing actual bodily harm, Contrary to Section 251 of the Penal Code.**

The particulars of this offence read that on the day of 13th October, 2010 at [Particulars Withheld] Location in West Pokot County, the appellant unlawfully assaulted D C, thereby occasioning her actual bodily harm.

The appellant also faced an Alternative charge of **Indecent Act with a child, Contrary to Section 11(1) of the Sexual Offences Act no 3 of 2006.**

The particular of this offence are that on the 13th day of October, 2010, at [Particulars Withheld] Location in West Pokot County, the appellant did an indecent act with D C a girl aged 10years by stripping her pant and touching her vagina.

The plea in this case was taken on 15.10.2010 whereby the appellant herein pleaded guilty to the offence in count 1 and 'not guilty' to the alternative count in count II. The facts on the main count were not ready and the case was given a mention date of 18.12.2010. That day the prosecutor giving no reason requested facts on 19.10.2010. On 19.10.2010 he had no police file and requested to state the facts on 21.10.2010. On 21.10.2010 the accused was absent. Production order was issued and the matter was placed for mention on 22.10.2010. That day the prosecutor indicated the complainant in the second count wished to withdraw the case. It is not clear from the proceedings why the matter was put off to 2.11.2010. On 2.11.2010 it appears the trial magistrate and the prosecutor had forgotten the matter was for facts. It was given a hearing date of 19.1.2011 and a mention of 16.11.2010. On 19.1.2011 witnesses were not in court and it was adjourned to 2.3.2011. On 2.3.2011 the complainant indicated to court of her intention to withdraw the case.

The court observed that it was the mother of the young child who had made the application on her behalf.

The alternative count touched on the minor and if she withdrew the first count it would compromise on the alternative second count. The request on the ground was declined by the court.

On 30.3.2011 the accused (appellant) reminded the court that he had pleaded guilty to the first count. The court re-read the charge to him to which he pleaded guilty. Prosecutor requested to read the facts on 31.3.2011 and his request was allowed. That day the plea was taken afresh and the accused pleaded guilty to the offence in count 1. He was sentenced to serve 3 years in prison. A date was also taken for hearing of the case in count II. It was eventually heard and judgment delivered on 29.8.2012 in which the appellant was found guilty and sentenced to serve 10 years in prison.

The appellant dissatisfied with the conviction and sentence in the Alternative count, appealed on 9.4.2014. In his grounds of appeal the appellant avers that the ingredients of the offence were not established by the prosecution beyond reasonable doubt, the evidence was not sufficient to warrant a conviction and that incredible witnesses were relied on.

The state prosecutor in his submissions agreed to the averment that the ingredients of the preferred offence in the alternative count were not established by the prosecution. He however urged this court to find that the established offence is of attempted defilement and convict the appellant of that offence.

The appeal herein relates to an alternative count where the appellant had pleaded guilty to the main count, convicted and sentenced of it. An alternative count in law is as rightly implied by its name, an alternative to the main count. It is a spare count considered only when and where the main count fails. Where the main count succeeds the alternative count is not considered. It can be well compared in its use as the spare tyre of a vehicle as this court had indicated in the case of ***Dominic Okodoi versus Republic, Criminal Appeal number 12 of 2016, Kapenguria High Court.***

The trial magistrate was well aware that the count, to which he proceeded to hear evidence, evaluate it, convict and sentence the appellant, was an alternative count. This is so given what he indicated in the proceedings of 2.3.2011 when the mother of the complainant sought to withdraw the complaint. He indicated this:-

> "***Complainant is a minor – young child but the one speaking is the mother to the minor. The alternative charge also touches on the minor so if she withdraws the first one, it will compromise the alternative second count, so request declined. Case to proceed to hearing."***

On 31.3.2011 when the appellant pleaded guilty to the main count, and was convicted and sentenced to serve 3 years imprisonment, the matter came to an end and the hearing in the alternative count should not have been entertained by the trial magistrate. Actually the proceedings show the investigating officer had rightly taken the matter as finalized but the court position was different and proceeded wrongly in respect of the alternative count. The said entire proceedings were erroneous and equally the finding and sentence arising therefrom. I accordingly quash the entire proceedings in relation to the alternative count, the conviction arising therefrom and the sentence. Consequently, the appeal is allowed in relation to the Alternative count (second count) and the sentence of 10 years in prison set aside. The appellant should be released upon completion of the sentence of 3 years imprisonment imposed on the main count. This court so orders.

Judgment read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 24th day of January, 2017.

S. M. GITHINJI

JUDGE