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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 13 OF 2016

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 628 of 2015 the Principal Magistrate's Court at Kapenguria)

D M :::APPELLANT

VERSUS

REPUBLIC::RESPONDENT

JUDGMENT

In April, 2015 the complainant in this case was aged 15 years. She was schooling at K Primary School in class 8. She was living then with her grandmother who is PW-4 in this case. On 27.4.2015 at about 6pm the complainant was in the house alone. PW-4 was away. She was joined in the house by her uncle, the appellant in this case. There was a time the complainant was staying with the said uncle and he was therefore a person she knew very well. She cooked supper of which they ate together before proceeding to sleep. The complainant went to her grandmother's room to sleep as the appellant went to the kitchen. The appellant later expressed that he was fearing sleeping in the kitchen alone, and joined the complainant. He sat on the bed the complainant was to sleep in. Complainant spread the bed and slept. At about midnight she noted of a spotlight which was shone on her. She asked the appellant what was happening and he replied that he was chasing mosquitoes off her. She then continued to sleep. After a while the appellant grabbed her and ordered that she be his wife that night. He further said that he knew he was her uncle but that was only in the head as below the head he was a man and she was a woman. He still had the spotlight. He covered her mouth with a shawl and used a knife to threaten her to remain silent. He proceeded to remove his trousers and pants, tore her inner pants and entered his manhood into her womanhood. He did not use a condom and did it till 5am. He ordered her to accompany him to the shop to buy cigarettes. She did so. He kept an eye on her as they walked, not to escape. He thereafter proposed that they go to where the grandmother was. Complainant however managed to escape. She reported the matter at Konyao Police Post. The police went and arrested the appellant.

PW-5 examined the complainant at Kacheliba District Hospital on 28.4.2015. He noted that she was sober. Her majora and minora were freshly torn. She had swelling on her private parts. She also had a vaginal discharge. He concluded that she had been defiled. HIV test was negative. He thus filled her P-3 form. He also did age assessment to her, and concluded that she was 15 years old. He made a report to that effect.

The appellant was then charged with the offence. The appellant in his defense gave unsworn testimony. He stated that he was living at Konyao and was a mason. He did not know the complainant. On 27th and

28th of April, 2015 he was at Kasei. He was called by a person an asked to wait for him. He was arrested and taken to Konyao by police officers. It was alleged he defiled the complainant. He was then charged.

The trial magistrate weighed the evidence and found him guilty. He was convicted and sentenced to serve 20 years imprisonment on 8.3.2016.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on 13th July, 2016, on the following grounds:-

1. That he pleaded not guilty.

2. That key witness was not called.

3. That prosecution evidence was not corroborated.

4. That the defense was rejected without cogent reason.

5. That no document supported the age of the victim.

In his written submissions he raised another ground that the charge was defective for omission of the mandatory terms, “intentionally and unlawfully.”

The state opposed the appeal. They averred that it was incompetent having been filed 4 months after the sentence while no leave to file it out of time was obtained. Other grounds raised by the appellant were equally opposed. The state observed that only the shopkeeper was not called as a witness and his evidence was not relevant in the case. He was not an eye witness to the incident. Other key witnesses were called and their evidence was sufficient to warrant a conviction. The evidence of the complainant was well corroborated by the evidence of PW-5 the clinical officer. His defense was weighed and rightly rejected. Complainant’s age was assessed and a report submitted by PW-5.

On the claim that the charge is defective, the state submitted that the victim involved was a girl aged 15 years and the charge was read to the appellant as well as its particulars. The omission of the said words did not prejudice the appellant in any way, and is therefore not fatal.

On the foregoing ground the state urged the court to dismiss the appeal in its entirety, uphold the conviction and sentence.

Before I consider the issues raised in the appeal, I have noted that the way ***voire dire*** was conducted and recorded is wanting. The examination is a question and answer process between the child and the court for the purposes of establishing whether the child possesses intelligences to:-

1. Understand the nature of oath

2. Know the difference between telling the truth and lying

3. Prepare the child to testify truthfully

4. Observe, remember and verbally describe events;

In the case of ***Kivevelo Mboloi versus Republic Criminal Appeal number 34 of 2013[2013] eEKL***, the court observed that it is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.

In this appeal, the trial magistrate only recorded:-

"I am 15 years old. I am in class 8 at M. I know I am in court. I am Christian. I know value of saying truth from falsehood. I will say the truth from falsehood. I will say the truth to avoid punishment."

These are only answers and the questions put by the court to the child were not recorded. While I find that the ruling by the magistrate is correct, more so given the evidence the child offered, it is advisable to conduct and record ***voire dire*** correctly. If the High court is in doubt as to correctness of the finding in ***voire dire***, it can be a ground for reversal of the lower court finding.

This appeal was filed out of time and was erroneously admitted to hearing without leave. Having already been admitted to hearing by the court the error becomes a procedural technicality curable under ***Article 159(1) (d) of the Constitution***, which reads that, "***Justice shall be administered without undue regard to procedural technicalities.***"

Section 8(1) of the Sexual Offences Act creates the offence of defilement. It states a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. In the Act, a child is a person below the age of 18 years. A child is also incapable of giving consent to sexual matters or activities. Consent is therefore not a defense. The only defence is under **section 8(5)** which is if proved that the child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and the accused reasonably believed that the child was over the age of eighteen year. Given this position one can hardly have unintentional and lawful sexual intercourse with a child.

The error in the omission of the words in the charge sheet though wrong and not by any standard desirable, did not prejudice the appellant in any way in the case of which was fully heard, and is therefore curable.

Other grounds raised in the appeal carries no weight at all. The girl stated her age as 15 years and was well corroborated by the evidence of PW-5. All the relevant key witnesses were called by the prosecution. The evidence of PW-1 was on its own strong enough to warrant conviction, but better still to a good extent was corroborated by the evidence of PW-5 who ascertained that she had been penetrated. Appellant's defense was considered against the weight of the prosecution case and rightly rejected. The appeal carries no weight; it is unmerited; it is rejected. The conviction and sentence are accordingly upheld. This court so finds.

Judgment read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 14th day of March, 2017.

S. M. GITHINJI

JUDGE

14.3.2017