Case Number:	Criminal Appeal 22 of 2016
Date Delivered:	01 Nov 2017
Case Class:	Criminal
Court:	High Court at Kapenguria
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji
Citation:	Moses Rionoluk v Republic [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	West Pokot
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 22 OF 2016

(From original conviction and sentence in criminal case number 62 of 2016 of the Principal Magistrate's Court at Kapenguria)

MOSES RIONOLUK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

MOSES RIONOLUK the appellant herein, was charged in the main count with the offence of **Defilement, Contrary to Section 8(1)(4) of the Sexual Offences Act Number 3 of 2006.**

The particulars of this offence are that between 17th and 20th day of September, 2016 within West Pokot County, the appellant intentionally caused his penis to penetrate the vagina of M C a child aged 16 years.

In the alternative, he was charged with **Indecent Act with a child, contrary to section 11(1) of the Sexual Offences Act 2006.**

The particulars hereof are that on diverse dates between 17th and 20th September, 2016 within West Pokot County the appellant touched the breast and buttocks of a child named M C, aged 16 years.

The prosecution case is that on 21.9.2016, when the complainant in this case gave evidence, she was aged 16 years. She however could not remember the year she was born leave alone the date and the month. She was schooling at [Particulars withheld] Primary school in class 7. On 17th September, 2016 she was chased away from school by Abakook for allegedly eating his doughnut and tea. She did not have transport home at Turkwel. At about 6.00pm while at Makutano, the appellant whom she referred to as Moses, offered her a place to sleep. It was in his house. That night he touched her all over the body. On 18.9.2017 the appellant lowered his trousers. She removed her pant and they had unprotected sex. The following day the appellant's wife found the complainant in the house. She attacked her, injuring her on the face. Meanwhile, PW-2 who is the father of the complainant was looking for her. He reported about her going missing at Alale Police Post. The police had the name of the appellant as the person suspected of keeping the girl. PW-4, who is the investigating officer, arrested the appellant. The appellant told the police where the girl was, and gave them the key to the house. They proceeded there, of which was a one roomed house behind a bar.

They got the complainant inside the room asleep. She had a bag of which contained her clothes, books and medicine. She was taken to the police station where her statement was recorded. She was as well issued with a P-3 form.

The form was filled by PW-5 on 20.9.2016. The clinical officer noted that she was in blood stained clothes. She had suffered wound on her face. She was having her menses at the time of examination.

The officer concluded that she had been successfully penetrated before she started her menses. She filled her P-3 form and PRC form. She concluded that there was actual penetration and assault. She made an age assessment and found that she was 16 years old. The appellant was then charged with the offences.

The appellant gave a brief sworn testimony in his defence. He denied the offence and said he got the complainant a place to sleep. He slept with her in the same room and bed but they never had sex.

The trial magistrate evaluated the evidence and found the appellant guilty of the offence in the main count. He convicted him and sentenced him to serve 15 years imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

1. He pleaded not guilty to the charge.

2. He was convicted on contradictory prosecution evidence.

3. The evidence was not sufficient to warrant a conviction.

4. The prosecution did not proof their case beyond reasonable doubt.

5. The defence was not well weighed and the burden of proof was shifted to him.

I have re-evaluated the entire evidence in the file. In a case of defilement, the ingredients that need be established beyond reasonable doubt are:-

a) The age of the victim, who must be below 18 years

b) Whether her genital organ, namely vagina, was penetrated by a male genital organ, namely penis.

c) If penetrate, the person who penetrated her.

On the first issue the complainant said she was aged then 16 years old. She produced no document in support of the alleged age, and could not remember the date, month and the year she was born. PW-5 who assessed her age said she had developed breasts and had had her menstrual periods for the last three years. He concluded that she was indeed 16 years. The trial magistrate observed that having had the opportunity to see her, he was satisfied that she was indeed aged 16 years. PW-2 who is the father of the complainant did not address the age issue.

In Sexual Offences, determination of the age of the victim is of great importance. This is so as it distinguishes between the offence of ***Defilement under section 8(1),*** and ***Rape under section 3(1) of the Sexual Offences Act***. It's also crucial for the sentence in the offence of defilement differ depending on the age of the child, under ***section 8(2), (3) and (4)*** of the said Act.

Logically, one is able to tell his or her age at any given date by calculation of time lapse from the date of birth. A person who is not aware of the date, month and the year she was born can hardly be precise about her age. The correctness of the age given by the complaint, of 16 years is doubtful.

The clinical officer whose evidence would have guided the court on the issue, was of no much help. She used non scientific method in assessing the age. She talked of fully developed breast and that she had started her menses in the last 3 years. Its common knowledge that breast development or growth in a woman cannot correctly indicate the age as it vary from one person to another. The same would apply with the genesis of menstrual. So far the best known and applied method is to have an X-ray of the teeth and the wrist. The teeth and wrist bones development, though cannot also guarantee a precise age assessment, can at least give an acceptable age indication, given that it is the only reliable method known and used all over the world. Any other method used, in absence of a reliable document to show the age, can be deceptive. The trial magistrate on the issue, as well observed, **"Having had the opportunity to see her I was satisfied that yes indeed she is the age of 16 years."** Age in a serious issue like this one cannot be established by visual examination, especially where the range is close like in this case, between 16 and 18 years. Possibility of making a dangerous and an expensive mistake is high. The foregoing fact leads to a conclusion that the age of the complainant was not established beyond reasonable doubt. She could have been a child or an adult, by the time the offence was allegedly committed.

Penetration was only established if the evidence of the complainaint alone was found adequate. However this is not the only evidence the magistrate relied on. He relied as well on the evidence of PW-5, the clinical officer, when he observed that, "**The clinical officer, PW-5 confirmed that there was positive penetration on the girl's genitalia**." Though the clinical officer concluded that, she did not indicate the basis of so finding. In the P-3 she indicated that, **"No harm or injuries observed on the genitalia."** She went further to indicate that the girl had received normal menses on 19.9.2016. These facts are inconsistent medically, scientifically or otherwise, with her conclusion that the girl had been penetrated. She must have been guided by history in finding so, of which was wrong. The trial magistrate erred in finding that PW-5's evidence confirmed that PW-1 was penetrated. I would have been comfortable with the finding if the court would have relied on **Section 124 of the Evidence Act**, and offered reasons for believing that the girl told the truth on penetration. That is not the case, and there is doubt on whether the girl's evidence alone is dependable as the sole evidence available on the issue of penetration. I never had the advantage of seeing her offer evidence, and I am not in a position, to make a conclusive firm position on the issue. Where there is existence of doubt, the law is that it be resolved in favour of the accused. On the issue of penetration the benefit of doubt is accorded to the appellant.

The last issue it is not disputed that it is the appellants who was in company of the complainant between 17th day of September and 20th day of September 2016. He conceded to it during his defence and said they never had sex.

The evidence shows that the complainant gave consent to whatever happened between them inside the appellant's house. Her age is not known. The alternative count can't therefore also stand.

The bottom line is that the appeal has merit. It's allowed. The appellant should be set free forthwith, unless otherwise lawfully held.

Judgment is read and signed in the open court in presence of the appellant and the state prosecutor, M/S Kiptoo, this 1st day of November, 2017

S. M. GITHINJI

JUDGE

1.11.2017