



IN THE SUPREME COURT OF NAURU

AT YAREN
CRIMINAL JURISDICTION

Criminal Case No.22 of 2019

BETWEEN

Republic

V

Kaeka Kam

Before: Rapi Vaai, J

APPEARANCES:

Counsel for the Prosecution:	S.Serukai
Counsel for the Defendant	K.Tolenoa
Date of Hearing:	15 th April 2020; 15 th & 20 th May 2020
Date of Ruling:	28 th May 2020

Case may be cited as: *Republic v Kaeka Kam*

DECISION

Introduction

1. The accused is charged with one count of rape contrary to Section 116(1)(a)(b) Crimes Act 2016. It is alleged that between the 30th November 2018 and 30th November 2019 at Location compound the accused had sexual intercourse with JK, a female child under 13 years of age. The accused is the brother of JK's mother.

2. JK testified. She was not asked about her age or date of birth. She is nonetheless a very young child. The only indication of her age was stated by the doctor in her medical report.

3. JK was questioned about a day she was playing with her friend Bower when the accused allegedly took her by the hand and led her inside the house where the offence allegedly took place. She was asked:

Question: Do you remember one day you were playing with Bower?

Answer: I remember

Question: What happened on that day you were playing with Bower?

Answer: Kaeka came and just held me

Question: Held you where?

Answer: My hand.

Question: Which hand?

Answer: On the wrist.

She then proceeded to tell the court that she was taken to a room inside the house. The accused undressed her, she was laid down on her side and the accused was behind her doing pumping action (sexual act) on her. She also told the court that her mother tried to come inside the room but the door was locked.

4. She also told the court that the accused also got on top of her and did the pumping. She was then asked.

Question: So when he was doing this to you did you scream?

Answer: Yes, screaming.

Question: And what did he do when you screamed?

Answer: He locked the door. When I was screaming there's people knocking on the door.

Evidence of Bower.

5. Bower Rubrina Kam, nine years of age, a friend of JK, told the court that she was playing marbles with JK and Aily when the accused called. JK went over to the accused and they walked inside the house and to the room. She was asked:

Question: How did you know she was taken to the room?

Answer: She told me when she came out of the room.

6. But later on she said the door to the room was locked, and when asked how she knew it was locked she responded; "*I went to open it and it was locked*".

Question: So how did you know JK was there?

Answer: She went in there

Question: With who?

Answer: With Kaeka

Question: So how long were you trying..like you said you went to call..how long were you calling her for?

Answer: Just once

7. When she received no response she then went out of the house and waited for JK. When JK later came out her face was pink. JK told Bower what the accused did to her. Bower told JK's mother what the accused did to JK.

Medical Evidence

8. The examining doctor testified and produced a report which confirmed there were no injuries in the genital area and the hymen was intact. She examined the young patient within about two weeks after the alleged incident. If there was penetration, even a slight one, there should be sign of healing tear even after two weeks. Examination of the anus was also done as the doctor was told that the accused inserted his penis in between her buttocks, but again the doctor noted no injuries in the anus.

Discussion

9. The defence called no evidence.
10. It is the medical evidence through which the court was told that the young girl was 6 years old, having born on the 10th March 2013. Opening address by counsel is not evidence.
11. It is also very blatantly obvious from the medical evidence that the alleged incidents which the young girl JK and her friend described and which lead to the allegation of rape was committed in November 2019; some two weeks before the medical examination was done by the doctor. It is therefore very puzzling to understand why the information

alleged that the offence was committed between November 2018 and November 2019. None of the prosecution witnesses indicated or stated when the offending took place.

12. As the two key witnesses for the prosecution were very young girls, the court was mindful of the obstacles the prosecution attempted to overcome to extract the evidence it desired. The nature of the alleged offending contributed to the difficulty. Some leading questions which were not objected to by the defence were, as a result allowed. But this of course did not minimise the duty of the court to ensure that the accused had a fair trial.
13. There are no special rules to be applied when considering the evidence of children. As with other witnesses the judge or jury exercising common sense and wisdom have to decide on what to make of the credibility and reliability of a child witness and how much weight to give to the evidence.
14. The accused, uncle of JK was living together with JK and her mother in the same house. One of the rooms in the house is where the accused is alleged to have taken JK and committed the offence of rape.
15. JK said the accused walked over to where she and Bower were playing, held her wrist and they walked inside the house and into a room which the accused locked. Bower told the court they were playing marbles with JK and Aily when the accused called JK. JK walked over to the accused and they went inside the house and into the room.
16. Perhaps the conflict in evidence at this point can be treated as peripheral relating to events prior to the commission of the offence. It must however be considered in the final assessment of credibility.
17. Inside the room, JK said she went for the door when the accused tried to pull her down. But the door was locked. Her mother was trying to open the door. Later on in her evidence she said, she screamed when the accused got on top of her and pumping her. And there were people knocking on the door.
18. If the mother knocked on the door, and if other people were also knocking, obviously there were people at the house who were obviously concerned with what was happening in the room. At least one of them would have testified to remove any cloud of doubt that

the accused was in fact in the room with JK. This conflict within JK's evidence cannot be treated as insignificant; it's a conflict on the core evidence in support of the charge.

19. The testimony of JK's friend Bower did not assist the prosecution in attempting to show that the accused was in the room. Firstly, she told the court that the accused called JK to come over to him, secondly she said at the beginning of her testimony that she knew JK and the accused were in the room because JK told her when JK came out of the room.
20. The medical evidence did not support what JK said happened inside the room. There was no evidence of injury to the anus and vagina, hymen was still intact; and although the examination was done some two weeks after the incident there should still be signs of healing tear if there was penetration, even a slight penetration. No evidence of sexual assault was reported in the conclusion of the examining doctor.
21. If the evidence however had satisfactory placed the accused inside the room, the court could still find the accused guilty of rape or the lesser charge of indecent assault despite the medical evidence.
22. The evidence falls far short of the required standard of proof.

Conclusion

23. The accused is not guilty as charged.



Judge Rapi Vaai

