REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 32 OF 2019

ABDI MAALIM ABDIRAHMAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgement of the Principal Magistrate's Court at Wajir in Sexual Offences Case No. 4 of 2019 delivered by Hon. Mugedi Nyaga on 30/8/2019)

JUDGEMENT

1. The Appellant was convicted and sentenced to 20 years imprisonment for defilement offence contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006.

2. Particulars being that on 31/12/2018 in Wajir West Sub-County, Wajir County intentionally caused his penis to penetrate the vagina of LBM a girl child aged 13 years.

3. He was aggrieved by the verdict and has thus lodged instant appeal where he complains vide his grounds in submissions:

- **There was no fair trial.**
- **There was no prove of case beyond reasonable doubt.**
- **The identification evidence was not safe to warrant conviction.**

PROSECUTION'S CASE

4. The summary of the facts of the case are, LBA (PW1) testified that she was 13 years old. It was her testimony that on 31/12/2018 around 1pm the appellant went to where she was grazing goats. That is at a place called [particulars withheld]. PW1 testified that she was in company of her sister called S. According to PW1, the appellant greeted her and asked for her tribe. He then left.

5. PW1 testified that the appellant returned after a few minutes and asked them for water. They gave him water. After that the appellant asked them to sit under a tree. PW1 told the court that the appellant ran to where they were and directed them to sit. It was her testimony that they ran towards their home and the appellant ran after them.

6. PW1 testified that the appellant grabbed her hijab and pushed her to the ground. She told the trial court that the appellant removed her innerwear. At the time she was lying on the ground.

7. PW1 testified that the appellant pushed her dress up and told her to part her legs. It was her testimony that she screamed. Her sister escaped. It was PW1's testimony that the appellant was wearing a shirt and a kikoi (traditional male wear).

8. She told the trial court that the appellant raised his kikoi. According to PW1, the appellant did not have underwear. He then proceeded to insert his penis into her vagina. PW1 testified that the appellant did so 3 times.

9. According to PW1, after the appellant was done, she escaped. She picked her innerwear before escaping. PW1 testified at their home she found AM, her sister and some boys. One of them was AB. She narrated to them what had happened.

10. PW1 testified that she took them to the scene where they found the appellant's shoes and kikoi. They reported the matter at Lagbogol Police Post. She was taken to Lagbogol Police Station before being referred to Wajir County Referral Hospital.

11. At the hospital they were referred to Wajir Police Station. They were then referred to Griftu Police Station. Finally, PW1 testified that she did not know the appellant before the incident.

12. In cross examination PW1 admitted that there were no other people when the appellant committed the offence. She also admitted that the appellant did not assault her. PW1 testified that at the time the appellant committed the offence he had a beard. The trial court noted that the appellant had a beard. PW1 insisted that she was sure that it was the appellant who defiled her.

13. FB (PW2) testified that PW1 was his sister and she was 13 years old. It was his testimony that on 31/12/2018 he was at home with one Amina Adan. While there PW1 who had been grazing goats returned running. PW2 testified that she was crying.

14. It was his evidence that her dress was covered with blood. Also, her dress had dirt on the back. According to PW2, she told them that the appellant had defiled her. PW2 testified that PW1 led them to the scene of crime.

15. One Ahmed went with them. It was PW2's testimony that at the scene of crime they found a vest, torch and kikoi. According to PW2, they started looking for the appellant. He was found at a place called Burji. He was arrested and then take to Lagbogol Police Station.

16. In cross examination PW2 admitted that he did not see the appellant commit the offence. It was his evidence that the appellant was arrested by members of public. He told the trial court that at the time they arrested the appellant they were many. He testified that at the scene they found the appellant's shoes.

17. David Kiprono Cheserek a Clinical Officer at Griftu Sub-County Hospital (PW3) testified that he examined PW1 on 1/1/2019. On examination of the clothing there was no presence of tears or bloodstains. PW3 told the trial court that PW1 had sustained injuries on the vagina walls.

18. PW3 testified that on examination PW1 had bruises on both hands. Also, she had bruises on the back of her thighs and inner thighs. The approximate age of the injuries was hours.

19. PW3 testified that on the examination of the genitals she had a tear on the anterior aspect of the vagina which was inferior to the clitoris. A tear was also noted on the lower part of the vagina. PW3 testified that there were bruises on the vaginal wall.

20. PW3 formed the opinion that there was penetrative sex. Further, PW3 testified that there was whitish discharge on the vagina. It was his testimony that on microscopy, sperms were noted. The pregnancy and HIV tests were negative.

21. PW3 produced a P3 form dated 1/1/2019 and an outpatient record dated 1/1/2019 as exhibits 1 and 2 respectively.

22. Jamila Ismail Dawit (PW4) testified that on 31/12/2018 she received a call that PW1 had been defiled. PW4 told the trial court that together with one Garat Adan they picked PW1 and took her to a hospital in Lagbogol.

23. First, they reported the matter to the police. PW4 testified that they also took the appellant's shirt, kikoi, watch, torch and a pair of shoes to the police. It was her testimony that at Lagbogol they were referred to Wajir County Referral Hospital. At the facility they were referred to Griftu Sub-County Hospital where PW1 was examined.

24. PW4 testified that PW1 told them that the appellant had defiled her. It was her testimony that they started looking for him the same day. She testified that the appellant was arrested by members of the public in February, 2019.

25. No. 104478 PC Cornelius Kemboi Koech of Hadado Police Station (PW5) testified that on 2/1/2019 he was allocated this case to investigate. PW5 told the trial court that the exhibits that were collected at the scene of crime were handed over to him.

26. It was his testimony that the appellant was arrested on 18/2/2019 at Boji area by members of the public. He was taken to Lagbogol Police Station where PW1 identified him. He was charged with this offence.

27. PW5 produced the items that were recovered at the scene of crime. They were a pair of sandals (exhibit 1), a yellow kikoi (exhibit 4), a brown kikoi (exhibit 5), a torch (exhibit 6), a shirt (exhibit 7) and a wrist watch (exhibit 8).

28. In cross examination PW5 testified that he had no issues with the appellant.

DEFENCE CASE

29. The appellant was found with a case to answer and placed on his defence. He elected to give unsworn statement. He told the court that he had a land dispute with the prosecution witnesses. That was 5 years ago.

30. It was his defence that they framed him with another defilement case but he was acquitted. The appellant denied committing this offence. It was his defence that he was being framed because of the land dispute.

31. The parties were directed to canvass appeal via submissions.

APPELLANT'S SUBMISSIONS

32. The appellant submitted that he is being guided by the Court of Appeal decision in the case of **Ramadan Ahmed vs Republic [1955] Vol. 22 at pg 395** where it was held that:

> **"On a first appeal in a criminal matter, the onus is upon the appellant to show that the findings of the court of the first instance was unreasonable and couldn't be supported having regard to the evidence."**

33. The appellant submitted that applying the above principles to the present case and going back to the subject issue that the entire case for the prosecution cannot be said to have been proved beyond reasonable doubt as required in law as held by the trial magistrate.

34. It is his irresistible contention that his conviction was bad in law and manifestly unsafe as indeed the provisions of section 214(1) of the CPC ought to have been applied soon after the testimony of PW1 (LULU BILLOW AHMED). Indeed, he says so because the charge sheet indicates one LUL BILLOW MOHAMED to who the State served summons to as the complainant of the case. See Coram in the charge sheet indicated:

> "Complainant – STATE through LUL BILLOW MOHAMED C/O KIRICHA LOC' and address."

35. The appellant submitted that for clarity purposes section 214(1) of the CPC clearly states:

> **"214(1). Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or additional of a new charge, as the court thinks necessary to meet the circumstances of the case."**

36. On identification of the defiler, the appellant submitted that, PW1 said, ***"I did not know the person who defiled me before the day of the incident. I marked his face."***

37. The appellant submitted that the evidence on record indicates that upon *voire dire* examination on LULU BILLOW AHMED (who is not the person charged or indicated in the particulars of the charge sheet as having been defiled) testified that on 31/12/2018 at around 1pm a certain man came to where she was grazing goats at a place called [particulars withheld].

38. That the above testimony indicates that whoever defiled PW1 (if any) was a stranger to her and she only marked his face. She never gave the description of the person to the police upon report and in any case the mater before court was in respect of defiling one LUL BILLOW MOHAMED.

RESPONDENT'S SUBMISSIONS

39. The respondent submitted that the conviction was for defilement of 13 years victim. Sentenced to 20 years imprisonment. PW3 confirmed the age. On penetration was by complainant. How the event unfolded leading to defilement. He had sex by force. Clinical officer – age line 9 – 10. No. 3 – 10 findings of penetration. Line 5 bruises of vaginal wall. There was penetration.

40. On identification complainant did not know appellant before the incident. But pg. 5 line 26 remembered appellant's face. She gave descriptions. When appellant was arrested there was dock identification.

41. PW2 brother to complainant – who give description. There was no identification parade. Page 6 line 22.

ISSUES, ANALYSIS AND DETERMINATION

42. After going through the evidence on record and the submissions tendered, I find the issues are; **whether there was fair trial, whether there was prove of case beyond reasonable doubt and whether the identification evidence was safe to warrant conviction?**

43. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

44. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the written submissions.

45. On the first issue the court has gone through the record and submissions by the appellant and observed/found that the appellant does not point out any specific breach of provisions of the constitution on fair trial. Instead he complains that the charge sheet talked of the victim being Mohamed rather than Ahmed in her testimony.

46. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them.

47. (a) **On the age of the complainant:**

The age of the complainant was not contested in this appeal. The prosecution produced the complainant's Age Assessment Report as proof of age which indicated that the complainant was 13 years old at the time of the commission of the alleged offence.

48. (b) **On the issue of penetration:**

Section 2 of the Sexual Offences Act defines penetration as:

> **"The partial or complete insertion of the genital organs of a person into the genital organ of another person."**

49. This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

> **'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….'** *(emphasis added).*

50. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."**

51. PW1 appeared before the trial court and court observed that, she appeared to be a minor. This is the reason the trial court conducted *voire dire* examination. In her testimony PW1 told the trial court that she was aged 13 years. This was corroborated by PW2 who is her brother.

52. The P3 form and the outpatient record (exhibit 1 and 2) indicated that PW1 was 13 years old when she was examined. To trial court, PW1 apparent was 13 years.

53. From the foregoing the trial court had no doubt as to PW1's age. I find the same was proved beyond any reasonable doubt.

54. The court now turns to the issue of penetration. PW1 testified that after the appellant removed her innerwear he told her to part her legs. The attacker then inserted his penis into her vagina 3 times. PW3 examined PW1 and found that she had a tear on the anterior aspect of the vagina which was inferior to the clitoris.

55. He also noted a tear on the lower part of the vagina. PW3 testified that there were bruises on the vaginal wall. PW3 formed the opinion that there was penetrative sex. PW3 told the trial court that there was whitish discharge on the vagina. It was his testimony that t microscopy sperms were noted. He concluded that there was penetrative sex.

56. The appellant did not tender any evidence to the contrary. The tears and bruises on the vagina, the vaginal discharge and presence of spermatozoa proved beyond a reasonable doubt that there was penetration.

57. From the testimony of PW1, the appellant first went to where she was grazing goats and greeted them. He then left. After a short while he went back and asked them for water.

58. He then commanded them to sit down. PW1 testified that as they attempted to escape the appellant grabbed her and pushed her to the ground. He then proceeded to defile her.

59. It was her evidence that the appellant removed her innerwear and pushed her dress up. The appellant then raised his kikoi and proceeded to insert his penis into her vagina 3 times. None of the prosecution's witnesses saw the appellant defile PW1.

60. The trial court found that, the provision of section 124 Evidence Act, allows the court while handling sexual offences to convict on uncorroborated evidence of a minor victim if the court is satisfied that the minor is telling the truth. The court is mandated to record the reasons for believing the minor is telling the truth.

61. The offence was committed during the day. Therefore, PW1 could not have missed the person who defiled her. It was her testimony that after the incident she went home and informed her relatives.

62. She then took them to the scene. This was corroborated by PW2 who visited the scene. It is on record that when the appellant was arrested it is PW1 who identified him. The trial court did not have a reason to doubt this.

63. On evidence on identification on which this case turns, Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence. It is an established principle that there is a special need for caution before accepting identification evidence.

64. In **Charles O. Maitanyi vs Repu{1988-92} 2 KAR 75** , it was held inter alia that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.

65. In **Kariuki Njiru & 7 others vs Republic, Criminal Appeal no. 6 of 2001 (Unreported)** the court held inter alia that the **"law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."**

66. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness.

67. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

68. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony.

69. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

70. I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution.

71. In our instant case the court relied on dock identification. In **Gabriel Kamau Njoroge vs Republic (1982-1988) 1KAR 1134,** the Court of Appeal observed:-

> **"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."**

72. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade.

73. In our case, the 13-year-old victim stated, on identification of the defiler, PW1 said, ***"I did not know the person who defiled me before the day of the incident. I marked his face."***

74. No other descriptions were given nor was there any parade organized to identify the attacker. The victim was shown appellant in court and said she identified him because of beared. Nothing unique on his beard was stated.

75. In this regard and considering there was no watertight evidence by the prosecution on identification, there was doubt that the appellant was positively identified as the perpetrator of offence charged. Thus court finds the conviction to be unsafe and makes the following orders;

> **i. The appeal is allowed, conviction is quashed and sentence set aside and appellant is set at liberty unless otherwise lawfully held.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JULY, 2020.

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C. KARIUKI

JUDGE