



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 52 OF 2018

MOHAMED BILLOW ISSACK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Manderu Magistrate's Criminal Case No. 264 of 2018 by Hon. P. N. Areri (SRM))

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Manderu with defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that during the month of November 2017 at unknown date at 2 pm in Manderu North Sub-County within Manderu County intentionally caused his penis to penetrate the vagina of HIA (name withheld) a child aged 16 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that during the same time and place, unlawfully touched the buttocks, breast and vagina of HIA (name withheld) a child aged 16 years with his penis.

3. He denied both charges. After a full trial, the appellant was convicted of the main count of defilement and sentenced to 15 years imprisonment.

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial appeal in September 2018 in person. In November 2018, Mr. Paul Mugwe Nyagah advocate filed another petition of appeal for the appellant on six grounds as follows-

(1) The trial court erred in law and in facts by failing to find that the charge sheet was defective on account of the evidence being at variance with the charge.

(2) The trial court erred in law and facts by failing to warn itself of the danger of convicting the appellant on the evidence of PW1 who was said to be in a relationship with another man who could have been the perpetrator.

(3) The trial court erred in shifting the burden of proof by placing the duty to name the man who was in a relationship with the complainant and thus the perpetrator on the appellant.

(4) The trial court erred in law and in facts by failing to warn itself of the danger of relying on the evidence of close relatives of the complainant before convicting the appellant.

(5) The trial court erred in law and in facts by failing to find that the prosecution did not call crucial witnesses, to wit, the medical practitioner who conducted the abortion.

(6) The trial court erred in law by failing to critically analyze and consider the defence of the appellant and in so doing to find that it was plausible and it had impeached the prosecution case.

(7) In the alternative the trial court erred by failing to find that the appellant was entitled to the benefit from the defence provided under section 8(5) (A) and (B) of the Sexual Offences Act.

5. At the hearing of the appeal Mr. Nyagah learned counsel for the appellant said that the charge sheet stated that the complainant was 15 years old but the birth certificate stated that she was born in June 2001 which meant she was 17 years and some months old.

6. Secondly counsel argued, the magistrate erred in his conclusion, since PW1 was in a relationship with another man and therefore the

evidence of the complainant should not have been relied upon since the appellant gave sworn defence that the father of the complainant gave her in marriage to another man. Counsel stated that the complaint was brought against the appellant because relatives of the complainant were not happy with the shame that the complainant had brought to the family, for the alleged pregnancy of the complainant.

7. Counsel further contended that the prosecution failed to bring to court the crucial witnesses who performed the abortion on the complainant.

8. Counsel finally submitted that the appellant explained in detail in his sworn defence about what happened. Lastly, counsel submitted that the defence provided under section 8(5) (a) and (b) of the Sexual Offences Act was available to the appellant in the circumstances of this case, as the complainant was just 7 months below 18 years of age.

9. In response, the learned Prosecuting Counsel Mr. Okemwa asked this court to make its independent evaluation of the evidence but felt that the character of the complainant raised the defence available to the appellant under section 8(5) of the Sexual Offences Act.

10. This being a first appeal, I am duty bound to evaluate afresh all the evidence on record and come to my own conclusions and inferences. In doing so, I am required to bear in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanor and give due allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32**.

11. I have re-evaluated the evidence on record. Counsel for the appellant has raised several points on appeal.

12. He stated that the prosecution witnesses should not be believed. These prosecution witnesses are; PW1 the complainant, PW2 APC Zeinab Abdullahi Ibrahim, and PW3 IAI the father of the complainant.

13. Having perused the evidence of all these three witnesses, I find nothing particularly contradictory in their evidence. They were cross examined and my finding is that they were saying what they could remember about the incident. It was not challenged that the complainant disappeared from home for a number of days and had to be sought for and she herself said that she had gone to abort. I dismiss the complaint about contradictions in the evidence of these witnesses.

14. With regard to failure to call crucial witnesses, Mariam Salim Mbithi PW4 the Clinical Officer confirmed in her evidence that, the complainant had aborted a pregnancy three days earlier. Therefore, in my view it cannot be said as contended by the appellant's counsel that crucial witnesses on the abortion were not called to testify. In my view, the evidence of the Clinical Officer was adequate to establish the abortion without the prosecution calling the doctor who procured the abortion. I also dismiss that complaint.

15. The appellant's counsel has also submitted strongly about the magistrate shifting the burden of proof on the appellant by saying that the appellant did not name the person whom he alleged had married the complainant. In my view, that complaint of counsel had no basis of support. The appellant was in court at the trial when the prosecution witnesses testified. He had the opportunity to cross examine the prosecution witnesses. He did not ask any question about another person having been given the complainant in marriage. He made no suggestion of the sort. In fact he elected not to cross examine the father of the complainant PW3 IAI. I thus agree with the learned magistrate that the defence on the alleged prior marriage of the complainant was an afterthought and just meant to divert the attention of the court from the real issues.

16. The appellant himself said that he had a relationship with the complainant in 2017. The complainant merely gave more details on the said relationship. In my view therefore, it was established by the prosecution beyond any reasonable doubt that the appellant had sexual intercourse with the complainant.

17. The important issue however relates to the conduct of the complainant at her age, that is, between 16 and 18 years. She personally gave evidence that she went to the house where the appellant lived, during the afternoon. They conversed and even talked about marriage and she willingly consented to sexual intercourse and then left. There was no indication from her that she was misled by the appellant or by the sister of the appellant who escorted her to that house. There being no requirement that a person who wants to engage in sexual intercourse with another has to ask for a birth certificate or other evidence of adulthood, the conduct of the complainant herein made the appellant believe that the complainant was an adult.

18. From the facts and circumstances of this case, I am of the view that the defence provided under section 8(5) of the Sexual Offences Act was available to the appellant as he was misled by the complainant to believing that the complainant was an adult by the conduct of the complainant herself. There is no indication whatsoever that the appellant knew or ought to have known that the complainant was below 18 years of age. The fact that the complainant was in Std. 4 in Primary School by itself does not mean that she must have been below 18 as different people go to school at different ages.

19. On account of the provisions of Section 8(5) of the Sexual Offences Act 2006, which provides a complete defence, I find that the learned magistrate erred in not acquitting the appellant. I thus allow the appeal, quash the conviction and set aside the sentence of the trial magistrate. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Garissa this 20th day of February 2019.

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George Dulu

JUDGE