REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 48 OF 2015

ADEN IBRAHIM AHMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Aden Ibrahim Ahmed was charged before a Chief Magistrate's court in Garissa with defilement contrary to section 8 (1) as read with section 8 (3) of The Sexual offences Act number. 3 of 2006.

The particulars of the offence were that on 5th May 2014, at Bulla province in Garissa township within Garissa county intentionally and unlawfully caused his penis to penetrate the vagina ZA. a girl aged 14 years.

In the alternative he was charged with indecent act with a child contrary to section 11 (1) of the Sexual offences Act. The particulars of the offence were that on the same day and place, unlawfully and intentionally committed indecent act by rubbing the vagina of ZA a child aged 14 years old with his penis.

He denied both charges. After a full trial he was convicted on the main count of defilement and sentenced to serve 20 years imprisonment.

He has now come to this court on appeal. He filed his appeal on 8th June, 2015. Before the appeal was heard however, and with the permission of this court, he filed amended grounds of appeal, and written submissions. His grounds of appeal were as follows;

1. The learned trial magistrate erred in law and fact to convict him without considering that the charge sheet was fatally defective.

2. The trial magistrate erred in convicting him without considering that a voire dire examination was not conducted in accordance with the law.

3. The trial magistrate erred in convicting him without tangible evidence, to support complainant's allegations against him.

4. The trial magistrate erred in convicting him without considering that prosecution evidence was contradict nary and full of inconsistencies.

5. The trial magistrate erred in convicting him without putting into consideration that the prosecution failed to tender enough evidence hence their case remained unproved and unquestionable.

6. The trial magistrate erred in law and fact in shifting the burden of proof to the accused person.

7. Medical evidence did not support complainant's allegations thus failed to establish the culprit of the alleged defilement.

On the hearing date of the appeal the appellant relied on his written submissions, which I have perused and considered.

Mr. Okemwa the learned Principal prosecuting counsel submitted that penetration was proved though the P3 form does not confirm such penetration, it was evident from the evidence therein that the hymen was broken, and complainant was pregnant. Counsel submitted that the case authorities on D.N.A. test was not conclusive regarding such cases, because D.N.A test could be done on the child after delivery.

According to counsel, though at the time of trial, the child had been delivered D.N.A test was not conducted.

With regard to identity of the perpetrator, counsel submitted that the complainant, lived with the appellant who was an employee of the aunt of the complainant. The appellant in his defence said that the complainant nearly implicated him as she also lived in Nairobi.

This is a 1st appeal. As a first appellate court, I am required to evaluate all the evidence on record afresh, and come to my own conclusion and inferences. In doing so, I have 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.

I have evaluated the evidence on record, the prosecution called four witnesses. It is clear from the evidence of both PW1 (complainant) and the appellant that they had lived in the house of an Aunty of the complainant in Garissa. The complainant, stated in her evidence that the appellant defiled her on a specific date which was 5th May, 2014 and thereafter on a number of occasions and that she got pregnant.

It is evident, from the entries in the Pw3 form as well as the evidence of Moses Koech Kibet a clinical officer at Garissa Provincial General hospital, that by 28th September, 2014 the complainant was 15 weeks pregnant.

The appellant in his defence, gave sworn testimony. He denied committing the offence and said that the complainant, lived partly in Nairobi and that she was making a story against him.

On the totality of the evidence, the trial court found that the prosecution had proved its case, beyond reasonable doubt, convicted and sentenced the appellant.

The appellant has stated on appeal that the charge sheet was defective. I have perused the same, and in my view the charge sheet is not defective. The fact that evidence is not tendered, to support a charge does not necessarily mean that the charge sheet is defective. The charge sheet is merely meant to be a statement of the alleged offence and Section of the law and providing for such offence and providing such particulars as will make an accused person understand the allegations against him or her.

I find no defects on the face or contents of the charge sheet.

In a Criminal case the burden is always on the prosecution to prove every element of the charge sheet against the accused beyond any reasonable doubt. The accused does not have the burden to prove his innocence.

The offence on which the appellant was convicted was defilement. The appellant and the complainant were said to be living in the house of an aunt to the complainant. This aunt did not come to court to testify.

The pregnancy was allegedly discovered in Nairobi, where the complainant was with the mother at [particulars withheld]. The mother of the complainant also did not come to court to testify. That in my view was an omission on the part of the prosecution. Indeed it is true that under Section 124 of The Evidence Act, a single victim witness of a sexual offence can if his or her evidence is believed by the court, sustain a conviction.

In the circumstances of this case, in my view it would have been preferable either to call the mother of the complainant, or the aunty of the complainant to testify in support of the evidence of the complainant.

Short of that, the defence of the appellant that this might have been a frame up, cannot be ignored.

As the Principal Prosecuting Counsel has said, while the case proceeded the child was born. However, no effort was done by the prosecution to carry out D.N.A test to find a connection between that child and the appellant.

That was also an omission on the part of the prosecution.

The learned magistrate also in the Judgment appears to have shifted the burden of proof to the accused which was a mistake. In particular the trial court stated as follows:

> *" The accused did not deny in his defence that she knew him. In cross-examination of his defence, he admitted that she lived with the complainant and Pw3 and were not mistaken about his identity. The accused in defence did not raise any denial or penetration of his penis in complainants vagina. In cross-examination of his defence he admitted that he did not raise a denial against a defence of complainant that accused defiled her on 5th May 2014 and thereafter whenever her aunty was away in Nairobi, until September, 2014 when her mother found out that she was pregnant. ……From the accused defence it is clear that he does not discredit or challenge the evidence of complainant, that the accused is the person who penetrated her and defiled her."*

In my view the above was a clear shift of the burden of proof to the appellant which was a mistake of the magistrate. An accused person is constitutionally allowed to keep quiet. That is his or her right. The magistrate should have considered whether or not the prosecution tendered credible evidence to proof their charge, rather than whether or not the appellant denied everything.

In my view, from the evidence on record, the prosecution did not proof beyond any reasonable doubt that the appellant defiled the complainant.

It was clear however, that the complainant, was defiled and made pregnant. What the prosecution did not proof was whether the defiler was the appellant. Therefore, the culprit of the offence was not established by the prosecution beyond reasonable doubt.

On that account, the appeal will succeed.

I thus allow the appeal, squash the conviction and set aside the sentence.

I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Garissa this 20th day of March, 2018

GEORGE DULU

JUDGE.