REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 56 OF 2018

BISHAR HUSSEIN AHMED.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

JUDGEMENT

1. The Appellant was charged with defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3. Particulars of offence were that on the 14th day of September, 2015 at about 1.00pm in Lagdera Sub-County within Garissa County, intentionally caused his penis to penetrate the Anus of IK a child aged 7 years in violation of Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.

2. Alternative charge was committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. Particulars of offence were that on the 14th day of September, 2015 at about 1.00 pm in Lagdera Sub-county within Garissa County intentionally touched the anus of IK a child aged 7 years with his penis in violation of Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

3. He pleaded not guilty and matter went into full trial.

4. He was found guilty and was convicted and sentenced to life imprisonment.

5. He was aggrieved by the decision aforesaid and thus lodged instant appeal with 10 grounds of appeal vide his petition of appeal namely;

1) That the learned trial magistrate erred in law and fact by finding his conviction and sentence by relying on circumstantial evidence which was never proved beyond reasonable doubt.

2) That the learned trial magistrate erred in law and fact by convicting the appellant on a charge sheet that was fatally defective.

3) That the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the prosecution's case was not proved to the standard required of law.

4) That the learned trial magistrate erred in law and fact by failing to consider appellant's defence.

5) That the learned trial magistrate erred in law and fact by misinterpreting the provisions of Section 200 Criminal Procedure Code.

6) The trial court erred in law and fact by relying on a doctor's evidence, who did not produce treatment notes but only produced a P3 form that was filled perfunctorily.

7) That the learned trial magistrate erred in law and fact by convicting the appellant on evidence that was inconsistent and untrustworthy.

8) That the learned trial magistrate erred law and fact by convicting the appellant where the evidence of crucial witnesses who were alleged eye witnesses were not called to testify.

9) That the learned trial magistrate erred in law and fact by convicting the appellant despite the age of the complainant not been conclusively proved. The trial magistrates misdirected himself on the requirement to prove the age of the minor.

10) **That the learned trial magistrate erred in law and fact by convicting the appellant without bearing in mind that the P3 findings did not link the appellant with the alleged offence.**

6. The matter was directed to be canvassed via submissions. The appellant filed same but State conceded.

Appellant's Submissions:

7. The appellant submitted that, the testimonies of the witnesses were shaky, contradictory and totally unreliable as will be demonstrated herein below;

8. It is contended that, PW1 who was the complainant gave testimony that the appellant ordered him to spread out a mattress inside the kitchen. And whilst he was doing so, the appellant lied on top of him. He gave him 10/= coin. The first person to meet him with the complainant was the sister. The ten shillings was never produced in court neither was the sister called to testify. The witness did not talk about threats to his life. His testimony contradicts that of the PW4 the mother who in her testimony page 29 of the proceedings testified that the appellant asked the complaint to make him a resting place just outside the house.

9. It is argued that, PW4; in her testimony did mention that one of her daughter was the first to meet the complainant. It defies logic how the said sister could disappear leaving a young brother who had been defiled unattended. The mother PW4 did not also report whether she saw the daughter or not. The witness also testified that she checked the anus of the complainant. She did not testify what she found out. If there was a tear, this could have been visible, how could the doctor see a tear afterwards yet the same was not visible when the mother checked PW1? Is there something missing? Yes and the same can only be resolved to the advantage of the Appellant which was not done. The PW4 testified that she met with the appellant escaping within the plot, the complainant's sister must have been within the compound since she is the one who met the complainant first, yet the PW4 does not testify anywhere having met her. Who is talking the truth?

10. It is argued that, the only evidence about defilement was the testimony of PW1, this was sole evidence, of a child, of tender years. Whereas in sexual offences, corroboration is not mandatory for conviction. This is one case where corroboration was necessary since there was no eye witness. The court did not also warn itself before convicting the Appellant.

11. The PW6 clinical officer did not submit treatment notes. As was pointed out in ***Hussein Mohammed Bathi vs Republic (2018) eKLR:***

> ***"The P3 form appears to have contained information from treatment notes whose maker was not called to testify. Nor basis was made before the trial court to produce the same, under the exceptions to hearsay evidence in the Evidence Act (Cap 80). In my view, where the incriminating evidence is from medical treatment notes, the maker of those notes is a primary and crucial witness who should be called to court to testify, failure to which proof of the alleged fact will not have been established by the prosecution"***

12. It is submitted that there was no evidence that there was defilement. The doctor opined that the tear could have been caused by defilement. But the doctor did not rule out the tear having been caused by other factors like hemorrhoids. There was no evidence that the child was ever defiled and then there was no linkage of the appellant and the defilement if at all there was any. There was no blood seen by the mother nor semen deposited in the anus. It is unfathomable for a minor of 7 years to be defiled by penetration by an adult and there is no blood, no tear seen by the mother. It is only the doctor who saw the tear but could not exclusively give a verdict it was caused by penetration.

13. It is further argued that, the age of the complainant was not proved at all. The court did not have any evidence on the age of the minor. PW1 stated he was 10 years old, the doctor testified he was 7 years. No single document was produced as to the evidence of the minor the importance of age on Sexual Offence Act. ***Hilary Nyongesa vs Republic (2010) eKLR*** where **Mwilu J.** (as then was) stated as follows;

> **"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved… and this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."**

14. The prosecution having failed to prove the age of the minor, the decision should not be allowed to stand.

15. It is contended that the court erred by failing to consider the testimony of the Appellant person whose testimony was not challenged. The Appellant gave sworn evidence but the prosecution never challenged his testimony. Thus submission that the court erred by not giving the evidence consideration and or with weight it deserved.

16. It is submitted that, the court didn't comply with mandatory provisions of Section 200 of the Criminal Procedure Code. The fact that the case had reached prima facie stage and the court ruled that he Appellant had a case to answer does not in any way prohibit the court from starting the case de-novo. The Appellant had not been supplied with typed copy of the proceedings neither was given that chance. The Appellant (and the court) had to presume the unseen proceedings as correct though not seen. This greatly prejudiced the Appellant right to a fair hearing.

The Duty of the First Appellate Court:

17. The role of this Court as the first appellate Court is well settled. It was held in the case of ***Okeno vs Republic (1977) EALR 32*** and further in the Court of Appeal case of ***Mark Oiruri Mose vs Republic (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.

18. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences were proved.

Evidence Adduced:

19. Complainant testified that on the 14/9/2018 at about 1 pm, he was at Shanta-abaq with A and F. His mother had gone to the market to sell vegetables. The Appellant person was in their kitchen. The Appellant person asked the complainant to spread out a mattress for him in the kitchen.

20. The complainant did so. The Appellant person then asked him to lie down on his stomach. The Appellant person then lay on top of him. The complainant stated that he cried because of the Appellant person's weight and pain in his anus. The Appellant person had inserted his penis in his anus.

21. The complainant testified that the Appellant person had removed his truck suit. He had also removed his "*kikoi*" and underpants. After defiling him, the Appellant person gave him Kshs.10 to buy his silence. His sister came and found him crying. The complainant told her what had happened.

22. The complainant pointed out to his sister where the Appellant person had inserted his penis. His sister informed their mother. The complainant's mother escorted him to the police station and later to a hospital at Shanta-abaq. The Appellant was later arrested. The complainant testified that he had never seen the Appellant person before.

23. PW2, No. 2012039888. APC Anthony Kibicho Munyiri attached to Shanta-abaq Administration Police Post testified that, on the 14/9/2015, at about 1.30 pm, he was on duty with APC Kitur when a lady by the name NM arrived with her son IK together with members of the public and reported that her son had been defiled by one Bishar Hussein, the Appellant person herein. After a few minutes Bishar Hussein arrived. APC Munyiri testified that they arrested the Appellant person and referred the complainant to hospital.

24. PW3, No. 2013069924, APC Kutur Benard attached to Shanta-abaq Administration Police Post, testified that on the 14/9/2015 at about 1.30 pm, he was on duty when a lady called N went and reported that her son had been defiled by one Bishar Hussein, the Appellant person herein. She was accompanied by the complainant and members of the public.

25. APC Kitur testified that they booked the report and interrogated the complainant who informed them that the Appellant person had given him Kshs.10/= after defiling him. The Appellant person later arrived on a motorcycle. They handed the Appellant over to Modogashe police station.

26. PW4, NM recalled that on 14/9/2015, at about 1.00 pm, she left her place of work at about noon to go and cook. At the entrance of her plot, she met the Appellant person leaving. The Appellant person appeared to be frightened. She proceeded to her house and found her child crying. She asked him why he was crying but the child was not able to talk at that time.

27. Later her son told her that the Appellant person had asked him to prepare a resting place for him outside the house. The Appellant told her son that he was his uncle.

28. At first her son refused but when the Appellant person threatened to kill him, he agreed to do so. When her son took the mattress outside and bent over, the Appellant person jumped on him and inserted his penis in his anus. N testified that she checked the child's anus.

29. Together with a neighbor, they took him to the AP post where they were referred to a hospital at Shanta-abaq. They were referred to Modogashe sub-county hospital. The child was treated and a P3 form issued. N testified that the child was in class 1.

30. PW5, No. 69863 Sgt Richard Kipteben attached to Modagashe police station recalled that on 15/9/2015, he was summoned by the OCS, Mr Wachira informed him that there was a suspect who had been arrested by the Administration Police at Shanta-abaq.

31. He asked Sgt Kipteben to go and pick up the suspect and investigate the case. The suspect alleged to have defiled a child. The suspect had surrendered himself to the police in fear of being beaten up by the public. Sgt Kiptaben testified that he saw the child who was with his mother.

32. The mother of the child informed Sgt Kiptaben that she had taken the child to Shanta-abaq dispensary for treatment. Sgt Kipteben took the Appellant person, N and the complainant to Modogashe. He took the complainant to Modogashe hospital. He interrogated the complainant and his mother.

33. He stated that the mother of the complainant told him that the child was seven years but had no documents to prove so. He later had the Appellant charged with the present offences.

34. PW6, Abdallah Mumir Haji, a Clinical Officer previously attached to Modogashe Sub-county hospital, testified that on the 15/9/2015, he was on duty at the hospital. At about 3.00 pm a male child aged about 7 years brought to the hospital by police officers and his parents on allegations of defilement

35. On examination, the child was in good health. He had no injuries on the genitalia. However, he had an anal tear. The child was not bleeding. However, his opinion was that the injury could have been caused by forced penetration. He assessed the degree of injury as harm.

36. In his defence, the Appellant testified that the allegations against him were false. He attributed his arraignment in court to a dispute between himself and N, the mother of the complainant, over a plot that he had inherited from is parents.

ISSUES:

37. After going through evidence tendered, I find the issues are; ***whether the charge was defective? Whether the provisions of 200 CPC were complied with? Whether prosecution proved its case beyond reasonable doubt? and; Whether appellant defence was considered by the trial court?***

Analysis and Determination:

38. The ground on whether the charge was defective, the same was not argued thus court takes same to be abandoned .In any event the court has looked at the contents of the charge and finds that the same complies with the statute. In any event same issue was not raised during the trial.

39. On failure to comply with Sect 200 CPC, same will be dealt as herebelow. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences were proved. It is on that footing that I perused the record and came across an issue which has been raised on compliance with section 200 CPC. It is so fundamental in the justice system as it forms part of a fair trial. The issue is how the matter was handled by the succeeding Honourable magistrate.

40. Section 200 of the Criminal Procedure Code deals with instances where a criminal trial is handled by more than one magistrate. For ease of reference the said provision states as follows: -

> **"(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –**
>
> **(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or**
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> **(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummons the witnesses and recommence the trial.**
>
> **(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercise that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.**
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> **(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.**
>
> **(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."**

41. On the importance of compliance with the said procedural requirement, my brother **Makau J**. In the case of ***Office of Director of Public Prosecutions vs Peter Onyango Odongo & 2 others*** *High Court at Siaya Constitutional and* ***Judicial Review Division Petition No. 2 of 2015 (2015) eKLR*** rightly so expressed himself while considering whether Section 200 (3) of the Criminal Procedure Code was unconstitutional. The learned Judge delivered himself thus: -

> ***"16. Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.***
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> ***17. It should be noted Section 200 (3) of C. P. C. gives an accused person an opportunity to demand to have any witnesses recalled. Tis Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross – examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross – examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.***
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> ***18. Section 200 (3) of C. P. C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010.***
>
> ***19. ……***
>
> ***20. In the case of Republic vs Wellington Lusiri [2014] e KLR the Court emphasized the need for succeeding Magistrate to***

continue with the proceedings under Section 200 by informing the accused of his rights.

21. In my view Section 200 (3) of the Criminal Procedure Code protects the rights of the accused to a fair trial as guaranteed by the constitution under Article 50. (2) of the constitution which state every accused person has the right to a fair trial, which includes other rights as set out thereunder. Section 200 (3) of CPC as couched or framed do not have any provision to protect the rights of the complainant. It is silent on the rights of the complainant.

22. The question therefore is do the silence on the rights of the complainant under Section 200 (3) CPC mean the complainant's rights are not protected? The succeeding Magistrate before determining the accused demand for retrial or recalling or re-summoning of any of the witnesses, in my view, as Section 200 (3) is not mandatory for the accused demand to be granted or to be allowed, the succeeding Magistrate is not supposed to deal with Section 200 (3) of CPC in an isolation of several articles of the constitution dealing with the Bill of rights as section 200 (3) of CPC is not exhaustive in itself. The succeeding Magistrate is supposed to be guided by Article 27 (1) of the constitution, which states every person is equal before the law and has rights to equal protection and equal benefit of the law. This means the protection to fair trial is automatically granted to both the complainant and the accused. This means as I understand the said article, before final order is made on the accused demand in terms of Section 200 (3) CPC the complainant should be afforded an opportunity to be heard on the application. A blatant granting of the application without hearing the complainant would in my view not only be against the rules of natural justice but would amount to a violation of the letter and the spirit of our constitution and would not be in the best interest of achieving a fair trial, If the complaint is completely overlooked on the issue.

23. In considering Section 200 (3) CPC as regards the information given to the accused, the same information should be extended to the complainant in equal measure, Article 159 (2) (a) (b) and (d) of the constitution deals with justice to all irrespective of status, justice not being delayed and being administered without undue regard to procedural technicalities. That the accused and the complainant should get justice without delay and should be administered without undue regard to procedural technicalities. That the accused and the complainant are entitled to justice without procedural technicalities and discrimination.

24. The court in determining an application under Section 200 (3) of CPC should comply with Article 28 of the constitution which provides every person has inherent dignity and the right to have that dignity respected and protected. Further under Article 47 (1) of The Constitution every person has the right to administrative actions that is expeditious, efficient, lawful, reasonable, and procedurally fair. Article 53 (d) of the constitution states every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and Article 53 (2) provides a child's best interest are of paramount importance in every matter concerning the child."

42. The learned Judge further rightly concluded that, ***'…Section 200 (3) of the Criminal Procedure Code was constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the Constitution of Kenya, 2010……'.***

43. In our instant case, the record shows on page 33 that the appellant's right were explained under section 200 CPC on 9/10/2017. He wished the case in which it had reached defence to start afresh. He did not state the reason for that. The trial court in its ruling considered the facts that the case was old, procuring witnesses would be a challenge and that the victim was 7 years and to bring him to court again may not be fair thus court rejected the application by appellant to start the case afresh.

44. The duty of the succeeding magistrate in partheard matter is only to inform the accused the right under section 200 CPC but the court is not bound to accede to the request by the accused. The court is to consider all the circumstances as it was done in the instant case. Thus the court rules that section 200 CPC was complied with and thus the ground fails.

45. On whether the prosecution proved its case as required by the law, the court has to re-evaluate evidence tendered and the ingredients of the offence to see whether the threshold of prove was achieved.

46. The crucial ingredients forming the offence of defilement are:-

i. The age of the complainant.

ii. Proof of penetration; and

iii. Positive identification of the assailant.

47. **8(1) A person who commits an act that causes penetration with a child is guilty of an offence termed defilement.**

48. **8(3)** In ***Dominic Kibet Mwarengu vs Republic [2013] eKLR*** **Ndolo J** stated that;

"The critical ingredients forming the offence of defilement are the age of the complainant; proof of penetration and positive identification of the assailant."

49. Whether the complainant is a child: Section 2 of the Children's Act defines a child as any human being under the age of 18 years. In this case, the complainant himself testified he was 10 years. His mother testified that the complainant was in Std 1.

50. The Clinical Officer observed that the complainant was about 7 years and indicated so in the P3 form. The Investigating Officer testified that the mother of child told him that he was 7 years old. I also perused the proceedings and observed that, after conducting a *voire dire*

examination, the trial court came to the conclusion that the complainant could not understand the nature of the oath.

51. However, no birth certificate or any other formal document was produced to show the exact age of the child. Having out lined the evidence on the issue as above, it is to be to noted that, courts in the country have been very strict with the requirement that the child's age be conclusively proved before any conviction can be made under the Sexual Offences Act. The courts are strict with this requirement because the penalty is dependent on the age of the victim.

52. However, emerging jurisprudence tends toward a liberal approach to this issue. **Ngugi J**. In ***Fappyton Mutuku Ngui vs Republic [2012] eKLR*** rendered himself thus;

> **"I would be prepared to clarify that "conclusive" proof of age in cases under the Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or production of a birth certificate. Such documents might be necessary in borderline cases, but other modes are available and can be used in other cases."**

53. In the case of ***Francis Omuron vs Uganda Criminal Appeal No. 2 of 2000*** the court held that:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents, or guardian and by observation and common sense."***

54. In the present case, the evidence of all witnesses would seem to imply that the complainant couldn't have been more than 10 years. The trial court had no doubt in its mind that, it is because of tenderness of age of the complainant that the magistrate found that the complainant could not understand the nature of the oath. Therefore, from the evidence available, it held that the complainant was less than 11 years. Therefore court holds age of child was proved as that of a minor under 11 years.

55. Whether there was penetration; Section 2 (1) of the Sexual Offences Act define "*penetration*" as the partial or complete insertion of the genital organs of a person into the genital organs of another person. In his evidence, the complainant testified that the Appellant person inserted his penis in his anus.

56. His testimony was corroborated by PW6, the Clinical Officer, who observed that the complainant had a tear in the anus. His conclusion was that the tear was caused by forced penetration therefore trial court was justified in holding that there was penetration.

57. Whether the penetration was by the Appellant person; in his testimony, the complainant named the Appellant person as the person who defiled him. Before then, he had told both his sister and mother that the Appellant person had defiled him.

58. His mother N also testified that he met the Appellant person at the entrance of her plot as he was leaving the plot.

59. Further, the testimonies of PW2, PW3 and PW5 are that, the Appellant person in fear of being beaten by the public surrendered himself to the police.

60. In his defence, the Appellant testified that the allegations against him were false. He attributed his arraignment in court to a dispute between himself and N, the mother of the complainant, over a plot that he had inherited from is parents.

61. However he never brought up the issue during cross-examination nor did he show PW1 have grudge against him. The defence mounted was mere denial and an afterthought.

62. All this evidence leads to the inevitable conclusion that it is the Appellant person who penetrated the complainant.

63. Thus the conviction was well merited and thus appeal is found to have no merit and is hereby rejected on conviction.

64. On sentence the court has noted that after mitigation the trial court held that it was bound to award mandatory minimum sentence thus awarded appellant life sentence. This has already been declared unconstitutional by our courts thus the court will interfere with the same.

65. Thus the court makes the following orders:

> ***i. The appeal on conviction is dismissed and conviction is upheld.***
>
> ***ii. The mandatory life sentence is set aside and file remitted back to trial magistrate or any other competent magistrate in Garissa Chief Magistrate's Court for resentencing after mitigation.***

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 23RD DAY OF SEPTEMBER, 2019.

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C. KARIUKI

JUDGE