REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 57 OF 2017

MUKTHAR IMAN HUKA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Garissa CM Criminal Case nO. 1649 of 2014 –M. Wachira CM)

JUDGMENT

1. The appellant was charged in the Chief Magistrate's Court at Garissa with attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on 14th October, 2014 at around 11.00 am at [particulars withheld] village, Tana North Sub-county within Tana River County intentionally attempted to cause his penis to penetrate vagina of IM a girl aged 3 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 on the same day and place intentionally touched the vagina of IM a child aged 4 years with his penis.

3. He denied both counts. After full trial, he was convicted of the main count of attempted defilement, and was sentenced to serve 10 years imprisonment.

4. Aggrieved by the decision of the trial court, he has come to this court on appeal on the following grounds:

1. The trial magistrate was not considerate in ruling in favour of the complainant.

2. The trial magistrate erred in law and fact by sentencing him to 10 years imprisonment for attempted defilement which was not established to the standard required by law.

3. The learned trial magistrate misdirected herself in relying on contradictory evidence instead of relying on medical evidence from the medical expert.

4. The prosecution conducted shoddy investigations.

5. The trial magistrate erred by not taking into consideration the evidence brought forward by the medical expert.

6. The magistrate erred in law and fact when she did not consider his defence.

5. The appellant also filed written submissions to the appeal and relied on the same. I have perused and considered the said written submissions.

6. The learned Principal Prosecuting Counsel, Mr. Okemwa, in response submitted that this being a first appeal, the court was required to reconsider the evidence on record.

7. On age, counsel submitted that the age of the complainant was proved in that the child was established to be a minor of between 4 and 5 years. Counsel however, submitted identification of the culprit by the complainant who was positive as PW1 did not mention or describe the appellant but merely referred to him as the accused. According to the counsel, the prosecution failed to lead the complainant to positively identify the appellant. .

8. Counsel further added also that witnesses who were said to have seen the appellant at the time were not called by the prosecution to testify which created a challenge on the prosecution evidence. In addition PW4 who could have been of assistance identifying the appellant neither mentioned the name of the appellant nor gave his description.

9. Counsel closed his submissions by stating that the doctor who filled the P3 form did not bring out any evidence to suggest even a slight struggle. In that event therefore, the Prosecuting Counsel said that the DPP was not supporting the conviction.

10. This is a first appeal. As a first appellate court, I am required to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. In doing so, I have to bear in mind that I did not have the opportunity to see any of the witnesses testify to determine their demeanor and to give due allowance to that fact. See the case of OKENO –VS- REPUBLIC (1972) EA 32.

I have re-evaluated the evidence on record. The prosecution called a total of five (5) witnesses. The appellant tendered unsworn defence and did not call any other witness.

11. In brief the evidence of the prosecution is that between 10.00 am to 11.00 am on the material day, the appellant took the complainant from a place where she was playing outside with friends into a house, where he attempted to defile her. The prosecution witnesses said that due to the cries of the complainant, people came to the scene and the appellant was arrested and taken to the police.

12. It was the prosecution evidence that the complainant was medically examined shortly after the incident and a P3 form filled by PW4 Jeremiah Musimbe a Clinical Officer who found no signs of sexual assault but concluded that since the complainant had red eyes, a sign of crying, the complainant had suffered injuries which PW4 assessed as “harm”.

13. In response to the prosecution evidence, the appellant tendered unsworn testimony denying the offence and said it was a frame up.

14. I note that the complainant gave evidence which was not on oath. She was a minor of 4 years at the time of incident. In accordance with the provisions of Section 124 of the Evidence Act Cap.80), the evidence of a minor complainant in sexual offences, even if without corroboration, when it is believable and is believed by a trial court, can be the basis of founding a conviction.

15. Having re-evaluated the evidence on record, I find that indeed the complainant was a child aged between 4 and 5 years, though there were no documents of her birth relied upon by the prosecution, and though it is also not clear how the age assessment report was done and by whom. That said, I am certain that the magistrate must have noted the approximate age of the complainant, by seeing her, which was not challenged by the appellant. I find that though there were the above shortcomings and the mother of the complainant did not attend court to testify on her age, the prosecution proved to the required standards that the complainant was 4 years of age at the time the incident in 2014.

16. In sexual offences, the proof of the physical act is an important requirement. The appellant was

convicted of attempted defilement, not indecent act. In my view, the evidence on record as contained in the P3 Form could only possibly prove an offence of an indecent act not attempted defilement. Though the complainant said that the appellant pushed his genital organ into her genital organ, there is no medical evidence to support the allegation. As such, in my view, what the prosecution could proof it the allegations were true, was at worst indecent act of the appellant touching the vagina of the complainant with his penis. Therefore, in my view the offence of attempted defilement was not proved.

17. I now turn to the identity of the appellant as the culprit. The incident occurred during broad day light between 10.00 am and 11.00 am. The complainant appears to have known the appellant before as MK. She did not however give the name of the appellant, or a description of his appearance, or identify him in court as the culprit. She merely referred to him in court as "the accused person", which in my view was not an adequate description of the appellant as the culprit. Such statement fell short of positively identifying the appellant as the culprit.

18. It is important to note also that PW3 who claimed to have seen the appellant in the house with the complainant at a time when the appellant placed the complainant on his thighs with an erected penis touching the complainant's vagina said that she was called to the scene by Zainab. Zainab was not called as a witness by the prosecution and no explanation was given to the court on that failure. PW2 , A B the grandmother of the complainant also said that she was called by L a child and went to the house of the mother of the complainant where she saw the complainant crying with many people around. Neither L nor any of the people she found at the scene were called by the prosecution in court to testify. In my view, the failure of the prosecution to call crucial witnesses brings into play the adverse inference principle on the prosecution case as enunciated in the case of BUKENYA –VS- UGANDA (1972) EA 549. I so find against the prosecution.

19. From the evidence on record also, it is not clear when, where, and by whom the appellant was arrested. The investigating Officer PW5 PC Victor Mandegwa merely went to office on 18th October, 2014 at 8.00 pm to find a report of a sexual offence and escorted the victim to hospital and found the appellant already arrested. Nobody testified on arrest of the appellant. As such it is not clear whether the appellant was arrested for the offence herein. As he said in his defence, he was arrested at work and not at the scene. Since the prosecution had the burden to establish where, why, and by whom he was arrested, in my view, the circumstances of arrest herein are that the appellant could have been arrested wrongly as stated by him.

20. In those circumstances, I find that the appellant was not positively identified as the culprit, even assuming that the incident alleged by the prosecution did occur. As a result, he is entitled to an acquittal.

21. I thus find merits in the appeal. I allow the appeal, quash the conviction, and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Garissa on 23rd January, 2018

George Dulu

JUDGE