REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 74 OF 2016

HASSSAN DUBOW….……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 385 of 2014 by Hon. M. Wachira (CM)

JUDGEMENT

BACKGROUND

1. The appellant was charged in the Chief Magistrate's Court at Garissa with defilement of a girl contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006; the particulars of the offence being that on 23rd February, 2014 at [particulars withheld] in Garissa Township of Garissa County, intentionally and unlawfully caused his penis to penetrate the vagina of H.S.G. (name withheld) a girl aged nine (9) years.

2. In the alternative, he was charged with indecent act with a girl 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 an indecent act by rubbing the vagina of H.S.G. (name withheld) a child aged nine (9) years with his penis.

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

THE APPEAL

4. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his initial appeal in 2016. Before the appeal was heard however, he filed an amended petition of appeal as well as written submissions. His grounds of appeal in the amended petition of appeal are as follows –

1. The trial magistrate erred in law and fact by not conducting *voire dire* (examination) in accordance with the law.

2. The trial magistrate erred in law and fact in convicting him without considering that the trial was unfair.

3. The trial magistrate erred in law and fact in convicting him without putting into consideration the age of the alleged victim which was very crucial in determining the penalty and hence contravened section 8 (2) of the Sexual Offences Act.

4. The trial magistrate erred in law and fact in convicting him without considering that the prosecution failed to meet the threshold of proof as to the requisite standard contrary to section 109, 110 and 111 of the Evidence Act.

5. The trial magistrate erred in law and fact in convicting him in the absence of very essential evidence from the other children who were alleged to be present at the time of the alleged offence contrary to section 150 of the Evidence Act.

6. The trial magistrate erred in law for finding him guilty without considering the contradictions and inconsistencies which occurred during the hearing of the prosecution's case contrary to section 163 of the Evidence Act.

7. The trial magistrate erred in law to allow the prosecution stand down the complainant in order to train her and possibly impose in her, concocted evidence purposely to fix him.

8. The mode of arrest was poorly instigated.

9. Medical evidence was poor and dubious.

SUBMISSIONS OF THE PARTIES

5. At the hearing of the appeal, the appellant relied on the written submissions and opted not to make oral submissions. I have perused and considered the written submissions filed.

6. Mr. Balongo learned Prosecuting Counsel for the State opposed the appeal and submitted that the trial court complied with the law in convicting the appellant as the prosecution had proved its case against the appellant through evidence of prosecution witnesses. Counsel submitted also that the appellant did not raise any of the grounds of appeal during the trial.

7. In response to the Prosecuting Counsel's submissions, the appellant said that the prosecution evidence on the age of the complainant (victim) was contradictory as in the evidence the complainant said that she was seven (7) years old while in the charge sheet she was described as being nine (9) years. The appellant also felt that it would not be possible for a person to defile somebody then remain in the same home the whole day.

CONSIDERATIONS

8. This is a first appeal and as a first appellate court, I have to remind myself that I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. In doing so, I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanour, and give due allowance to that fact. See the case of **Okeno vs Republic** [1972] EA 32.

9. The prosecution called five (5) witnesses at the trial. The allegation of the prosecution against the appellant was that on the 23rd February, 2014 at about 5 pm, the complainant was defiled by the appellant at her father's home. It was the complainant (PW1's) evidence that at that time, she was with two younger sisters. It was also her evidence that the appellant had worked previously for her father as a herdsman.

10. The appellant on the other hand gave his defence on oath and was not cross examined. He stated that he claimed a plot from the complainant's father and they fought, which led the complainant's father to instigate this case against him.

11. Having considered the totality of the evidence on record, my view is that the appeal of the appellant will succeed. The first reason is that the incident was described by the complainant PW1 as having occurred in the evening at 5 pm in her father's house where there were other small children. In my view, it was very unlikely that a normal person would have committed such an act of defilement in the presence of children knowing fully well that smaller children are very likely to report everything they notice verbatim to a close relative. In my view, had such an incident occurred, these younger children would have mentioned what they perceived as the incident to their mother PW2 I S when she came back home. This witness not having said that any of the children narrated to her the unusual story about that incident; my view is that the incident described by PW1 did not take place.

12. In addition to the above, the father of the complainant PW3 G D did not say anything about employing the appellant at any time, while PW1 the complainant talked about such employment. This discrepancy in my view, goes to greatly affect the credibility of these two witnesses PW1 and PW3. One cannot know whom among them was saying the truth. In fact, in cross examination, the father of the complainant said that the appellant was a watchman near his home and denied being a friend of the appellant. In my view, if indeed the appellant had been his employee, he would have said so.

13. I now turn to age. Though the appellant says that the age of the complainant was not proved, in my view, such an argument cannot be helpful to him. Whether the complainant was nine (9) years or seven (7) years, that is immaterial as she fell within one bracket for the definition of defilement under the Sexual Offences Act, and consequently that ground of appeal has to fail, and I dismiss the same.

14. With regard to penetration, it was not proved to the required standards by the prosecution. It took three (3) days for a report to be made to the police about the incident, and the P3 form was also based on treatment notes whose maker was neither identified nor did her/she testify in court. The documentary evidence is thus clearly hearsay evidence from an unknown source or person and should not have been relied upon. In addition to this, the P3 form which was filled by PW4 a Clinical Officer, Donald Kithambi concludes that, **"from the evidence above, there is a high probability that the survivor was defiled."**

15. The above conclusion contained in the P3 form was not proof that penetration did occur as it talks of probability, while the complainant PW1 clearly stated that the defiler had complete sexual intercourse with her and ejaculated. With this material contradiction, and inconclusive conclusion from the medical expert, it cannot be said that the prosecution discharged its burden of proving that sexual penetration occurred.

DETERMINATION

16. In my view, with the above considerations in mind, the learned magistrate should have found that the prosecution had failed to prove their case beyond reasonable doubt, as they did not discharge their burden of proof to the required standard. The learned magistrate thus erred and the conviction and accompanying sentence therefore cannot be sustained.

17. For the above reasons, 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, Signed and Delivered in open court at Garissa this 26th day of June, 2018.

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George Dulu

JUDGE