



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 72 OF 2017

MOHAMED YUSSUF HUSSEIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From sentence and conviction in Mandera Senior Principal Magistrate

Court Criminal Case No. 591 of 2017 – Hon. D. K. Mtai (RM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Mandera with defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 22nd August 2017 at [Particulars withheld] village in Mandera North Sub-County within Mandera County intentionally caused his penis to penetrate the vagina of A. M. S. (name withheld) a child aged 4 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 buttocks, breast, anus and vagina of A. M. S. (name withheld) a child aged 4 years with his penis.

3. He denied both counts, and after a full trial, he was convicted with the main count of defilement and sentenced to life imprisonment. The alternative count of committing an indecent act was left in abeyance by the trial court.

4. The appellant has now come to this court on appeal. He filed his initial appeal in March 2018. Before the appeal was heard however, he filed an amended petition of appeal as well as written submissions.

5. In his appeal, he relied on the amended petition of appeal, whose grounds are as follows:

(1) The magistrate erred in law and fact in convicting him without putting into consideration that the complainant's age though a minor was not established beyond any reasonable doubt.

(2) The magistrate erred in law and fact in convicting him without considering (that) the doctor who examined the complainant did not qualify to examine the victim.

(3) The trial magistrate erred in law and fact to convict him without considering that the perpetrator of the alleged offence was not identified positively as required by the law.

(4) The trial magistrate erred in law and in fact in convicting him without considering that the arrest was poorly done.

(5) The trial magistrate erred in convicting him without noting that there existed vendetta between him and the complainant's family.

(6) The evidence alleged by the victim/complainant is unbelievable and untrue since she used a strange language and an interpreter was her relative.

(7) That the magistrate erred in law and fact to convict him without considering (that) the prosecution failed to prove their case beyond reasonable doubt and the evidence was inconsistent contrary to section 109 and 163 of the Evidence Act.

6. During the hearing of the appeal, the appellant relied on his written submissions which I have perused. He added orally that no DNA test was conducted on him. He also complained that he did not follow the proceedings as the translator was a Borana. Lastly, he complained that some of what he stated in court was not recorded by the trial court.

7. Mr. Okemwa the learned Principal Prosecuting Counsel in response stated that no document was produced by the prosecution to establish the age of the complainant. According to counsel though the complainant appeared to be a minor because she was not able to testify in court, she could be a dwarf.

8. With regard to penetration, counsel submitted that PW4 Hellen Ndunge who gave a description of a medical examination of the complainant did not confirm penetration. Counsel said that, this being a serious offence there was need for this court to consider the issue of revenge against the appellant. Counsel however submitted that there would be no issue of possible mistaken identity as the appellant was a neighbour of the complainant.

9. This is a first appeal. As a first appellate court, I am required to re-examine the evidence on record and come to my own independent conclusions and inference. In doing so, I have to bear in mind that I did not have the opportunity to see witnesses testify, and to give due allowance for that fact. See the case of **Okeno vs Republic [1972] EA 32**.

10. In proving their case, the prosecution called 6 witnesses. The complainant did not testify in court as the court felt that she could not testify. However, PW1 Ali Sheikh Abicho, a cousin of the complainant, testified about the incident. PW2 Bilal Sheikh and PW3 Osman Sheikh Harun also testified that they were attracted by screams and went to the scene of the alleged offence. PW5 Z A A the grandmother of the complainant who lived with her testified that she was informed about the incident when she arrived back home from fetching water. All the evidence regarding the incident is consistent that it was alleged to have occurred in broad daylight, about 11 am.

11. The prosecution also called PW6 Hellen Ndunge Thuku the Clinical Officer who examined the complainant and produced the P3 form and PW6 Dominic Nyongesa a Police Corporal who was the investigating officer of the case.

12. In his defence, the appellant gave a long sworn statement denying the offence and alleged the existence of a grudge.

13. In a case of defilement such as the present, the prosecution is required to prove firstly the age of the complainant. Secondly, the prosecution is required to prove penetration, even if it was partial penetration. Thirdly, the prosecution is required to prove that the suspect or accused is the culprit. All these three elements are to be proved by the prosecution beyond any reasonable doubt, this being a criminal case.

14. With regard to the age of the complainant, no documentary evidence was produced by the prosecution. The complainant was not able to testify in court, but other witnesses was claimed to know her and the incident like PW1 Ali Sheikh Abicho testified.

15. As the prosecution stated in their charge sheet that the complainant was aged 4 years, they had an obligation to prove this allegation beyond any reasonable doubt. They did not produce any documentary evidence to support the alleged age, and the Prosecuting Counsel has submitted on appeal that the complainant could have been a mature person but a dwarf. In my view, the magistrate must have seen and observed the complainant well before coming to the conclusion that she was a very young person. Even if she was not exactly 4 years, she was within the bracket of those below 11 years covered under section 8 (1) (2) of the Sexual Offences Act and in my view therefore, the age of complainant was proved by the prosecution beyond any reasonable doubt. However, the prosecution should in all cases not be estimating the age of a person where such age is an important ingredient of an offence such as in cases of defilement otherwise courts will be inclined to find that the age of the victim was not proved.

16. I now turn to penetration. Penetration also had to be proved by the prosecution beyond any reasonable doubt. The complainant did not testify. Her grandmother PW5 Z A A said that she examined the complainant and noted injuries in her private parts. The entries in the P3 form made by PW6 Hellen Ndunge Nthuku a Clinical Officer were that there was tenderness and inflammation of the vagina walls and a freshly broken hymen with bloody vaginal discharge. There was also soil in the external labia majora and minora and around the anal region.

17. The appellant on the other hand claimed that this case was a frame up and that the medical officials refused to medically examine him except to merely observe visually that his penis was dry.

18. PW1 Ali Sheikh Abicho stated that he witnessed the incident where the appellant lay on the complainant on a bed. The appellant claimed that, this was not true and that there was a grudge and this case was a frame up. The medical report is that there were injuries in the private parts of the complainant, and also sand in the private parts as well as the clothes of the complainant. If indeed the incident occurred on a bed, one would ask how did sand get all the way into the private parts of the complainant? In my view, considering all the facts and circumstances of this case, I find that most likely this case was a framework. The injuries on the complainant, in my view, must have been caused deliberately by someone scratching her private parts with sand. I find that though the hymen was broken, such penetration was a deliberate act by someone who wanted to implicate the appellant. I find that penetration of a sexual nature was not proved by the prosecution.

19. As for the identity of the appellant, PW1 knew him well. The appellant also knew PW1 well. The incident occurred in broad daylight. According to the appellant, he was called on the phone by PW1 with whom they had issues before which he thought they had been resolved, and when he went there, he was put in a house and not attended to thus proceeded back home where he was arrested in his mother's house lying on a bed. In my view, any penetration in the private parts of the complainant was not of a sexual nature nor was it caused by the appellant. Therefore, the appellant was not identified as the culprit who caused penetration and injuries in the private parts of the complainant.

20. I am of the view that the prosecution did not prove beyond any reasonable doubt that there was penetration of a sexual nature on the complainant and that the appellant committed the offence charged. The magistrate should thus not have convicted him. The magistrate also made a mistake in leaving the charge of indecent act in abeyance. That charge was an alternative to the charge of defilement and not having

been proved, the magistrate should have acquitted the appellant on that charge instead of leaving in abeyance as if it was to be considered and determined later. I thus make a finding that the appellant was not guilty of the alternative charge of indecent act.

21. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 27th day of September, 2018.

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George Dulu

JUDGE