REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 45 OF 2015

SAID IBRAHIM ODHA ……..…….…….APPELLANT

VS

REPUBLIC……...……RESPONDENT

(From the conviction and sentence in Garissa

Chief Magistrate's Criminal Case No.1341 of 2013 – Hon. M Wachira)

JUDGEMENT

The appellant was charged in the Chief Magistrate's Court at Garissa with defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on diverse dates between December 2012 and 1st October 2013 at Sala Location in Bura-Tana District within Tana River County did commit an act which caused penetration with his genital organ namely penis to the vagina of AA a girl aged 16 years. In the alternatively, he was charged with indecent act contrary to section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on the same diverse dates and place willfully and unlawfully touched the vagina and breasts of AA a girl aged 16 years.

He denied both charges.

After a full trial, he was convicted on the main count of defilement and sentenced to serve 10 years imprisonment.

The appellant has now come to this court on appeal. He filed his initial grounds of appeal in May 2015. Before the appeal was heard however, he filed an amended petition of appeal and written submissions. At the hearing of the appeal, the appellant relied on the written submissions and elected not to make oral submissions. I have perused the written submissions of the appellant.

Mr. Mazisa the prosecuting Counsel opposed the appeal and stated that the P3 form confirmed that the girl was 7 months pregnant. In addition, counsel stated that the appellant was positively identified as he was a neighbour of the complainant. Counsel however asked that the age of the appellant be ascertained, as he alleged to have been 17 years at the time of commission of the offence.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and reach my own independent conclusions and inferences. I have to bear in mind that I did not see witnesses to testify to determine their demeanor and give due allowance to that fact. See the case of **OKENO-VS-REPUBLIC (1972) EA32.**

Though the appellant claims to have been 17 years of age at the time of alleged commission of the

offence, his age was assessed on appeal and he was found to be 23 years old on 25th May, 2017. He was thus around 19 years when the offence was allegedly committed in 2012. That ground of appeal is dismissed.

Having considered the evidence on record, I find that though the charge sheet states that the offence was committed between December 2012 and 1st October 2013, the evidence of PW1 the complainant however was that the appellant only had sex with her once. It cannot thus be said it was a continuous repeated act. The complainant also stated that in January 2013 she became sick on being taken to the hospital, she was found to be pregnant. The evidence of the doctor on the other hand was that it was in October 2013 that the complainant was confirmed as having been pregnant.

The above are serious contradictions. The complainant was the only witness to the incident. Assuming that she was a minor victim of a sexual offence, then section 124 of the Evidence Act would apply to her. In that event, a conviction would be upheld, without corroboration if her evidence was believable and was believed by the trial court. With the above glaring contradictions, in my view, the evidence of the complainant was not believable and should not have been believed by the trial court, in the absence of corroboration.

I now turn to the age of the complainant. She testified that she was 16 years of age. Her father PW2 A R S also stated that she was 16 years old and had the birth certificate. He however did not produce the birth certificate in court.

The medical age assessment form that was produced dated 30th January 2015, was not in my view produced properly in terms of section 77 of the Evidence Act Cap. 80. Firstly, no basis for not calling the maker was given by the prosecution to the court before production of that report.

Secondly, the appellant was not asked whether he objected to the production of that report by somebody other than the maker. Thirdly, the report did not state how the age was assessed, and instead refers to another report which was done in 2013, which was lost. From its contents, the report produced appears merely to be an attempt to confirm the previously alleged assessment of age.

In my view, with the above evidence, the complainant was not scientifically assessed to be of the age of 16 at the time of incident. That is another reason why the prosecution did not prove its case against the appellant.

The complainant was said to have been pregnant at the time of discovery of the allegation that she was defiled by the appellant. The complainant was found to have been 7 months pregnant. In my view, in order to clear any doubt in this particular case, it was necessary for the prosecution to have facilitated the conducting a DNA test to determine whether the appellant was the father of the child. With the evidence on record, and in the absence of a DNA report, it is clear to me that the prosecution did not prove beyond reasonable doubt that the appellant had sexual intercourse with the complainant or that he was responsible for the pregnancy.

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

Dated and delivered at Garissa on 28th June, 2017.

GEORGE DULU

JUDGE