REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO.58 OF 2014

KALIF DIDHOW ABDI……..……..…….APPELLANT

VS

REPUBLIC……RESPONDENT

(From the conviction and sentence in Garissa CM Criminal Case

No. 158 of 2014- M. Wachira CM)

JUDGEMENT

The appellant was charged in the Chief Magistrate 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 18th February, 2014 in Dadaab District within Garissa county intentionally attempted to cause his penis penetrate the anus of AJA a child aged 9 years. He denied the offence. After full trial he was convicted of the offence and sentenced to serve 10 years imprisonment.

He has now come to this court on appeal. He initially filed his appeal in 2014. Before the appeal was heard, he filed an amended petition of appeal and written submissions, which he relied upon. His grounds of appeal are in summary as follows:-

1. Charge sheet was defective.

2. PW1 the complainant lied in court regarding his age.

3. Crucial witnesses were not called.

4. Medical examination did not support the offence.

5. The prosecution evidence was not corroborated.

6. The sentence of 10 years imprisonment was harsh and excessive.

At the hearing of the appeal the appellant relied on his written submissions and elected not to make oral submissions.

Learned Principal Prosecuting Counsel Mr. Okemwa, submitted that PW1 the complainant gave evidence of penetration through the anus but the doctor confirmed the contrary. The father PW2 talked of oily buttocks of the complainant which was not supported by any evidence. Counsel submitted that this was a cooked case.

I have considered the appeal as I am required to do in first appeal. I am required to re-evaluate the evidence on record and come to my own conclusion and inferences see the case of OKENO –VS-REPUBLIC (1972) EA 32.

The evidence of the complainant PW1 and his father PW2 on the age of the complainant is at variance. The complainant stated that he was 11 years while the father stated that he was 9 years of age.

Though the complainant claims that he was defiled through penetration of the anus the doctor PW4 Dr. Sarah Kasoga found no evidence of such penetration, and stated that she merely wrote the report from the information given by the father of the complainant. The father of the complainant also gave a story the complainant had oily buttocks, which is not supported by any other evidence of records. In my view, the prosecution evidence against the appellant was an exaggerated story.

There exist contradictions that cannot be reconciled. The complainant did not state that he was gagged in the mouth with a piece of cloth. However the father PW2 informed the doctor that the complainant was gagged using a piece of cloth. PW 2 the father also stated that when his son, PW1 delayed in bringing back his radio from the appellants' house, he walked there knocked the door and the appellant came out of the house and then went back into the house and started defiling the young man who now screamed. In my view, it is a very unbelievable situation where the father of the complainant goes to that house calls the appellant from the house who comes out of the house and they talk and then goes back into the house and deliberately defiles the boy while the father is nearby. In my view such an action can only be committed by a mad person.

That is not all. PW2 the father of the complainant also stated that the neighbours were attracted by the screams and come to the scene. However no neighbours name was mentioned by any of the witnesses, and no neighbour was called in court by the prosecution to testify. It would thus appear to me that no neighbour came to the scene, which again supports my view that this case was a frame up.

The appellant tendrered a defence of alibi. He also cross examined witnesses. The magistrate however stated in the judgment that the appellant did not challenge the prosecution case. This was a mis-direction on the part of the trial court. It also meant that the magistrate did not consider the defence case and acted under the wrong impression that the appellant did not cross examine or defend himself. This error obviously prejudiced the appellant.

The Principal Prosecuting Counsel had conceded to the appeal and in my view rightly so. I find that the conviction is not sustainable and the sentence has to be set aside.

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 on 25th July, 2017.

GEORGE DULU

JUDGE