REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 18 OF 2017

ABDIHAKIN ABDOW ABIQAL…… APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 1798 of 2014- M.W Wachira CM)

JUDGMENT

1. 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 15th Novemvber, 2014 at [particulars withheld] area within Garissa County unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of HG a girl aged 16 years. He was charged with a second count of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on the same day and place unlawfully and intentionally touched the breasts and vagina and buttocks of HG with his penis.

2. He denied both charges. After a full trial he was convicted of count 1 for defilement. The magistrate treated count 2 for indecent act as an alternative count and found the appellant not guilty of the same and acquitted him under Section 125 of the Penal Code. The magistrate sentenced the appellant to serve 15 years imprisonment for defilement.

3. The appellant has now come to this court on appeal through Counsel C.P. Onono, raising 4 grounds of appeal as follows:-

1. The evidence on record was inadequate to prove a charge of defilement.

2. Learned trial Magistrate erred by failing to give the appellant the benefit of doubt having regard to material inconsistencies and gaps in the recorded evidence.

3. The Learned trial Magistrate erred by drawing conclusions which were unsupported by the recorded evidence.

4. The conviction was against the weight of the available evidence.

4. At the hearing of the appeal, Mr. Onono learned counsel for the appellant made extensive oral submissions. Counsel wondered how the trial magistrate would proceed to convict the appellant on the evidence on record. Counsel submitted that there was no evidence from the doctor's findings of resistance

by the complainant who was said to have had no previous sexual experience, and stated that mere reddishness of the vulva, which was not elaborated by the doctor, and the presence of whitish dis-colouration did not establish sexual activity. According to counsel, the hymen could be broken by vigorous exercise. Counsel submitted further that there was no evidence of sexual penetration as the doctor did not even indicate in the P3 form that the hymen was broken but merely stated that allegation in his oral evidence in court.

5. Counsel also submitted that the defence was unshaken and that the magistrate appeared to have acted on unrecorded evidence to found a conviction, which was wrong.

6. Counsel further attacked the conduct of the complainant, in that the complainant knew the appellant before he was alleged to have gone to his home. In addition, the complainant was married to somebody else shortly after the alleged defilement which contradicted the allegation that she was a minor. Counsel said that there was no evidence that the complainant screamed though she said so in court. Thus though in sexual offences one could be convicted on uncorroborated evidence of a complainant, in this particular case counsel felt that the evidence did not meet the high standards required.

7. Lastly, counsel submitted that the age of the complainant was not proved though a birth certificate was allegedly used.

8. The learned Principal Prosecuting Counsel Mr. Okemwa, submitted that prosecution had proved age of the complainant and the identity of the perpetrator. However, penetration was not proved to the required standards as the doctor did not record in the P3 form that the hymen had been broken.

9. This is a first appeal. As a first appellate court, I am required to evaluate all the evidence on record afresh and come to my own conclusions and inferences. See the case of **Okeno –Vs- Republic (1972) EA 32.**

10. I have re-evaluated the evidence on record. I have perused the judgment and considered the submissions of counsel for the appellant as well as the submissions of the Principal Prosecuting Counsel. In criminal cases the standard of proof is beyond reasonable doubts. The burden of proof is on the prosecution.

11. In defilement cases, the age of the complainant is a crucial factor to be proved by the prosecution. Secondly, the identity of the perpetrator has to be proved. Thirdly, penetration has to be proved.

12. With regard to age, the complainant who testified as PW2 stated her age as 16 on 30/3/2015. A birth certificate was relied upon and produced as exhibit 4. I do not however see a copy of that birth certificate in the file. The Clinical Officer, PW1 Adan Ali Dira who conducted the medical examination of the complainant filled in the P3 form that the age of the complainant was 16 years, which was the age given by the police. The Clinical Officer did not conduct medical age assessment.

13. The evidence on the age of the complainant, other than the birth certificate of which I do not even see a photocopy in the file or any indication that it was released to the complainant, leads me to the conclusion that the age of the complainant was in doubt. The prosecution thus in my view, did not prove the age of the complainant beyond reasonable doubt.

14. With regard to penetration, the complainant clearly stated that she went to the appellant's house and they engaged in sexual intercourse for a night. The doctor found reddening of the vulva about two days thereafter. There is no evidence of forceful sexual intercourse. However in my view the evidence on record was sufficient and did establish sexual intercourse or penetration, though voluntary. In my view it would be unlikely for the doctor to have found traces of spermatozoa after the lapse of two days.

15. With regard to the culprit, the appellant and the complainant knew each other well. The evidence on record is that the appellant had indicated to the complainant and her mother PW3 Isino Abdikhalif that he would marry her. He was also a person who lived in the neighbourhood. The evidence on record is also

that after spending the night, the mother of the complainant and members of the public knocked at the door and the appellant and complainant emerged from the same room. There can be no possibility of mistaken identity. The appellant in my view was proved by the prosecution to have penetrated the complainant sexually that night.

16. Even assuming that the complainant was 16 years old at the time of the incident, in my view her conduct and that of her mother and relatives made the appellant believe that she was above 18 years. The evidence is that the complainant and the appellant became social friends in their own neighbourhoods. The appellant told the complainant that he wanted to marry her. The appellant was then taken by the complainant to the complainant's mother PW3 and the appellant informed the mother of the complainant that he wanted to marry her. The mother did not say that the complainant was underage but instead said that she had to inform an uncle of the complainant, as the father had died, which in my view was a custom of the community here in Garissa.

17. The complainant then on another day was called on phone by the appellant and went to his house where they had voluntary sexual intercourse with the appellant without her raising any issue of her age. It is also in evidence that shortly after the incident of the alleged defilement, the complainant was married off to somebody else.

18. The totality of the above facts and circumstances in my view, is that any reasonable man would believe that the complainant was an adult. The conduct of the complainant and that of her relatives brought into play the provisions of Section 8 (5) of the Sexual Offences Act, which provides a defence in cases of defilement where an accused person believes that the complainant is above the age of 18. Since both the complainant and her family in the present case made the appellant reasonably believe that the complainant was 18 years of age or above, the appellant should not have been convicted by the trial court.

19. 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 forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 23rd November, 2017.

George Dulu

JUDGE