



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 42 OF 2015

SAID MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 442 of 2015 – M. W Wachira CM)

JUDGEMENT

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(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on 30th April, 2015 at 20:00 hours in Tana River County willfully and unlawfully committed an act which caused penetration of his genital organ namely penis to genital organ namely vagina of RM a girl aged 15 years.
2. In the alternative he was charged with indecent act with a child contrary to Section 11 (1) of the Penal Code. The particulars of the charge were that on the same day and place willfully and unlawfully committed an indecent act with a child namely RM aged 15 years by touching her private parts.
3. When he appeared in court on 4th May, 2015, he was recorded as having pleaded not guilty to the main count, but pleaded guilty in the alternative count. The prosecutor present C I Munyotu then informed that court that he held brief for Mr. Collins of the Director of Public Prosecutions Office and the matter was placed aside to 11.00 am for facts.
4. Mr. Collins Orwa gave the facts at 12.15 pm and the appellant admitted the facts and said that he admitted count 1 in that he defiled the complainant. The magistrate then convicted him on his own plea of guilty, but the prosecution immediately said they wanted a mention of the case on 7th May 2015 to read the facts on the main charge which was allowed by the court.
5. When the matter came up in court on the 7th of May, 2015, the appellant was absent and the court thus put the matter for mention for the next day 8th May, 2015. When the prosecution informed the court that the matter was coming for mitigation and that an age assessment had been done for the complainant, where upon the appellant was recorded as having said that he was asked for leniency and that he did not know. The court then proceeded to sentence him to 10 years imprisonment for the alternative count and discharged him on the main charge.
6. I have given the above history of events to show how the matter progressed before the trial court to its conclusion. The appellant has now come to this court on appeal. He filed his initial appeal on 25th May,

2015, but on the day of hearing the appeal, on 15th November, 2017 he filed an amended petition of appeal and written submissions, which he relied upon.

7. His grounds of appeal are as follows:-

1. The sentence of 10 years imprisonment was illegal due to the fact that the charges as drafted were defective.

2. Though he pleaded guilty to the charge the facts that were read in support of the charges were inconsistent with the statements of the offence.

3. The whole trial and proceedings was conducted unfairly.

8. During the hearing of the appeal, the appellant elected to rely on his written submissions and did not make oral submissions. I have perused and considered his written submissions.

9. The Learned Principal Prosecuting Counsel Mr. Okemwa, submitted that the appellant pleaded guilty to the alternative count. According to counsel the facts given clearly supported an offence of defilement and that though the prosecutor asked for a date to give facts on the main charge, he never did so, and the court went ahead and on and convicted on the alternative charge of indecent act.

10. Counsel urged this court to revisit the record of proceedings and decide whether or not to order a retrial.

11. This being a first appeal, and as the appellant was convicted on his own plea of guilty, I am duty bound to re-examine the entire record of the trial court proceedings to establish whether the plea of guilty was properly taken.

12. I have perused the record of the trial court proceedings which I must say are confusing. The language used was Kiswahili and I have no doubt that the appellant understood that language. However, the record of what transpired in the magistrate's court has a lot to be desired.

13. Firstly, the appellant was recorded on the 5th of May, 2015 to have pleaded guilty to the alternative charge, which was indecent act on a girl. At that time, Mr. Collins Orwa, prosecuting counsel for the Director of Public Prosecutions (DPP) was represented by CI Munyotu who asked the court to put aside for the facts. When Mr. Orwa came to court at 12.15 pm however, he gave facts which supported the charge of defilement instead of indecent act which the appellant had pleaded guilty to, as he stated that the complainant left home pretending that she was going to visit an uncle but instead went to the appellant's house at Mororo where they spent the night and engaged in unprotected sexual intercourse. This was a mistake on the part of prosecuting counsel.

14. After the above facts were given for the main count of defilement, the appellant said he admitted count one that he had defiled the complainant.

15. Since the appellant stated in reference to the facts given that he admitted count one that he defiled the complainant, in my view the learned magistrate should have entered a plea of not guilty for the alternative count of indecent act which the appellant had initially admitted. As the appellant had initially pleaded not guilty to count 1, the magistrate should have read a fresh all the charges for the appellant to understand them and plead again to each count 1 and count 2. The trial magistrate did not do that and convicted on count 1, which was a mistake.

16. The confusion did not end there as Mr. Orwa immediately after conviction of the appellant asked for a mention on the case on 7th May 2015 to read the facts on the main charge, which gives the impression that the prosecuting counsel did not know the particulars of the main charge as the facts he had already given in court were for the main charge of defilement.

17. The court also did not question the prosecuting counsel's request and allowed the case to be mentioned on 7th May 2015. On that date however, the appellant was not produced in court, and when he was produced in court on 8th May, 2015, the prosecutor was now S. P Marete instead of Mr. Collins Orwa. The prosecutor made yet another mistake of informing the court that the case came up for mitigation while in fact the prosecution had obtained an adjournment from the court to enable them read the facts on the main count of defilement.

18. The prosecutor also came up with another surprise of informing the court that he had an age assessment report of the complainant which should have been part of the facts which had been given earlier. Then the magistrate did not question this and made another about turn in that, after having convicted for the main charge of defilement, she sentenced the appellant to serve 10 years imprisonment on the alternative charge, and discharged him on the main charge of defilement.

19. The sum total of all the above irregularities was that it could not be said that there was proper plea taking and a conviction on plea of guilty as required and explained in the case of Adan –Vs- Republic (1973) EA 445 in which the Court of Appeal for East Africa listed the elaborate steps to be taken in recording a proper plea of guilty.

20. The confusion arises from two reasons. Firstly, the changing of prosecutors. Mr. Orwa should not have come into the proceedings in the middle and then leave them again to the police prosecutor. The change of prosecutors between Chief Inspector Munyotu, Prosecuting Counsel Collins Orwa, and later S. P Marete a police prosecutor, in my view created uncalled for confusion. In the process, the magistrate also lost track of the proceedings and the requirements of the law and became part of the confusion that was created by the prosecution. As such the conviction herein cannot stand as the plea of guilty entered against the appellant was not unequivocal, since it cannot be deduced from the record whether the appellant or the magistrate understood the charge to which the appellant pleaded guilty. The appeal will succeed on that account.

21. The other reason why this appeal will succeed is that the appellant was said to have been convicted and sentenced on the alternative charge of indecent act on a child. In addition to the fact that the record shows that he later changed his plea, the charge as drafted was defective in that it was based on the Penal Code rather than the Sexual Offences Act. In my view such was an incurable defect as there is no such offence under the Penal Code. The magistrate should have either rejected the charge or ordered an amendment. In my view therefore, the purported conviction and sentence on the charge of indecent act cannot be sustained.

22. Mr. Okemwa the Principal Prosecuting Counsel, has suggested a retrial. In my view there is no justification for ordering a retrial. Other than the fact that such an order would be manifestly prejudicial to the appellant as both the prosecution and the court made glaring mistakes in the trial proceedings herein, the age of the complainant was also not proved. It is instructive to note that after the facts had already been summarized, the prosecutor sneaked in an age assessment report of the complainant in court during a mention for mitigation, which was improper practice.

23. The alleged age assessment report done in the same year 2015 also stated the complainant was 16 years while the charge sheet says she was 15 years, was not a detailed document, and was signed by a person whose identity and qualifications were not indicated in the form, nor was the process of determining that approximate age of 16 explained.

24. More importantly, the conduct of the complainant leaving her parent's home and pretending that she was going to visit an uncle and yet voluntarily going to spend the night with the appellant and indulging in unprotected sex, in my view portrayed her to the appellant as an adult. The appellant in mitigation asked for leniency and said he did not know after the prosecutor gave the age assessment report.

25. With that in mind, in my view, the conduct of the complainant together with what the appellant said after knowing about the contents of the age assessment report of the complainant, brought into play the provisions of Section 8(5) of the Sexual Offences Act, which provides a defence to an accused who

believes reasonably that a child, in view of his or her conduct and presentation is an adult.

26. Consequently, 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 and delivered at Garissa on 14th December, 2017.

George Dulu

JUDGE