REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEALS NO. 95 OF 2014

PATRICK MULANDI MUSYOKA…..……. APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court at Mwingi with attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 22nd June 2014 at 1pm at Maongao Village, Waita Location in Mwingi Central District of Kitui County intentionally attempted to cause his penis to penetrate the vagina of N. M a child aged 9 years and 9 months. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 10 years imprisonment after the trial court received a social inquiry report.

Aggrieved by the decision of the trial court, the appellant filed his appeal on 5th November 2014. Before the appeal was heard, the appellant filed amended petition of appeal and written submissions. The amended grounds of appeal are as follows:-That the learned trial magistrate erred in law and fact to convict him in reliance of a defective charge sheet.

1. That the trial magistrate erred in law and fact to convict him without considering that the age of the complainant was not proved beyond reasonable doubt.
2. The trial magistrate erred in law and fact to convict him without considering that the prosecution witness evidence was contradictory and inconsistence.
3. The trial magistrate erred convicting him without considering that medical evidence failed to support the offence of defilement and attempted defilement.
4. The mode of arrest was dubious hence not consistent with the allegations of attempted defilement.
5. The learned trial magistrate erred both in law and fact convicting without due considering that the investigations were very shoddy in comparison to the nature of the offence.
6. The learned trial magistrate erred in law and fact to deliver a judgment which was not signed or dated.
7. The magistrate was wrong in not finding that there was a mediator between two families.

At the trial of the appeal the appellant highlighted his written submission. The appellant stated that crucial witnesses to whom PW1 reported the incident did not take action to help her and were not called to testify. In addition it took very long for a report to be made to the police.

The learned assistant director of public prosecution Mr. Wanyonyi opposed the appeal. He said that the error of the date on the charge sheet was amended to 2014. Counsel argued that the evidence was very clear that the appellant went to the home of the complainant and called her to go to the bush and attempted to defile her. The mother of the complainant PW1 saw the appellant running away. Counsel

maintained that the evidence established an attempt to defile the complainant.

Counsel submitted that an explanation was given as to why documentary evidence on the age of the complainant was not given. Counsel emphasized that the appellant after a social inquiry was found to have been previously been acquitted of a similar offence.

In response the appellant maintained that there was a boundary issue/dispute between two families. There were contradictions in the evidence of PW1 and PW2. He said that he did not swear at the trial because the court did not give him that option.

During the trial in the subordinate court the prosecution called 5 witnesses. PW1 was S M the mother of the complainant. She testified that the complainant was born on 25th September 2004 though the birth certificate and other clinic documents had been destroyed. She stated that on 27th June 2014 she was at the farm and left the complainant preparing lunch but when she went home her daughter M told her that M went with the complainant to the bush. M was a name used for the appellant. She proceeded to find out and met the complainant crying and the appellant running away. She found people repairing a road such as M, M, M and M who refused to help her. She reported the incident to the father of the complainant PW3 who was at Dadaab. On the 28th of June 2014 the father of the complainant came and they reported the matter to the village elder and talked to the mother of the complainant. Those who were involved into the discussions included Kasimu and Mulandi. They agreed that the mother of the appellant would take the complainant to hospital but that was not done and they reported to the police on 2nd July 2014. It was her evidence that the mother of the complainant was not married and that on examining the complainant she noticed substance like saliva on her private parts and with a torn pant.

In cross examination she insisted that the appellant attempted to defile the complainant in the farm. She stated that the child was not injured however. She agreed that she had previously crossed a road in the farm. She was referred to the police statement which contradicted what she said in court. In the police statement she stated that the appellant had sexual intercourse with the complainant. She stated that the mother of the appellant had wanted to resolve the matter by selling 11 goats but later ran away.

PW2 was the complainant. She said that she was class 3 and was sworn before testifying. She gave her age as 10 years. It was her evidence that the appellant pulled her hand into the bush while holding a stick. 50 metres away he started removing her pant, fell her on the ground and removed one leg from the pant. Just then the mother PW1 called her and the appellant ran away. He had already started removing his trouser. She denied that her pant got torn.

In cross examination she stated that there was no problem between the appellant and her father. She maintained that the appellant pulled her to the bush. She denied that the mother beat her to implicate him. She was referred to the police statement which contradicted what she stated in court as it said that the mother found her on the ground in the bush without a pant.

PW3 was G M M the father of the complainant. He testified that he was a casual worker and the complainant was his second child. It was his evidence that the complainant was born in 2004 in September. That on 27th June 2014 at 2pm he was called on the phone while at Dadaab by his wife who told him that the complainant had been dragged into the bush by Patrick his nephew. He travelled home the next day arriving at 5pm. He called the head man and another man to discuss the issue as the mother of the appellant was his eldest sister. That meeting was held in the absence of the appellant. Though the mother of the appellant promised to take the child to hospital she escaped. When later they took the complainant to Mwingi District Hospital the doctor said she had not been penetrated. The appellant was arrested by members of the public later.

In cross examination he maintained the story he was briefed about the incident. He said that he met with the elders and discussed the issue. He was referred to his police statement in which it was stated that the complainant had sexual intercourse twice with the appellant. He said that he wrote the statement before the doctor made the observations that the complainant had not been penetrated. He maintained that the appellant attempted to defile the complainant.

PW4 was Dr. Joseph Mutua from Mwingi District Hospital who testified that he worked with Dr. Hassan Abdulrahman and testified on the P3 form filled by the same Dr. Hassan. He stated that he was familiar with the handwriting of Dr. Hassan. According to him the complainant was taken to the hospital initially on 2nd July 2014 on a history of attempted defilement. Examination established normal private parts with no injuries and no discharge. No tests were conducted. It was established that there was no penetration of a sexual nature. Dr. Hassan filed the P3 form on 17th July 2014 from the tretament notes. He produced both the P3 form and treatment notes as exhibits.

In cross examination he stated that the complainant did not bring the clothes she wore during the incident and that no marks were seen on the complainant though she gave a history of attempted defilement.

PW5 was PC Justus Bett the investigating officer from Mwingi Police Station. He stated that on the 2nd July 2014 at 4.30pm while at the police station the complainant came with the company of her parents and they stated that on the 27th of June 2014 the appellant called the complainant then pulled her towards a forest, removed her clothes and tried to defile her. The mother was alerted by M her son and rushed there. When the appellant heard the sound he escaped and the mother found the complainant carrying her pant. In the company of PC Olivia Oketch they took the complainant to hospital and on examination it was confirmed that no penetration had occurred. He charged the appellant although he denied commuting the offence.

In cross examination he maintained that the appellant wanted to defile the young girl though he did not go to the scene. He stated that members of the public or villagers would not have framed him. He stated that members of the public arrested and brought the appellant to the police after the matter had been reported to the village elder. He maintained that the complainant did not lie.

When put on his defence the appellant gave a long unsworn statement. He stated that the mother of the complainant was her aunt and on 25th June 2014 he closed the boundary road between the adjacent land. He stated that his mother was unmarried and that the family was saying that she should go and get land from her husband. He asked her why she was crossing the road and she said that they should move away and they had a disagreement. On that day he went to Mwingi and then on 27th June 2014 he went to Mbomeni Market. On 29th June 2014 while at Mwingi town his uncle called him and said there was a problem at home. He told him that they should meet on 3rd July 2014 on which day they met at Mwingi main stage. His uncle was the father of the complainant. He was then lured into a probox vehicle and taken to the police station where he was arrested and charged with an offence he did not know about. He stated that his grandfather had given him land but after he died his uncle wanted to take the land away and chased away his mother.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno Vs. Republic 1972 EA 32***.

I have re-evaluated the evidence on record. The appellant has appealed to this court on several grounds.

He has complained of a defecting charge, that the date in the charge was 2013 rather than the year 2014. It is true that the charge was initially dated 2013. However when that mistake was discovered during the tendering of evidence by witnesses, the charge was collected. That was the correct procedure. In my view also the appellant did not suffer any prejudice due to the initial mistake in the year of the offence which was corrected during trial. I dismiss that complaint.

The burden is always on the prosecution to prove a criminal case agaisnt an accused person beyond any reasonable doubt. See the case of ***Woolmington Vs. DPP [1935] AC.***

In the present case the prosecution was required to prove that the complainant was below the age of 18. They were also required to prove that there was an attempt by the appellant to have sexual intercourse with the complainant. In my view, with the evidence eon record though the birth certificate and other documents evidencing the birth of the complainant were lost, and no medical assessment of the age was done, the prosecution proved beyond reasonable doubt that the complainant was a girl aged about 10

years. The appellant also does not challenge that fact on appeal. I find that the prosecution proved that the complainant was a child aged around 10 years in 2014 when the incident is alleged to have occurred.

The next issue is whether the appellant attempted to defile the complainant. The incident is alleged to have occurred in broad day light. However the person who said that the complainant was taken to the bush by the appellant, a child called M was not called to testify as a witness. No explanation was given as to why he could not be called to testify, even if he was not going to testify on oath. There is variation between the evidence of the mother of the complainant PW1 and the complainant on what happened at the scene. There is also variation between the statements of both witnesses which they made to the police and what they said in court. The details in the police statement were that defilement had actually occurred. Infact the complainant PW2 told the police that she had two previous sexual engagements with the appellant, while the medical evidence was that no penetration had occurred. In addition to the above none of the people to whom the mother of the complainant complained initially at the scene was called to testify. No explanation given as to why none of them appeared in court. The police said that the appellant was arrested by the public. None of those was also called to testify and the appellant's story was that he was arrested by the complainant's father and tricked to go to the police station.

Significantly there is an admission of a dispute of a land and this position was put by the appellant to witnesses throughout the trial. The elders who were said to have attempted to resolve the defilement matter initially were not called to testify as to whether or not there was such an incident and whether the appellant was aware of such meetings.

In my view it is a strong probability that the appellant was implicated the dispute over the land or the footpath that was closed by PW1 the mother of the complainant. The long defence of the appellant, though unsworn is certainly believable in view of the questions he had previously asked the prosecution witnesses in cross examination. I find that the prosecution did not prove beyond reasonable doubt that the appellant attempted to defile the complainant. The evidence of the prosecution is unbelievable, inconsistent and is not convincing.

For the above reasons I hold that the appeal has merits. 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 21st day of January, 2016

GEORGE DULU

JUDGE