



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 13 OF 2014

MAHAT MOHAMED OLOW.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant was charged in a magistrates court at Wajir with defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 21st July 2013 at in Wajir West District within Wajir County intentionally caused his penis to penetrate the vagina of D.N.A. a child aged 15 years. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally touched the vagina of D.N.A a child aged 15 years with his penis. He was also charged with a second count of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the same day and place, unlawfully did grievous harm to D.N.A.

He denied all the charges. After a full trial, he was convicted of count 1 and 2 for defilement and grievous harm respectively. He was sentenced to serve 50 years imprisonment in count 1 for defilement and discharged under section 35 (1) of the Penal Code, with regard to count 2 for grievous harm.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his petition of appeal in person but was represented by counsel during a hearing of the appeal. His grounds of appeal are as follows:-

1. That the trial court failed to consider the testimony of PW2 who said that he was arrested while peacefully herding his camels unaware of the said allegations.
2. That PW3 Abdullahi Gaba stated “that while they were tracing the defiler they were directed to him because he had a previous record of defilement”.
3. That PW4 uttered in court that he was telephoned and informed by those sent to trace the defiler that he was arrested owing to his previous record.
4. That PW5 the Area Chief clearly pointed out in court that he was not sure whether the appellant had defiled the girl but he was aware of the suspect’s previous record of defilement and that was the sole reason that led to his arrest.
5. That the verdict of 50 years imprisonment imposed on him by the trial magistrate was too harsh and excessive considering that there was no evidence to uphold it.

Before the hearing of the appeal, appellant's counsel D. K. Wanyoike & Co filed written submissions on 22nd October 2015. The DPP through the Senior Assistant Director of Public Prosecutions at Garissa also filed written submissions.

During the hearing of the appeal, Mr. Wanyoike learned counsel for the appellant highlighted the written submissions by briefly stating that the appellant was challenging both the conviction and sentence. Counsel emphasized that the sentence of 50 years imprisonment was too harsh and excessive.

Mr. Orwa learned Prosecuting Counsel, opposed the appeal and highlighted the written submissions by stating that the appellant was sentenced according to the law as the maximum sentence for defilement was life imprisonment and the victim was a minor and a relative. Counsel submitted also that there were no contradictions in the prosecution evidence and that the medical evidence tendered in court was reliable. Counsel relied on **Garissa High Court Criminal Appeal No. 38 of 2013 Abdi Kullow Abdi Vs. Republic 2013 eKLR** and **Kisumu High Court Criminal Case No. 23A of 2012 Dan Melly Maganga Vs. Republic 2014 eKLR** and also **Kitale High Court Criminal Appeal No. 77 and 78 of 2009 - L.N and another Vs. Republic [2011] eKLR.**

During the trial, the prosecution called eleven witnesses. PW1 was the complainant D.N.A. She testified on oath. It was her evidence that she was herding goats near their homestead accompanied by a 6 year old child F on the 21st July 2013 at 2.00pm, when someone hit her from the back of the neck and she fell down. When she regained conscience the man slapped her and hit her with a club. He slapped her several times on the cheeks causing face and neck bruises and reddening of the eyes. The injuries were on the cheeks and on the neck. She showed the injuries to the court which appeared to have been caused by finger nails.

It was her evidence that the assailant pulled her along the ground for about 20 metres. According to her, the assailant was a black person and wore a black coat and green kikoi.

She testified that the man tore her long dress by cutting on both shoulders, then removed her petticoat and lay on her after removing his kikoi. She felt pain in the vagina and bled. According to her, the incident took about 2 hours. She screamed and the other child of 6 years ran away. After the ordeal, she went home and informed her parents about it at around 6pm. The chief was then called and she was taken to Wajir hospital after passing through the police station. She was admitted in hospital for 5 days. She later heard that the appellant had been arrested but did not see him after the incident until they met in court. She identified the appellant in court.

In cross examination, she stated that the appellant was carrying a jerrican and a jug for milking camels during the incident. She stated that she had described to people that the person was tall and black and one upper tooth was broken. The court confirmed that indeed upper teeth of the appellant had been broken.

In re-examination, she stated that the appellant ran away with her shoes and left his own slippers of different colours at the scene. She however did not know where the slippers of the appellant currently were.

PW2 was A.A Noor a business man and an uncle of the complainant. It was his evidence that he lived with the complainant since she was a baby and that she looked after the goats. That on 21st July 2013 at around 8.30pm, he was called and informed that the appellant had been defiled by the complainant and he reported the incident to the area chief and elders.

According to him, the complainant was taken to hospital that before then, and he went to the scene with the senior chief, assistant chief and a chief called Ali and others. They split themselves into two groups one to take the complainant to hospital and another to follow footsteps and trace the suspect. He took the complainant to hospital. The other group followed footsteps. According to him the complainant had said that the culprit was black and one of his upper teeth was broken and that he wore a black coat and green kikoi. He was later told that the man had been arrested wearing the same kikoi.

In cross examination, he maintained that he was in the group which took the complainant to hospital and that he did not arrest the appellant. He denied forcing the appellant to pay money.

PW3 was Abdullahi Mohamed Noor a casual worker and an elder. It was his evidence that on 21st July 2013 at 9pm, they received a report that a girl had been defiled. They went to the scene and decided to follow foot prints using torches. They were able to differentiate footsteps but followed the footsteps from 10pm until the marks disappeared. At 2am they decided to go to sleep.

On the next morning, they continued following the footsteps to see where camels had slept. They followed camel footsteps and the appellants footsteps until 10am when they found him and the camels. He stated that they followed the footsteps in the bush and the sand enabled them see the footsteps, though they also saw footsteps of cattle.

According to him, the complainant had described to them how the suspect looked like. They found the appellant carrying a jug and one of his teeth was broken and he was of average age and of black complexion. They found him also wearing a black jacket and green kikoi and they thus called the area chief and the appellant was thus taken to the police station.

In cross examination, he stated that they found the appellant alone with camels but did not arrest him and called the area chief because they suspected that he could run away. He maintained that the girl or complainant did not fail to identify appellant, and that they never brought the 8 years old child to identify him.

PW4 was Ali Ibrahim also a casual worker. It was his evidence that on 21st July 2013 they received a report from Bishar Abdi that the complainant had been defiled. They took the report to the area chief and police. They then boarded a vehicle and in the company of three chiefs, went to the scene and split themselves into two groups. One group to take the victim to hospital and the other to follow footsteps. They followed footsteps up to 2am and felt tired and went to sleep.

According to him, the appellant had left his shoes at the scene and wore the slippers of the complainant which were smaller than his feet. When they found him with camels he had changed the slippers. He stated that they did not recover the complainant's slippers. He stated that they noticed that the appellant was shaky and asked them what they were doing but they called the chief. According to this witness, the complainant had described the assailant as a black person with a black vest, green kikoi, black coat and a broken tooth. The small kid also told them that the assailant had many camels, many of which were young camels. When they found the appellant he had 8 big camels and 8 young camels.

In cross examination, he stated that he did not call the young girl to see if the appellant was the culprit.

PW5 was F.B a young girl aged about 6 years. After being examined on his intelligence and understanding of the nature of an oath, the trial court decided that she should tender her evidence but not on oath. She stated that she lived with her mother and grandmother and the complainant who was her relative. It was her evidence that the complainant took care of goats near their home. One day as they took care of the goats together, a man came and greeted her and then proceeded to the complainant.

She ran away when she saw him jump on the complainant and hold her by the throat and sit on her legs. According to this witness, the same man later went and entered their home, drank water and jumped over the boma and then went away. She stated that she knew the appellant before. She stated also that the appellant wore a t-shirt and kikoi. The t-shirt was black and kikoi was green with white stripes and that his teeth were broken and that he was black in colour.

PW6 was Bishar Abdi Senei a livestock keeper. It was his evidence that on 21st July 2013, he went home and found his sister the complainant with injuries on the neck and her clothes torn. The complainant said that she had been defiled. He called Abdirahaman who informed the area chief about the incident. Elders came and with the Chiefs, they proceeded to the scene. He was later told that the suspect had been arrested and discovered later that he knew him as he had seen him 3 months earlier. According to him, the

appellant used to herd camels and cattle. He stated that the complainant said that the assailant was tall, black and one tooth was broken. He also stated that the complainant gave him the name of the appellant.

In cross examination, he said he stated that the complainant knew him and his father. He stated also that he did not have a dispute or a grudge with the appellant.

PW7 was Ali Hussein Abdi Chief Kukale Location. It was his evidence that on 21st July 2013 at 9pm, he was approached by elders who told him that a girl had been defiled. He saw the girl who was in bad shape. They went to look for another chief who gave them a vehicle. They went to the complainant's home with elders.

They divided themselves in two groups, one to take the complainant to hospital and the other to proceed to the scene. He was in the group that took the girl to hospital. He later went to the scene, and was told that footsteps had reached to the appellant's home and that the appellant wanted to cause chaos.

Together with others they went and took the appellant to the police station. It was his evidence that the complainant told him that the man was tall and black with a broken tooth. He stated that when they took the complainant to hospital they did not know that the culprit was the appellant.

PW8 was Muhumed Ahmed a chief of Lagbogol Location in Wajir town. He stated that on 21st July 2013 he was called and informed that a girl had been defiled and could not walk. He took a vehicle and, in the company of elders, they went to the home of the victim. He noted injuries on the eyes, neck and chest of the child. They took the child to hospital while others followed footsteps.

According to him, the victim said she was defiled and beaten and that she was able to identify the culprit though she had not seen him before. He together with two other chiefs took the girl to hospital and reported the case to police station. He stated that they learned the next day from elders at 11am, that the appellant had been found after following footsteps.

They then took the vehicle and proceeded and arrested the appellant who was looking after camels, though the appellant denied visiting the complainant's home, they took him to the police station. It was his evidence that the appellant had another case of defilement of a 70 year old woman which had been reported on 10th February 2013. They then went to the scene and found torn pieces of cloth which were blood stained. He did not know where the torn pieces of cloth came from.

In cross examination, he stated that no identification parade was conducted, and they did not call the small girl to identify the appellant.

PW9 was Muhumed Mahat Muhamud a Senior Clinical Officer at Wajir District Hospital. It was his evidence that on 22nd July 2013 the complainant was admitted at Wajir District Hospital with a history of sexual assault by a person known to her. She had blood stained clothing which were torn. She had red eyes and injuries on her eyes and neck. There were also bruises and blood stains on her vagina and her hymen was broken. (The appellant objected to the production of the P3 form by this witness).

PW10 was Sergeant Bernard Kibet of Wajir Police Station. It was his evidence that on 22nd July 2013 at 12.30am the complainant was brought to police station by the chief and members of the public. It was reported that a man had defiled her at 2pm on 21st July 2013 and assaulted her. The complainant said she was able to identify the person.

He recorded statements and referred the complainant to Wajir District Hospital. Later on the same day, the public brought the appellant whom they had arrested after following footsteps. He talked to the appellant who said that he did not commit the offence. He was aware that the appellant had a previous case of rape. He thus booked him and charged him.

He visited the complainant who was hospitalized for a week. He issued the P3 form, and identified the dress and a piece of cloth worn by the complainant during the incident, and produced the recovered clothes

as exhibits.

In cross examination, he stated that the appellant was arrested by members of the public, and that the complainant had described him as a dark tall man but did not know give his name. He stated that the complainant did not meet the appellant after the defilement.

In re-examination, he stated that the complainant described the assailant as a man who had cut his hair in a “box” style. She also said the assailant had a broken tooth and that those descriptions fitted the appellant. He stated that the complainant was in hospital when the accused was charged.

PW11 was Dr. Adan of Wajir District Hospital. He stated that on 22nd July 2013, he received the complainant and examined her with a Dr. Subdow, filled and put his stamp on the P3 form. He noticed blood stains on the clothing, underwear and dress of the complainant. According to him the complainant looked sick. He concluded that there was obvious penetration as the hymen had been broken. He produced the treatment notes and P3 form as exhibits.

In cross examination, he stated that he never met the appellant.

When put on his defence, the appellant gave sworn testimony and indicated that he would call one witness. In his sworn testimony he denied committing the offence and alleged a dispute over a plot which was grabbed by Mr. Ali Ibrahim who then decided to fabricate this case. He stated that the chief did an inspection parade and the complainant was brought where among 30 people, the complainant did not identify anybody until a woman beat her and told her she was told to say the assailant had a broken tooth. He said that the identification was done during the month of Ramadhan at around 1am and that it was done on 22nd July 2013.

In cross examination, he stated that he was a pastoralist looking after around 20 camels, some big some small in size. He denied seeing the complainant looking after goats but said he had seen her before at a well. He however did not know where she lived. He was aware that the complainant was his uncle’s daughter. He could not recall where she was on 18th February 2013, but admitted that there was a time he was detained for rape.

The appellant called a witness by the name Hussein as DW2. This witness swore that she was not the mother of the appellant which necessitated the court to allow other people to confirm she was indeed the mother of the appellant. In that process A.A testified on oath that the witness was the appellant’s biological mother. Another person Ali Issack also testified on oath that DW2 was the mother of the appellant.

Thereafter DW2 still maintains she was not the biological mother of the appellant. After a summons was issued to Chief Kukale to confirm the motherhood of the appellant, DW2 then admitted being the mother of the appellant by stating as follows:- “it is true that I am the biological mother of the accused”. She did not say anything else in evidence.

Based on the above evidence the learned magistrate delivered his judgment in the case.

This being a first appeal, I have to remind myself that I am required to re-examine the evidence on record and come to my own conclusions and inferences taking into account that I did not see witnesses testify to determine their demeanor and give due allowance to that fact. See the case of ***Okeno Vs. Republic [1972] EA 32.***

The appellant has raised a number of issues in appeal. In the main, he is contesting the credibility of witnesses and the proof of the offences on which he was convicted. He is also contesting the sentence which he considers to be harsh and excessive.

The appellant was convicted of two offences. Firstly it was defilement. Secondly he was convicted of grievous harm.

With regard to the offence of defilement the ingredients are that the victim be below the age of 18 years. Secondly, the prosecution is required to prove that there was penetration of a sexual nature. Thirdly the prosecution is required to prove that the appellant is the culprit.

The burden is always on the prosecution to prove an accused person guilty beyond any reasonable doubt. See the case of Woolington Vs. DPP [1935] AC.

Was the victim herein a girl aged below 18? The evidence on record is that she was aged 15 years. She did not state when she was born. Her father also did not state when she was born. Her mother did not testify in court. The medical evidence did not cover this suspect as no medical age assessment was conducted. The appellant however did not contest the age of the complainant. Even on appeal when he was represented by the counsel, the age of the complainant has not been challenged. In my view from the evidence and circumstances of this matter, I find that the age of the complainant was proved to be below 18 years and therefore an offence of defilement could have been committed against her.

The other important ingredient the prosecution have to prove beyond reasonable doubt is whether there was penetration. The evidence of the complainant is very clear that she was defiled after her clothes were torn. The clothes were produced in court as exhibits and were blood stained. She was taken to hospital immediately, admitted and found to have been forcefully defiled. There were injuries on her genital organs and the hymen was broken. Bleeding was also present. In my view penetration of a sexual nature did occur on the complainant. This element was proved by the prosecution beyond reasonable doubt. The only element remaining was the identity of the culprit.

There was another offence on which the appellant was convicted of. It was grievous harm. This offence could be proved by the prosecution establishing the type of injury suffered by the complainant and that the appellant was the culprit.

Indeed from the medical evidence the complainant was seriously injured and had to be hospitalized for five days. She had injuries on the neck, cheeks as well as the eyes which were red. Such injuries could have caused the complainant to have been hospitalized for five days were serious enough to constitute grievous harm, as they could as well have damaged the eye sight a limb of the complainant had it not been for prompt medical attention.

In my view, the prosecution proved beyond any reasonable doubt that the complainant was a minor girl aged below 18 years. They also proved beyond reasonable doubt that penetration occurred and that there was thus defilement. The prosecution also proved beyond reasonable doubt that the complainant was seriously injured in the incident and as a consequence she suffered grievous harm.

The question that begs an answer is whether the appellant was the culprit. The description given by the complainant about the culprit was not very specific. She said he was tall, black, and wore a black t-shirt and green kikoi and one tooth was missing. That description would fit anybody unless there were special circumstances.

The evidence of the prosecution witnesses, PW5, with regard to that description is contradictory because it appears that that description first came from a young girl (PW5) who testified but not on oath. She was not cross examined. She did not have an opportunity to see the appellant after the incident to identify him. In addition the appellant was arrested on the next day after tracing foot print and there was no indication that any attempt was made to conduct an identification parade by the police to confirm that the person who was arrested was indeed the culprit.

His slippers which were said to have been left at the scene also were not produced in court nor did anybody come to testify that he knew the description of those slippers and that they belonged to the appellant. Some of the prosecution witnesses such as the police and the Chiefs who assisted the complainant stated that the complainant did not give any description of the appellant which could be used to identify him. Admittedly this must have been the reason why a search for the culprit was conducted for a whole night using footprints and was continued the next day, before the appellant was arrested while

herding camels.

It appears that the appellant was arrested because there was a previous report on his having been involved in a sexual offence and also, because he was found herding camels which fitted the description given by the young girl of 6 years (PW5). He was not arrested because of a description given by any of the eye witnesses. In fairness to him an identification parade should have been conducted. I am sure the complainant could and should have been taken from hospital and taken to the police station to identify the culprit.

The fact that the witness who was called by the appellant turned out to be uncooperative, should not have been taken against the appellant. That witness did not say anything that would incriminate the appellant. In effect the appellant defended himself alone without the assistance of a witness. Therefore what the court should have taken into the account is the evidence tendered by the appellant alone which was on oath.

The magistrate stated that the complainant was in hospital when the appellant was arraigned in court. The complainant stated that a girl was called by the chief to identify the culprit among 30 people, but failed to identify any until she was beaten by a certain woman who told her that the person had a broken tooth. The magistrate was persuaded that since the complainant was in hospital she could not have gone to that identification.

In my view there is no evidence to suggest that the complainant herself could not be able to be taken to an identification parade organized by the chief and then taken back to hospital. She was perfectly conscious and could be transported by vehicle the same way she was transported by vehicle to the hospital. In addition the appellant did not say that the girl was the complainant. It could as well have been the little girl aged 6 years (PW5) who was called to identify the appellant by then because she was the first to give some sort of a description of the appellant. All this is not in favour of the prosecution case.

With these lapses in mind, I find that though the complainant was defiled and seriously injured that day, the prosecution failed to prove beyond any reasonable doubt that the appellant was the culprit. On that basis I find merits in the appeal. His conviction cannot thus be sustained.

I thus allow the appeal of the appellant, 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 20th day of January, 2016

GEORGE DULU

JUDGE