REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 91 OF 2015

(From original conviction and sentence in Criminal Case No. 1252 of 2014 of the Chief Magistrate's court at Garissa – M Wachira - CM).

S W .....APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with attempted defilement contrary to section 9(1) as read with section 9(2) of Sexual Offences Act No. 3 of 2006. The particulars of the offence were that in the night of 16th July 2014 in Bura Tana District within Tana River County intentionally attempted to cause his penis to penetrate the vagina of FJJ a child aged 15 years. In the alternative he was charged with indecent act contrary to section 11(1) of the sexual offences act No. 3 of 2006. On the night of 16th July 2014 in Bura Tana District within Tana River County, wilfully and unlawfully touched the vagina, buttocks and breasts of FJJ a girl aged 15 years.

He was charged together with one J M L the father of the complainant. The charge against J M L was failing to protect a child from harwful Cultural Rites contrary to section 14 as read with section 20 of the Children's Act 2010. The particulars of the offence were that on 16th July 2014 in Bura Tana District within Tana River County wilfully failed to protect a child namely FJJ a girl aged 15 years from Harmful Cultural Rites namely early marriage that negatively affected her life.

Both accused in the Magistrate's court pleaded not guilty to the charges. After a full trial, the appellant was found guilty of the alternative count of indecent act with a child and was convicted and sentenced to serve 10 years imprisonment. The father of the complainant was convicted of the offence of failing to protect a child from harmful cultural rites and was fined Kshs 30,000/- and in default to serve 6 months imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. I am informed that the father of the complainant has not appealed.

The grounds of appeal of the appellant are in summary as follows:-

1. The trial magistrate erred in convicting him without considering that the medical evidence was not conclusive as to whom in particular committed the offence.
2. The trial magistrate erred in law and fact in convicting him without considering that the second

accused was the one who approached and assisted him to marry his daughter.

3. The trial magistrate erred in convicting him without considering that the doctor's report and medical examination was contradictory and did not support the alleged offence.
4. The trial magistrate erred in convicting him without considering that no other witnesses came to court to prove what PWI claimed and as such the evidence remained that of a single witness.
5. The trial magistrate erred in convicting him by shifting the burden of proof to him in the Judgment.
6. The magistrate erred in convicting him without considering his defence which was to revert the prosecution evidence.
7. The trial magistrate did not consider that the charge sheet was defective.
8. The sentence was harsh.

The appellant also filed written submissions which I have perused and considered. At the hearing of the appeal the appellant relied on the written submissions.

Learned prosecuting counsel Mr. Okemwa opposed the appeal. He emphasized that the evidence of the key prosecution witness PWI was very clear and pointed to an indecent act. Her age was confirmed as being 15 years and the perpetrator of the indecent acts on the victim PWI was the appellant to whom the complainant was illegally married by the father who was also an accused person.

Counsel emphasized that the appellant spent two nights with the complainant and that he touched her breasts, vagina and buttocks. The trial magistrate was thus convinced that the alternative charge was proved. The appellant also did not deny that he purported to marry the complainant.

Counsel concluded by saying that the magistrate was lenient in sentencing the appellant to serve 10 years imprisonment.

In response to the prosecuting counsel's submissions the appellant said that he had nothing to add.

In brief the evidence of the prosecution was that of two witnesses PWI who was the complainant and PW2 a Police officer PC Koech. The evidence was that on 15th July 2014 the complainant was at the house of her uncle at Madogo by the name A when three girls including F her cousin, came and told her that they were taking her to F's house. They however took her to a house of an unknown person and told her that a man wanted to marry her. She resisted but they locked her inside the house and they went away. Later a young man came and opened the house and left the door open and the complainant went out to the house of F. She was later taken back by the same girls together with S W the appellant. The appellant then told her that he was the person who wanted to marry her.

The complainant went out again to the house of F but she was taken back and then a ceremony was arranged for her at her parents' home which she learnt was a marriage ceremony. After the ceremony she was taken to the house of the appellant who stayed with her for two days and touched her buttocks, breast and vagina but she resisted being undressed.

She then fell sick and was taken to Garissa General hospital after the first wife of the appellant threatened her. When she was later found with a piece of paper that had writing which indicated that it might be rat poison, the appellant took her to Madogo Police Station and reported that the complainant wanted to commit suicide. Investigations were thus commenced and the appellant was arrested by PW2 and charged with the offences.

In his defence the appellant gave unsworn testimony. He stated that he approached the second accused J M L and asked to marry his daughter. He said that J M L told him the child was 19 years old. Then J M L and other people went and forced J M L's daughter on him and when he rejected her, she took rat poison and because of that incident he asked his children to take her to hospital.

It is on the above evidence that the learned trial magistrate found that the appellant had committed the alternative count of indecent act.

This is a first appeal. As a first appellate court I am duty bound to reexamine all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see the witnesses testify to determine their demeanor see the case of ***Okeno -vs- Republic (1972) EA 32.***

I have reexamined the evidence on record. The prosecution called only two witnesses the complainant and the police officer PW2. The police officer stated that the mother of the complainant and the siblings and other relatives of the complainant, were reluctant to record witness statements and testify in court.

The appellant has complained that the charge was defective. I have perused the charge sheet and seen no defect on the same. I thus dismiss this ground of appeal.

The appellant has also complained that the magistrate erred in convicting him on the evidence of the complainant, without any supporting evidence from other witnesses. Indeed it was only the complainant PWI who testified relating to the commission of the offence. In the circumstances of this case however, it was not possible for anybody else to have witnessed the indecent acts committed by the appellant on the complainant. Both the prosecution and the defence stated and agreed that the complainant and the appellant slept in the same house for some days. As such the opportunity would have been there for the appellant to commit the offence, as he himself admitted that the complainant was there as his wife. I thus find that though the prosecution called only one witness to testify to the indecent acts, that evidence was sufficient and adequate to prove an indecent act.

The appellant has also complained about the medical evidence which did not prove that he committed the offence. I appreciate that the medical evidence or P3 form was irregularly produced by the police officer PW2, instead of a medical practitioner who could testify to its authenticity. However the offence the appellant was convicted of, was not defilement but indecent acts. Such indecent acts could not be proved through the entries in the P3 form. The proof required was merely on the basis of the evidence of the complainant, provided it was believable and was believed.

The appellant was convicted of committing an indecent act on a child who was aged 15 years. The evidence is not clear as to whether the complainant or anybody else told the appellant that the complainant was 15 years of age. The co-accused was defending himself when he referred to the age of the complainant and was an accomplice.

It doesn't come out clearly from the evidence on record that the appellant knew that the complainant was 15 years or that she was below 18 years, at the time he was alleged to have committed the offence. It must be borne in mind that the father of the complainant who was also a co-accused tried to give the complainant away in marriage as a second wife to the appellant.

In my view it would have been preferable that atleast one witness would state specifically that they brought it to the attention of the appellant that the complainant was below the age of 18 years at the time as sometimes girls of 15 years, depending on circumstances and body physique could look like actual adults of 18 and above.

The prosecution case or evidence in my view falls short of proving this important ingredient of the age of the complainant, considering that under section 11(2) of the Act, reasonable belief that a girl is 18 or above can in certain circumstances be a defence in sexual offences.. In my view lack of consent for the indecent act was proved. However the age of the complainant was not proved to be below 18 years.

Having found as above, I am of the view that the learned magistrate should instead have given benefit of the doubt and convicted the appellant for committing an indecent act with an adult contrary to section 11 A of the Sexual Offences Act.

I thus quash the conviction of the learned trial magistrate and also set aside the sentence. I substitute however a conviction for the offence of committing an indecent act with an adult contrary to section 11A

of the Sexual Offences Act and order that the appellant will pay a fine of Kshs 40,000/- or in default serve imprisonment for a term of three years from the date on which he was sentenced by the trial court.

It is so ordered.

Dated and delivered in Garissa this 20th day of July 2016.

GEORGE DULU

JUDGE