REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 93 OF 2014

(From original conviction and sentence of the Chief Magistrate's court at Garissa in Criminal Case No. 2067 of 2012 Garissa – B.J Ndeda – S.P.M).

B M S ....APPELLANT

V E R S U S

REPUBLIC ....RESPONDENT

JUDGMENT

The appellant was charged in the Chief Magistrate's Court at Garissa with attempted defilement contrary to section 9 (1)(2) of the Sexually Offences Act No. 3 of 2006. The particulars of the offence were that on 24th December 2012 in Bura District within Tana River County intentionally attempted to defile by pushing down and tearing the clothes, the full dress and pair of shorts of AJ a child aged 13 years. In the alternative, he was charged with 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 willfully and unlawfully touched the breasts of AJ a girl aged 13 years with his hands.

He was also charged with a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on 26th December 2012 in Bura District within Tana River County unlawfully assaulted Mohamed Godana occasioning him actual bodily harm. He was further charged with a third count of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on the same day and place unlawfully assaulted A B D occasioning him actual bodily harm.

He pleaded not guilty to all the counts. After a full trial, he was convicted of attempted defilement and the two counts of assault causing actual bodily harm. He was sentenced to serve 10 years custodial sentence on the offence of attempted defilement, and to serve 1 year imprisonment on each of the two counts of assault causing actual bodily harm. The trial court did not indicate whether the sentences were to run consecutively or concurrently, which means the sentences were to run consecutively.

Aggrieved by the decision of the trial court, the appellant has now come to this court on appeal on the following grounds:-

1. That the prosecution failed to prove their case against him beyond reasonable doubt.

2. It was not ascertained that the victim was a minor.

3. That the evidence of the complainant was stereo type, or appeared to be rehearsed.

4. The trial magistrate did not consider that crucial witnesses were not called to tender evidence.

5. That the prosecution case was full of contradictions and inconsistencies.

6. The defence was not considered though it was firm and reversed the prosecution evidence.

At the hearing of the appeal, the appellant tendered oral submissions. He stated that there existed a land dispute which was the reason why the complainants framed him with a girl. He stated that the totality of the evidence was not sufficient to justify a conviction. He stated also that his late father left him land which was the cause of the dispute and that all the civilian witnesses involved in the case were from the same family with him, and they wanted him imprisoned in order to inherit his farm.

Learned prosecuting counsel Mr. Okemwa opposed the appeal. Counsel said that initially the appellant faced a charge of attempted defilement and an alternative charge of indecent act which was later amended to bring in the charges of assault.

Counsel submitted that the complainant in the attempted defilement charge gave a moving story in her evidence that as she was herding goats, the appellant held her hand forced her to the grounds and removed her petticoat and inner wear and used force to tear her clothes in an attempt to defile her. She shouted and an uncle appeared and the appellant ran away. Counsel submitted the petticoat was produced in court as an exhibit, and PW2, and PW3 testified on how they assisted the complainant and gave a clear picture of the scene. Counsel said that corroboration in sexual offences was not mandatory and relied on the case of ***Makungu -vs- Republic (2002) 2EA 482.***

On the assault charges, counsel submitted that same should not have been brought through amendments of the charge but as separate charges. Counsel emphasized however that the appellant, who was armed, assaulted the two complainants occasioning them visible scars. The

Clinical Officer PW5 also confirmed the injuries suffered and P3 forms were produced as exhibits.

Counsel submitted further that the issue of land and boundaries did not feature in cross examination but was raised in the defence as an afterthought.

Counsel pointed out that though in the judgment the trial court referred to an offence of rape, such was a human mistake as the main offence was attempted defilement.

In brief the facts of the prosecution case are that on 24th December 2012 the complainant PWI AJ was herding goats alone when at around 12.30 Pm, the appellant whom she knew very well approached and held her hand, knocked her down and pulled off her clothes and pantie. He also tore her clothes and attempted to have sexual intercourse with her. She shouted but the appellant proceeded to put his penis on her vagina. However, in the nick of time as she shouted, an uncle appeared and the appellant ran away. The incident was then reported to Madogo Police Station and the appellant was later arrested. PWI stated that the appellant chased Osman with a panga and also threatened Abdillahi.

PW2 Abdillahi Bakero stated that he heard shouts, rushed to the scene and saw the complainant and the appellant struggling. On approaching, the appellant started running away thinking that it was the uncle but when he realised it was another person, he returned and threated Abdillahi. In a short while however, A B D PW3 the uncle of the complainant arrived and the appellant ran away.

The incident was reported to the police, and on the 26th December 2012 both PW2 and PW3 and the police with others, went to arrest the appellant. He assaulted them using his panga but members of the public managed to arrest him. The injuries suffered by PW2 and PW3 were classified as harm. This formed the basis of the two assault charges. The appellant was thus charged.

In his defence the appellant tendered sworn testimony. He said that he had a farm and fenced it on 26th Febryuary 2012. However Abdillahi Bakero enquired why he was constructing on his land. He later discovered that the fence had been removed. When he tried to put up the fence again, Abdillahi Bakero came and threatened him. The said Abdillahi Bakero then came with others and slapped him and many people beat him, and police came and shot in the air and arrested him.

This is a first appeal. As a first appellate court, I am required to re-evaluate 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 of seeing witnesses testify to determine their demeanor and give due allowance to that fact – see the case of ***Okeno -vs- Republic (1972) EA 32.***

I Have perused the record as well as the judgment. I have considered the submissions on both sides, as well as case authorities cited to me.

The first issue is whether crucial witnesses were not called by the prosecution to testify. The appellant has not given the identity of the said crucial witnesses. I do not find any crucial witness who was not called to testify.

The second issue is whether the evidence of the complainant was stereo type or appeared to be coached. In the circumstances of this case, I find that there is nothing to suggest that any witness was couched to testify. The complainant PWI was certainly not coached to testify against the appellant.

I observe that though the complainant was said to be 13 years of age, no witness other than herself testified regarding her age. She did not say when she was born. Her uncle PW3 A B D did not testify to her age. Nobody however has challenged the age of the complainant and in my view in the circumstances of the case, the age of the complainant was established at 14 years on 17th October 2013 when she testified in court.

The said witness also was not taken by the magistrate through the voire dire examination for minor children to find out whether she knew the importance of saying the truth and whether she understood the nature of an oath. This was a mistake on the part of the trial court, but I find no prejudice caused to the appellant.

With regard to the offence of attempted defilement, indeed the trial magistrate as stated by Prosecuting Counsel referred to it as rape. In my view also that was a curable mistake committed by the trial court in writing the judgment as the offence throughout was that of attempted defilement. The complainant could only be raped if she was above 18 years of age. The mistake of the trial court did not however prejudice the appellant.

The evidence of attempted defilement in my view was clear. The incident occurred in broad daylight. The complainant knew the appellant well before as a cousin. The appellant forcefully removed the complainant’s clothes and particularly the petticoat and the pant and used force to tear the same. The items were produced in court as exhibits. He knocked the complainant down and even placed his penison her vagina but because the complainant shouted PW2 Abdillahi Bakero approached and disturbed the situation.

The appellant attempted to run away but when he discovered that PW2 was not the uncle of the complainant, he came back and threatened PW2 and made a second attempt to defile the complainant. It was by chance that PW3 A B D the uncle of the complainant appeared and the appellant ran away armed with his panga while infact holding the petticoat of the complainant and dropped it because of the chase.

Though the appellant raised the defence of a land dispute, the evidence of the prosecution is so clear about the incident that it makes the defence of the appellant worthless. There is no relation between the alleged land dispute and the events described by PW1, PW2 and PW3. I find that the conviction of the trial court for the offence of attempted defilement was proper and I will uphold the same. The sentence was the minimum sentence provided by law.

With regard to the two counts of assaults causing actual bodily harm, I also find that the prosecution proved their case beyond any reasonable doubt. On the date of arrest, the appellant assaulted with a panga PW2 Abdillahi Bakero who was the complainant in the first assault count and PW3 A B D also a complainant, in the other count, when they attempted with the police and others to arrest the appellant. The appellant became violent and injured them in the presence of PC Mochama Zakaria PW4. The medical examination reports P3 forms produced by PW5 Nicholas Koech a clinical officer clearly described the injuries suffered by the two and classified them as harm. The P3 forms were filled by a Dr. Noor who was known by PW5 and had gone on study leave. In my view therefore the two counts of assault causing actual bodily harm were proved by the prosecution beyond any reasonable doubt. I will uphold the conviction.

With regard to sentencing, in my view because the offences though committed on different dates were related, and were tried in the same trial and one of the sentences was a minimum sentence, they should have been ordered to run concurrently. I will therefore order that the sentence for the offences of assault causing actual bodily harm will run concurrently with the minimum sentence for the offence of attempted defilement.

For the above reasons, I dismiss the appeal on conviction. I uphold conviction of the trial court. I order that the sentences of one year imprisonment for each of the two counts of assault causing actual bodily harm, will run concurrently with the sentence of 10 years imprisonment for attempted defilement. In effect, the appellant will serve at total of 10 years imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 16th day of September 2016.

GEORGE DULU

JUDGE