REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 98 OF 2015

MWENDWA MWANGI.....APPELLANT

V E R S U S

REPUBLIC .....RESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal Case No. 778 of 2011 – W. M. Murage – Ag.SRM)

JUDGMENT

The appellant was charged in the Senior Resident Magistrate's court at Mwingi with defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act of 2006. The particulars of the offence were that on the 3rd December 2011 in Mwingi District intentionally did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of MJ a girl aged 9 years. He was in the alternative charged with indecent act with a girl contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place committed an act which caused the contact of his male genital organ namely penis with the female genital organ namely vagina of MJ a child aged 9 years.

He denied both offences. After a full trial he was convicted of the alternative count of indecent act and sentenced to serve 15 years imprisonment. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the following grounds:-

1. The learned magistrate erred in convicting him on contradictory and un corroborated evidence.

2. The learned magistrate erred in convicting him yet the prosecution had not proved its case beyond reasonable doubt.

3. The magistrate erred in dismissing his defence and shifting the burden of proof to the appellant.

The appellant also filed written submissions to the appeal, which I have perused. At the hearing of the appeal the appellant relied on the written submissions and elected not to tender any oral submissions. He emphasized in the submissions that the doctor did not find any evidence of the allegation of defilement made against him and that he was charged because of an existing grudge, as the mother of the complainant who was his employer, had failed to pay him his salary for a number of months.

The learned Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that it was proved that the complainant or victim was 9 years old and that the appellant was the culprit. Counsel stated that though penetration was not proved, indecent act was proved. Counsel emphasized that the defence did not puncture the prosecution evidence.

In response to the Prosecuting Counsel's submissions, the appellant stated that he worked for the family of the complainant and was owed salary of 6 months. He stated that Pw1 and 2 were a mother and a daughter and that their evidence was contradicted by the evidence of Pw3.

In brief the prosecution evidence is that on the 3rd of December 2011 Pw2 the complainant, was at home when the appellant a herdsman of the mother of PW2, asked her to get into the bed inside her house. The appellant then removed the complainant's clothes and defiled her. Another 9 year old child Pw3 P M heard screams and entered house, When and the appellant then got off and moved away. A report on the incident was later made to the mother of the complainant Pw1 M M. The matter was also reported to the assistant chief and to the police and the complainant taken for medical treatment and examination.

The appellant was then charged with the offence after he was arrested with the assistance of the members of the public.

When put on his defence, the appellant gave sworn testimony. He stated that he was a herdsman of the mother of the complainant, working for a salary of Kshs. 1,500/= per month. He had worked for 5 months and was owed a salary of Kshs. 6,000/=. According to him, he was implicated with the offence because the complainant's mother wanted to avoid paying him his arrears of salary.

This being a first appeal, I am required 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. I have considered the submissions on both sides.

The appellant was charged with defilement, but convicted of indecent assault because the medical evidence did not establish that defilement occurred.

The evidence of eye witnesses was that of two minors Pw2 the complainant and Pw3 P M a cousin of the complainant. They were all at home and knew the appellant before as a herdsman. The incident was reported to the assistant chief on the same 3rd December 2011 and the appellant arrested by Pw5 PC Jackson Kirumba on 4th December 2011.

The medical report or P3 form was however filled on 23rd February 2012. From the documents in the file which were not produced at the trial, it appears that the appellant was treated at Mathare Hospital on 9th December 2013 for mental problems. That was after the trial commenced but before he was convicted on 3rd June 2014 and sentenced on 9th July 2014.

The appellant says that there was contradictory and un corroborative evidence from prosecution witnesses. Having perused the evidence on record, I see no contradictions in the evidence of the of the prosecution witnesses. I observe however that Pw3 P W was not examined by the magistrate to find out whether she knew the importance of saying the truth and whether she understood the nature of an oath. Her evidence therefore is not given in accordance with the Oaths and Statutory Declaration Act and shaky and in my view cannot be relied upon in the circumstances of this case.

The mother of Pw3 who was also the first person to be informed about the complaint was not called by the prosecution to testify. No explanation was given by the prosecution for such failure. This case is entitled to make an adverse inference – see the case of ***Bukenya –vs- Uganda (1972) EA 549.*** This in my view has left a big gap in the evidence of the prosecution.

It follows from the above that the only evidence relating to the eye witnesses of the incident was that of Pw2 the complainant who was initially stood down during the trial. She is not also the one who made the report either to her mother PWI or to anybody else. Even if a report was made to the assistant chief Pw4 Nicholas Mara on 3rd December 2011, there is no indication that that report was made by the complainant Pw2.

The evidence on record therefore is mainly hearsay evidence. It cannot be corroborative evidence. The

doubt created has to be given to the appellant and I do so.

There is nothing in the judgment which suggests that the learned magistrate shifted the burden of proof to the appellant. The learned magistrate merely weighed the evidence of the prosecution against the evidence of the defence and came to the conclusion that the prosecution had proved its case against the appellant. That was the correct approach, as Section 169 (1) of the Criminal Procedure Code requires that a trial court weighs the evidence of both the prosecution as that of the defence, before coming to its conclusion.

However, in my view, from the totality of the evidence on record and the sworn defence of the appellant, I find that the prosecution did not prove its case against the appellant beyond reasonable doubt and as such the conviction herein cannot be sustained.

Consequently 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 11th day of October 2016

GEORGE DULU

JUDGE