REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 24 OF 2015

DUALE AHMED.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the conviction and sentence in the Garissa Chief Magistrates

Criminal Case No. 1675 of 2011 – M. Wachira –CM).

JUDGMENT

The appellant was charged in the Chief Magistrates Court at Garissa with defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 10th September 2011 at [particulars withheld] Division [particulars withheld] Division within North Eastern Province intentionally and unlawfully caused his genital organ namely penis to penetrate genital organ namely vagina of KM a girl child aged 15 years without her consent. 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 offence were that on the same day and place unlawfully caused his genital organ namely penis to come into contact with the genital organ namely vagina of KM a girl child aged 15 years without her consent.

He was charged with a second count of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of offence were that on the same day and place unlawfully assaulted K M thereby occasioning her actual bodily harm.

He denied all the charges. After a full trial, he was convicted of the offence of defilement. He was discharged of count 2. He was sentenced to serve 20 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed initial grounds of appeal but before the appeal was heard, he filed amended petition of appeal and written submissions. The grounds of appeal are in summary as follows:-

1. That the magistrate erred in convicting him while the investigations did not establish the truth as the investigating officer was not summoned to adduce his evidence.

2. The magistrate erred in convicting him without considering that his identity was not established.

3. The magistrate erred in convict him without considering that the age of the complainant was not

proved beyond reasonable doubt.

4. The learned magistrate erred in convicting him without considering that no first report to the police about his recognition was made.

5. The medical evidence was dubious.

6. The trial magistrate erred in convicting him without considering that the prosecution did not prove their case beyond reasonable doubt.

In brief the prosecution evidence was that on the night of 10th September 2012 at around 8.00 Pm, the complainant Pw1 a primary standard 6 pupil was sent by her mother to get tea leaves from a neighbour. On the way back about 2kms from home, someone followed her from behind, held her by the neck knocked her down and removed her clothes. That person also undressed and inserted his penis into her vagina and then left, leaving the complainant was unconscious. When she gained consciousness, she rose and went home and informed her mother about the incident. The complainant said she knew the assailant who was a neighbour Duale Ahmed, and that there was moonlight that night. The complainant was later taken for medical treatment, and the appellant arrested and charged.

In his defence, the appellant gave unsworn testimony. He stated that he had been employed by one M M to herd livestock and they agreed that she would pay her one goat every 2 months and that he herded the goats for about 8 months and he was paid 2 goats. When he was informed that her mother had been admitted in hospital, he asked her employer to pay her for the extra 2 months but she failed to do so. According to him, that was the reason he was implicated with this offence, as the complainant was a sister of M his employer.

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 rely on the case of ***Okeno –vs- Republic (1972) EA 32***.

The Prosecuting Counsel Mr. Okemwa has opposed the appeal and stated that the complainant knew the appellant well so there could be no issue of mistaken identity. However the Prosecuting Counsel was of the view that age of the complainant was not proved beyond reasonable doubt as there were no documentary evidence tendered in court. Counsel was of the view that the 2nd count of assault was proved though the learned magistrate discharged the appellant on that count.

Having considered the evidence on record, and the submission of both the appellant and the prosecuting counsel, in my view the age of the complainant was not proved beyond reasonable doubt. She stated that she was 15 years, but no other evidence was tendered to support her allegation either documentary or verbal. She stated that she made a report about the incident to her mother. However her mother did not testify in court.

As such in my view, the age of the complainant was not proved. Since age was an essential ingredient of the offence of defilement on which the appellant was convicted, that failure of the prosecution to establish the age of the complainant alone means the conviction for defilement cannot stand.

The other problem or weakness of the prosecution case, is that the identification of the appellant as the culprit was far from positive. The complainant merely said that the assailant was the appellant. It was at night, 8.00 Pm. Visibility was poor. Though the complainant said that there was moonlight, she did not describe how bright the moon was that night. It is of note that she was attacked from behind, and also became unconscious.

Though the learned magistrate warned herself before relying on the evidence of single identifying witness, to convict, and cited the case of ***Maitanyi –vs- Republic (1986) KLR 196*** in my view the evidence of identification was not without the possibility of a mistake.

The other reason why this appeal will succeed is that crucial witnesses such as the mother of the complainant to whom the first report was made was not called by the prosecution to testify in court and no reason was given for the same. The investigating officer was also not called by the prosecution to testify and no explanation was given for such failure. The net effect of this created a big gap in the prosecution case and the benefit of the doubt so created has to be given to the appellant and I do so. I rely on the case of ***Bukenya –vs- Uganda (1972) EA 549,*** at page 550 where the court of Appeal for East Africa stated:-

> "***------- while the Director is not obliged to call superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there are other witnesses who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses if called would have been and would have tendered to be adverse to the prosecution case."***

The complainant might have been assaulted and possibly even defiled. However the evidence of the prosecution on record falls far short of establishing that the appellant was the culprit.

The appellant gave his version of the story saying that M M Pw2 was his employer who had failed to pay him his wages for 2 months. His story appears credible when weighed against that of the prosecution evidence. It is quite possible that he was framed. Since the burden is always on the prosecution to prove a case against an accused person beyond reasonable doubt, and an accused person does not have a burden to prove his innocence, the pendulum swings in favour of the appellant.

I find that the prosecution did not prove its case against the appellant on any of the charges brought against him. I will thus quash the conviction and set aside the sentence.

Consequently and for the above reasons, 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