REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 105 OF 2012

ISSACK ALI ISSACK……...……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Appeal from the judgment in Wajir S.R.A. Criminal Case No. 405 of 2012 delivered on 22nd October, 2012 (L. Kassam SRM)

JUDGMENT

The appellant was charged in subordinate court with attempted defilement contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 11th September 2012 at [particulars withheld] unlawfully and intentionally attempted to cause his genital organ to penetrate the vagina of JMH a child under the age of 14 years. In the alternative, he was charged with indecent act with a child contrary to Section 6(b) of the same Act. The particulars of offence were that on the same day and place unlawfully and intentionally touched the breast and vagina of the same child. He was charged with a second count of entering Kenya without a passport or permit Contrary to Section 34 (1) as read with Section 53(1)(j)(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of offence were that on the same day and place being an Ethiopian citizen, he was found present in Kenya without a passport or permit.

He pleaded not guilty to all the charges. After a full trial he was found guilty and convicted. The court did not specifically state the counts under which he was convicted. In sentencing however, he was sentenced to serve 20 (twenty) years imprisonment on count 1 and to be repatriated with regard to count 2. Dissatisfied with the decision of the trial court, the appellant brought this appeal. He filed his initial petition of appeal on 5th November, 2012. However, before the appeal was heard, the appellant tendered in court an amended petition of appeal as well as written submissions.

The amended grounds of appeal which the appellant relied on at the hearing are as follows:-

1. The learned trial Magistrate erred in convicting him while the charge sheet was defective.
2. The learned Magistrate erred in convicting him without considering that the trial was unfair since the language used was not favorable to the appellant.
3. The learned Magistrate erred in law and fact to convict him as there was no identification of the assailant.
4. The Magistrate erred in convicting him without considering that the mode of arrest was poorly done.
5. The learned Magistrate erred in failing to consider that the case was not investigated properly
6. The learned Magistrate sentence 20 years imprisonment was harsh and excessive.
7. That crucial witnesses were not brought to court to ascertain the allegations of the prosecution

8. That his defence was enough to revert the prosecution case.

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

The learned Prosecuting Counsel Mr. Okemwa conceded to the appeal with regard to count 1. Counsel urged that the conviction be quashed and the sentence thereon set aside. With regard to count 2, of being in Kenya without a passport or permit, counsel urged this court to confirm the repatriation order made by the trial court.

Specifically on count 1, the Prosecuting Counsel submitted that the charge was defective. Counsel submitted that the offence of attempted defilement was created under section 9(1) of the Sexual Offences Act. However, Section 8(1) (2) of the Act were wrongly cited in the charge sheet. In addition, the trial court relied on the wrong section of the law in the judgment. Counsel submitted that under section 89 (5) of the Criminal Procedure Code (Cap 75), the trial court had the discretion of either rejecting the charge or directing the prosecution to amend the same. None of these options was used by trial court. In effect, there was no valid charge.

Counsel also submitted that there was no P3 form produced in court. Counsel submitted that the absence of such a medical report was a fundamental defect in the proceedings, and as such the offence was not proved.

In response to the Prosecuting Counsel's submissions, the appellant stated that he did not commit any offence. He added that he did not have parents or a job.

The prosecution called three witnesses. PW1 was the complainant, a class six pupil aged 14 years. It was her evidence that on 19th September 2012 she was sleeping at home in a house with two of her siblings aged 4 and 2 years respectively. The mother Pw2, was also sleeping in the same house. At around 3.00am somebody came between her and the other two children. He attempted to remove her inner wear and she screamed. That person was arrested on the spot. He was the appellant. By the time of arrest the appellant had already attempted to remove her biker and pushed his kikoi up to his waist region.

Pw2 the mother of Pw1, stated that she was a miraa merchant. On the 10th of September 2012 she went to sleep at around 10.00 and the appellant came to her house. He told her that her relative Mohamed Chokaa had sent him there and that he was looking for a place to sleep. After finding out which clan he belonged, she told him to go and sleep in an iron sheet house in the same homestead. According to her that iron sheet house had two beds. The appellant then went to sleep in that house with her 16 year old son A K. At around 3.00am however, PW2 heard screams from the complainant. She then discovered that her torch had been switched off. She got out of bed and realized that the intruder was the appellant. Neighbors came and he was restrained and guarded by four men till morning when he was taken to the police station.

PW3 was PC Nabaso. It was his evidence that on 11th September 2012 a group of people reported that there was attempted defilement. He recorded statements from witnesses and charged the appellant with the offence. According to him the appellant was unable to produce either an identity card or any identification document. He was an Ethiopian.

When put on his defence, the appellant gave a long sworn statement. He stated that he had not gone to school and was merely a herdsman. That he used to chew miraa. On the day in question the mother of the complainant PW2, came with her brother and called him. She invited him to visit her. He bought miraa from her. She borrowed Kshs. 300/= from him and then requested from him 6,000/= loan to repay within 6 months. They went to her house. She gave her accommodation but told her to leave at about 3.00am. According to him, PW2 was the one who told him to go and sleep in the children's bed. He refused to sleep with the children and she gave him a mat to sleep under a tree outside. As he slept under the tree, he saw people shining torches at him. The complainant then said that a man had touched her head.

He could remember that he had met two men outside the complainants' mothers' house. One of those two left but one stayed on and they chewed miraa together. He did not know where this man had gone to. It was his defence that he was arrested and charged because he had disagreed with the mother of the complainant. He stated that both the complainant PW1 and her mother PW2 in slept in the house near the tree. He said that the allegations against him were lies. He was cross examined at length.

This is a first appeal. As a first appellate court I am a duty bound to evaluate the re-evidence on record and come to my own conclusions and inferences. **See the case of Okemo Vs. Republic (1972)EA32** . The Prosecuting Counsel has conceded to the appeal on count 1.

I have perused the record and the charge sheet. The Prosecuting Counsel has stated that the charge is defective because the statutory section covering attempted defilement under the Sexual Offences Act was not cited in the charge. Indeed section 8 was cited instead of section 9 of the Act. In my view the mere failure to cite the correct section of the law does not render the charge totally defective. The offence does exist under the law in the same Act. in my view, citing the wrong section was a mistake that is curable under Section 382 of the Criminal Procedure Code (Cap 75). Such a mistake did not cause any prejudice to the appellant or affect him adversely in his defence. **See the case of Fappyton Mutuku Ngui vs. Republic (2012)eKLR.** Even if the learned Magistrate did not either reject the charge or order its amendment, in my view no miscarriage of justice was occasioned upon the appellant.

The learned Prosecuting Counsel has also submitted that a P3 form was not produced, and as such the offence of attempted defilement was not proved. In my view, it is not a mandatory requirement that a P3 form should be filled and produced in cases of attempted defilement. Provided the evidence of the witnesses is clear that such attempt to defile was actually made, in my view a conviction can be sustained.

In the present case there is no reason why the minor child would frame the appellant. It is both the prosecution and defence evidence that the appellant and the mother of the complainant PW2 were together that night. It is also in the evidence of both the prosecution and the defence that they all ended up at the house of the PW2. It is also in the evidence of both the prosecution and defence that there were children sleeping in one of the houses of the homestead.

The only material variation between the evidence of the prosecution and defence, is that the PW2 claimed that she told the appellant to go and sleep in a nearby iron sheet house, while the appellant stated that she told him to go and sleep with the children and he refused and instead went to sleep outside under a tree. It is noteworthy that the said children included the complainant.

In my view, It is unthinkable that an adult mother would tell a stranger like the appellant to go and sleep in the same bed among female children. That was the line of defence of the appellant, which in my view was highly improbable.

In my view the defence of the appellant was an afterthought, and an attempt to shift blame. It was a long sworn defence, but it was not coherent or believable. He narrated a long story of being a house boy and how he was mishandled, instead of addressing the real issue about what he did in that homestead.

I appreciate that crucial witnesses, that is the neighbours who came to restrain the appellant at the scene, were not called by the prosecution to testify. However the appellant does not say nor is there a suggestion by any of the witnesses that he was arrested elsewhere. In my view therefore their evidence, though crucial is not likely to be different from that of those who testified in this case. As such I find that this court is not entitled to draw an adverse inference from the failure of the prosecution to call crucial witnesses to testify. The decision in the case of Bukenya vs. Uganda(1972)EA 549 is thus not applicable.

The offence in count 2 was proved as the appellant admitted that he was from outside the country, and did not have any valid documents. I will uphold the conviction.

I wish however to comment that while convicting, the trial court did not state the charge or charges on which the appellant was convicted and the section thereunder. The law required the trial court to do so.

Section 1698 the Criminal Procedure Code provides as follows in this regard- "169(2) in case of a conviction, the judgment shall specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted, and the punishment to which he is sentence." However since the court sentenced specifically on count 1 and 2, in my view that mistake was a mistake of form and he did not prejudice the appellant. There was thus miscarriage of justice.

The sentence and order of repatriation issued by the trial court were within the law. As such I will uphold them.

As a result, though the prosecuting counsel has conceded to the appeal on count 1, I do not agree that the learned magistrate was wrong. I find that the appeal lacks merit. I dismiss the appeal and uphold, convictions and sentence and orders of the trial court. Right of appeal explained.

Dated and delivered at Garissa this 17th February 2015.

GEORGE DULU

JUDGE

In the presence of:

Appellant in person

Mr. Orwa for state

Martin/Ahmed C/Clerk