REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 134 OF 2013

IBRAHIM HURIYE DEROW…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 22nd March 2012 at [particulars withheld] Refugee Camp in Dadaab District within Garissa County intentionally and unlawfully caused penetration with his genital organ penis into the anus of HMM a child aged 1 year and five months. In the alternative he was charged with indecent Act with a child contrary to Section II (1) of the same Act. The particulars of charge were that on the same day and place unlawfully and indecently assaulted JMM by touching her private parts (anus) of the child aged one year and five months.

He denied both counts. After a full trial he was convicted on the main count and sentenced to life imprisonment. He was also declared a dangerous sexual offender under section 39(1) of the Sexual Offences Act and put under supervision for not less than five (5) years in case he is released from custody.

Dissatisfied with the decision of the trial court the appellant filed the present appeal on 19/08/2013. on 12/06/2014 he filed an amended petition of appeal, which he relied upon. His amended grounds of appeal are as follows;

1. **The Magistrate erred in law and fact in convicting him without considering that the charge sheet relied upon was incurably defective.**
2. **The Magistrate erred in law and fact in convicting him without considering that there was no identification of the assailant by the complainant.**
3. **The Magistrate erred in convicting him without considering that the prosecution evidence was contradictory and inconsistent contrary to section 163 of the Evidence Act.**
4. **The Magistrate erred in convicting him without considering that the mode of arrest was poor since he was not arrested as a suspect for the alleged offence at the initial stage.**
5. **The Magistrate erred in convicting him without considering that the mother of the complainant did not adduce any evidence that would shed light on the prosecution allegations.**

The appellant also filed written submissions which he relied upon. He elected to make no oral submissions. I have perused and considered the written submissions of the appellant.

The learned Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that the

appellant was out to abuse the process of the court and to test the intelligence of the court. Counsel submitted that the appellant was initially tried by the subordinate court in criminal case no 461 of 2012. He filed an appeal in the Garissa High Court No. 51 of 2012 and the Judge ordered a retrial. He was then retried in criminal case no. 1600 of 2012 from which he has now appealed to this court. Counsel submitted that the findings of the first trial court were similar to the findings in the judgment from which the appellant had now appealed.

With regard to the alleged defect of the charge, counsel submitted that the fact that the words "**read with**" do not appear in the charge did not make the same incurably defective. Counsel submitted that it was adequate to have the relevant section and sub sections mentioned in the charge. Counsel emphasized that the victim was a child of less than two (2) years.

On proof of the offence, counsel submitted that the prosecution proved the offence of defilement beyond any reasonable doubt. Thought the child was too young to speak and tender evidence, the mother tendered evidence which was corroborated by the evidence of PW 2. Counsel submitted that PW 2 actually saw the appellant dressing up thus there was no possibility of mistaken identity. Appellant was also restrained at the scene. With regard to contradictions, as alleged by the appellant, counsel submitted that the evidence of PW 1 to PW 6 was consistent. In addition the report in the P3 form confirmed a tear in the victim and presence seminal fluid. The appellant was also examined and dried semen was found on the tip of his penis.

With regard to the mode of arrest, counsel submitted that the evidence on record showed no missing link between the commission of the offence and the arrest.

Counsel concluded by stating that the judgment in the trial court repeated comments from the previous proceedings. Counsel contended that though the High Court had frowned on the words "beastly act" the said comments by the trial court were appropriate in the circumstances of this case

In response to the Prosecuting Counsels submissions the appellant stated that he was not the one who committed the offence. He denied committing the offence or molesting a minor. He stated that refugees were implicated for no reason. He stated that he did the act to a grownup person, and so informed the trial court. These are the submissions on both sides.

The prosecution called 6 witnesses. The victim did not testify as she was too young to understand any language or even to speak.

PW 1 was the mother of the complainant. It was her evidence that she lived at [particulars withheld] in Dadaab. She was the mother of the victim, who was aged 2 as at the time of testimony which was 12/04/2013.

It was her evidence that on 22/03/2012 she left the victim with another small child in her refugee camp house. She informed a neighbor AS (PW3) to watch over the child. On coming back at 5 pm, she was informed by S A that the child had been defiled and taken to hospital. She went to the hospital and saw the child who was admitted for several days. She was informed that "Jeuri" whom she knew before, was the assailant. A report was made to Daghaley police station and P3 forms were issued and filled.

PW2 was S A M. It was his evidence that on 22/03/2012 PW1 left the victim in the house with the appellant. PW 1 told this witness that the appellant was sleeping and as such at midday he should confirm if the child was fine. When he went to check on the child at midday he found the child seated in front of the appellant who was dressing up. The child was crying. The child was bleeding from the private parts and the appellant informed him that he could not control what happened. PW 2 picked the child to hospital, and the appellant attempted to follow him but he managed to lock him in the house, block 6 where he was arrested.

PW 3 A S Y testified that at around 1pm on 22/03//2012 he met PW 2 running to the police station. PW2 informed him that he had locked the suspect inside the house PW 3 then picked the child victim who was

crying and they hired a taxi to the police station. The child was bleeding from her private parts.

Pw 4 O A N testified that he was a block leader at [particulars withheld] Refugee Camp. That on that day at 1pm, he was called by a watchman who informed him that a child had been defiled. He went to the scene and found the appellant in the house of PW 1. People had gathered and wanted to assault the appellant. He however restrained them and called a taxi to take the suspect to the police station.

PW 5 PC Edward Tunga was the Investigating Officer. He received the victim and suspect at the police station. He Issued P3 forms for the victim and appellant which were filled by the doctor.

The last witness was Dr. Abdulmalik Wanyama. He produced the P3 forms for the victim and the appellant which had been filled by a colleague Dr. Kevil Bidanga. The observations were that there was a tear to the anal opening of the victim and the presence of seminal fluid. Blood was noted in the anus opening. The appellant was found to have dried semen fluid on the tip of his penis. He produced both P3 forms.

When put on his defence, the appellant tendered unsworn testimony. He said that he was a miraa businessman. He stated that the mother of the victim (PW1) had a grudge against him because he had refused her love advances. She used to quarrel him whenever he passed by. That on material day some people went and grabbed him and alleged that he had committed an offence in PW 1's house. He denied committing the offence.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence on record and come to my own conclusion and inferences **see Okeno Vs. Republic (1972) EA 32.**

I have considered the evidence on record afresh.

The first complaint of the appellant is that the charge was defective. That the words “read with” to connect the sub sections of section 8 of the Sexual Offences Act were not included in the charge. In my view, that is no defect. Section 8(1)(2) and section 8 (1) as read with section (2) mean one and the same thing. Further there was no prejudice occasioned to the appellant. **See the case of Fappyton Mutuku Ngui Vs. Republic (2012) eKLR**. I dismiss that complaint.

The second complaint of the appellant is that there was no identification of him by the complainant. Indeed, the complainant (victim) did not identify him. The complainant was a child of 1 ½ years. She was too young to comprehend the occurrence of events, people or situations. She could not talk. It is thus true that the victim did not identify the appellant. However, PW2 clearly met the appellant in the house with the victim. The description given by this witness was adequate to identify and connect the appellant with the incident. PW 2 also locked the appellant in the house which enabled independent witnesses to come see him and take him from there. In my view, the appellant was positively identified as the culprit. He was seen by PW2 when dressing up with the child (victim) crying and was arrested from the same locked house. There was no possibility of mistaken identity.

The appellant has also complained that there were contradictions in the evidence of the prosecution witnesses and that the case was not proved against him beyond any reasonable doubt. With regard to contradictions, I find none. The evidence of the prosecution witnesses is consistent and corroborative. With regard to the proof of the offence beyond reasonable doubt, the appellant was left in the house with child victim by PW1. He was seen by PW2 dressing up when the child victim was near him crying and bleeding. He was locked in the same house and arrested from there. The medical evidence established a tear to the anus of the victim and bleeding. Traces of semen were also found on the victim. The appellant was also medically examined same day. He was and found to have traces of semen at the tip of his penis. In my view, the prosecution proved the defilement, as well as the fact that the appellant was the culprit.

Though the appellant stated in his defence that he was implicated by PW1, the evidence on record does not support that contention. The evidence was that PW1 left him sleeping in the house. PW1 was not at the scene when the incident occurred. The incident occurred between 12 noon and 1pm, and PW1 came

back at 5 pm. The appellant had by then been identified by other people as the culprit had been taken to the police. It cannot thus be said that the appellant was implicated by PW1 because he had refused to be her lover or to marry her. I dismiss the contention by the appellant. In my view the appellant's contention that he intercourse with an adult is an afterthought.

The appellant has finally complained about his mode of arrest. From the evidence on record, he was arrested in the house of PW 1 and taken to the police. It was during the daytime. No illegality was committed regarding the arrest. In my view, the arrest of the appellant was proper and legal.

Learned Prosecuting Counsel has raised concern on the reference to the incident as a "beastly act". by the two trial courts. Though different courts might hold different views on the appropriate language to be used, in the judgments, I find nothing wrong with describing the incident herein committed by an adult to such a young infant as beastly. The act could even have caused the death of the infant. It was certainly a senseless and inhuman act. Therefore, in determining sentence in my view, the learned Magistrate was right in describing the grave nature of the offence as being beastly.

The sentence is lawful and I will not interfere with the same.

To conclude, I find no merits in the appeal. I thus dismiss the appeal and uphold both the conviction and sentence of the trial court. Right of appeal explained.

Dated and livered at Garissa this 16 day of February, 2015

GEORGE DULU

JUDGE