REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 165 OF 2013

(From the original conviction and sentence by Chief Magistrate's Court at Garissa Criminal Case No. 499 of 2013).

N H H..... APPELLANT

V E R S U S

REPUBLIC..... STATE

JUDGMENT

The appellant was charged in the Subordinate Court with attempted defilement Contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 3rd May 2013 at Block [particulars withheld] in Lagdera Distict within Garrisa County intentionally attempted to cause his penis to penetrate the vagina on BGB a child aged 8 years. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the same Act. The particulars of the offence were that on the same day and place intentionally touched the vagina of BGB with his hands against her will. He denied both counts. After a full trial he was convicted of the main count and sentenced to serve 10 years imprisonment.

Aggrieved by the decision of the trial court, he has now appealed to this court. He filed his memorandum of appeal on 18th November 2013. Before the hearing of the appeal however he filed amended grounds of appeal, which he relied on at the hearing of his appeal. His grounds of appeal are as follows:-

1. That the trial magistrate erred in law and facts in convicting him without considering that the prosecution case was not proved beyond reasonable doubt as required under Section 109 and 110 of the Evidence Act.
2. The trial magistrate failed to consider that the evidence in support of the prosecution case was inconsistence and contradictory, and not was in incompliance with section 163(1) of the Evidence Act.
3. The trial magistrate failed to disclose the sex and language of witnesses with intent to hide the truth.
4. The trial magistrate erred by failing to adhere to the rules of voire dire examination when taking the evidence of the minor contrary to Section 19 of the Oaths and Statutory Declarations Act, hence the evidence of the complainant was full of inconsistences and was uncorroborated.
5. The magistrate erred in convicting him when very crucial witnesses were not brought to court to testify contrary to Section 150 of the Criminal Procedure Code.
6. That, the medical report failed to support the charge of attempted defilement.

The appellant also filed written submissions, which I have perused. At the hearing of the appeal, the appellant relied on his written submissions.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel emphasized that Section 124 of the Evidence Act did not require corroboration of the evidence of a single witness in Sexual Offences. In additional, counsel argued that the old requirement for corroboration of evidence of girls and women had now been held by courts to be unconstitutional.

With regard to crucial witnesses, who were not called to testify, counsel argued that the appellant had not identified any. Counsel submitted that the only witness who was not called had relocated to Somalia and could not be traced. The little boy who saw the appellant with the complainant could not testify. According to counsel, identification of the appellant was positive. Counsel also argued that there was no legal requirement for conducting a DNA test in Sexual Offences. Counsel argued that there was on evidence of the existing of a grudge between the appellant and the family of the complainant. Counsel further submitted that since this was a case of attempted defilement, proof of penetration and the production of a P3 form were not necessary. Counsel argued that the child victim was too young to give sworn evidence and as such her age was proved beyond doubt.

At the trial the prosecution called 4 witnesses. PWI was the complainant she tendered evidence but not on oath. She was however cross examined. It was her evidence that she was 9 years old. That on the date in question which she could not remember, the appellant whom she knew before took her on a motor cycle to Block [particulars withheld] at the refugee camp. They looked for her father but did not see him. The appellant then took the complainant to his house, applied oil on her and then defiled her. She testified that she was returned home by the appellant and that she informed the mother about the incident. She was thus taken to hospital for treatment. In cross examination, she stated that the appellant did not penetrate her but rubbed his penis on her vagina. She also stated that somebody by the name S saw the appellant returning her to her father's house.

PW2 was M A Y, the mother of the complainant. It was her evidence that the complainant, was her 3rd born child aged 8 years. That on 3rd of March 2013, she took her new born child for registration as a refugee. On her return home she was informed that the appellant, who was a nephew, had taken the complainant. When the complainant came back she had tears in her eyes and she noticed that her private parts had become red. She then took the complainant to hospital and a P3 form was issued. In Cross Examination, she stated that an auntie of the complainant saw the appellant return the complainant home. However that eye witness had relocated to Somalia.

PW3 was PC Joel Cheruiyot the investigating officer. It was his evidence that on 3rd May 2013 at 2.00 Pm, a report was made to the police regarding this incident. He issued a P3 form to the complainant and arrested the appellant from his house and charged him.

PW4 was Doctor Abdul Malik Wanyama who produced the P3 form. He stated that the complainant was examined by another doctor. The medical examination revealed that FGM had been done on the complainant. No tear was noted. However the hymen was missing. No spermatozoa was noted.

When put on his defence, the appellant gave sworn testimony. He denied the charge. He stated that he was arrested at home for no reason. He was not cross examined by the prosecution.

This being a first appeal, I am duty bound to evaluate all the evidence on record afresh 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. The complainant gave unsworn testimony. She was cross examined. That was a mistake. A witness who is neither sworn nor affirmed cannot be cross examined. The learned magistrate was therefore wrong in allowing the complainant to be cross examined.

The appellant was convicted of attempted defilement. The complainant testified that the appellant did not penetrate her, but only touched her. The witness who is said to have seen the complainant being returned home by the appellant was not brought to court to testify. The mother of the complainant stated that the witness had relocated to Somalia. The Investigating Officer did not say so. The prosecutor did not give any reason why they did not call that witness to testify.

In cases where the evidence of the prosecution merely establishes a weak case, if important witnesses are not called to testify then the court is entitled to draw an inference that the evidence of those witnesses if called would have tendered to be against the prosecution case. ***See the case of Bukenya – vs-Uganda(1972)EA 549.***

It was very important and crucial for the prosecution in this case to show through evidence that the complainant and the appellant were together or at least met during the time the offence was alleged to have been committed in the charge sheet. It was for the Investigating Officer to tell this court whether or not there was an important witness who was not called because of certain reasons. The Investigating Officer gave very short evidence. He was PW3 Corporal Joel Cheriot. On to the surrounding circumstances of the case he merely stated as follows:-

" We got information that the perpetrator was in his house. I and PC Owino went to his house. I arrested him, preferred the charges against accused in the dock. I did not know him before. I did not take him to hospital."

The investigating officer did not say that there was another person who saw the incident. It is not worthy from the evidence on record that the people who went to the police station to make a report were only the complainant and her mother. There is no indication that the mention of an eye witness was made. There is thus no record, other than what the mother of the complainant and the complainant stated in court, that there was a person who saw the complainant being dropped. The complainant also mentioned S only in cross examination. I find that if such a witness existed then, either the Investigating Officer or the Prosecutor should have explained her unavailability and the accompanying reason in court.

The eye witness was a crucial witness and her absence should have been explained buy either the Investigating Officer or the prosecutor. That was not done. I am constrained to give the benefit of the doubt to the appellant, by holding that the evidence of that witness would be prejudicial to the prosecution case.

As a result, I find that the conviction cannot be sustained. The sentence will also have to be set aside.

To conclude, I allow the appeal, quash the conviction, and set aside the sentence imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at Garissa this 18th day of June 2015.

GEORGE DULU

JUDGE