REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.1 OF 2011

From Original Conviction and Sentence by Senior Resident Magistrate at Wajir (Linus Kassan, SRM) in Wajir Senior Resident Magistrate's Criminal Case Number 182 of 2011

MOHAMED ISMAEL MOHAMUD……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

The Appellant, Mohamed Ismael Mohamud, was charged before the Senior Resident Magistrate at Wajir with attempted defilement contrary to section 8 (1) of the Sexual Offences Act. It is alleged that on 6th April 2011 at around 8.00pm in [particulars withheld] Location in Habaswein District within Wajir County attempted to do an act that could have caused the penetration of his genital organ penis into the genital organ of the D.Y, a girl aged 15 years.

He was charged with second count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. It is alleged that at the same place and on the same date and time as in count 1 he committed an indecent act with the same girl.

Facts

D.Y, PW1 aged 15 years, was sleeping outside their house with her younger sisters S, aged 8 years; S, aged 10 years and M, aged 12 years on 6th April 2011 when the Appellant attempted to defile her. The girls' mother S.M was away at the time. PW1 was woken by the Appellant groping her private parts and attempted to scream but no one came to her rescue. The Appellant escaped. The matter was reported at Habaswein Police Station and the Appellant later arrested and charged.

Evidence

Three witnesses testified for the prosecution. D.Y is the complainant. She testified as PW1, her mother S.M was PW2 and Police Constable Cosmos was PW3. PW2 was away on 6th April 2011. According to the evidence of PW1 she was with her sisters aged 8, 10 and 12 years but the three did not wake up. They did not testify. PW2 puts the date of the alleged offence as 6th June 2011 but this seems to be an error since PW3 said he saw the report of the alleged offence on the OB on 7th April 2011 at 8.00am when he reported on duty. He recorded statements of witnesses and arrested the Appellant. He testified that the dress alleged soiled with Appellant's semen got lost before it was produced as an exhibit.

In his defence before the trial court the Appellant stated that he was being victimized because he was an Ogaden while PW2 was a Degodia; that on the date in question he was at the trading centre walking when he was arrested and was informed of the alleged rape.

The trial magistrate was convinced that the charges were proved beyond reasonable doubt, convicted and sentenced the Appellant to 10 years imprisonment.

Petition of Appeal

By amended grounds of appeal filed on 28th October 2013, the Appellant has stated that:

1. The prosecution did not prove its case beyond reasonable doubt.
2. The prosecution evidence is contradictory and inconsistent.
3. That the identification of the Appellant was not established.
4. The Appellant's mitigation was not taken into account.
5. The charge sheet is defective.
6. The trial magistrate erred in not considering the Appellant's defence.

The Appellant has submitted in support of the grounds of appeal that PW1 testified twice and both statements contradict each other; that both sets of evidence remain on record; that she has contradicted herself by stating that she had a panty and again that she did not have a panty; that PW1 told her mother that her dress had been spoiled and not that someone had attempted to defile her; that PW1 said the Appellant was well known to her as he used to work for them while her mother denied that the Appellant had worked for them and that she did not know him well; that PW1 did not give the name of the Appellant as the person who attempted to defile her to her mother PW2 but told her that a man had attempted to defile her and that this is not normal for someone who knows another well; that the Appellant was not positively identified since the offence is alleged to have been committed at night; that the alleged spoiled dress was not produced as an exhibit; that the Appellant was not given a chance to mitigate and that the charge sheet is defective for not quoting the offence section and for not citing the time of the alleged offence.

Submissions by Respondent

The Respondent submitted that the prosecution discharged its mandate of proving the case beyond reasonable doubt and that the Appellant was recognized by PW1 and was spotted by PW2 running away.

Learned state counsel asked the court to pronounce itself on the sentence meted out in view of the error in citing the correct section under which the charge ought to have been drawn.

Determination

The duty of this court sitting on first appeal is to subject the evidence as a whole to fresh and exhaustive scrutiny before making up its mind whether to affirm the findings, conviction and sentence of the lower or to arrive at a different conclusion of the case **(see Dinkerrai Ramkrishan Pandya v. R [1957] E.A 336,** and **Shantilal Maneklal Ruwala v. R [1957] E.A 570.**

Starting with the charge sheet, it is true that the charge cites section 8(1) of the Sexual Offences Act. This section defines defilement and on its own is not complete without quoting the other sub-sections of section 8 which define the age of the victim and prescribe the penalty. Attempted defilement is found under section 9(1) of the same Act. To be complete, an offence of attempted defilement must quote sub-section 9(2) of the Sexual Offences Act because it defines the penalty.

However, my view on this issue is that the Appellant understood the charges and knew what he was charged with. He participated in the trial in a manner that suggested that he knew the charges facing him and the evidence is not at variance with the charge. There is therefore no prejudice to him and this error is curable by section 382 of the Criminal Procedure Code (**See also Criminal Appeal No. 296 of 2010**

Fappyton Mutuku Ngui v. Republic [2012] eKLR).

The trial magistrate was convinced by the evidence that PW2 saw the Appellant running away and that there was corroboration by PW2 on the shirt the Appellant was wearing. The trial magistrate found the charge under section 8(1) of the Sexual Offences Act proved beyond reasonable doubt.

The trial magistrate in my view was not alive to the fact that the charges were drawn on the wrong section of the law. The correct section for defilement is section 9 (1) and 9 (2) of the Sexual Offences Act.

The record of the lower court shows that PW1 testified twice. On 4th May 2011 she was subjected to *voire dire* examination and the trial court made a finding that she was to give evidence under oath. She was sworn and begun to give her testimony. She was stood down to allow the prosecutor to bring a dress meant for exhibit. When hearing resumed on 9th August 2011 the complainant was put to the stand again after another *voire dire* examination and another finding by the trial magistrate that she was capable of testifying under oath. This time she finished her testimony and was cross-examined. I cannot explain why the trial magistrate made such obvious errors!

The evidence of the complainant is contradictory. She told the court that she was wearing her panties the first time she testified. She also said the Appellant was known to her because he had gone to their home once to fetch water. In her second testimony she said the Appellant had taken sand to their home. PW1 said her mother PW2 came but does not specify whether her mother came at the time of the alleged offence or later and she does not say that her mother saw the Appellant running away from the scene. PW2 said she found her daughter crying and saw the Appellant running away. She also testified that her daughter told her that a man had slept near her and spoiled her dress with his semen. The said dress was not produced nor was any examination done on it to confirm this evidence.

PW1 said it was 9.00pm and she had been deeply asleep when she was woken up to find the Appellant groping her between the legs. She did not tell the court how she identified him. She said that she tried to scream but no one came. On cross examination she told the court that she did not scream but just quarreled with the Appellant.

I find the evidence inconsistent and contradictory. I also find it doubtful that PW2 found the Appellant at the scene. The identification of the Appellant by recognition is doubtful too given that there is no evidence to show how PW1 identified him given that it was at night. In my considered view the conviction of the Appellant is not safe. I also find that the trial magistrate did not carefully consider the evidence and casually handled this matter.

For this reason, I do hereby allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless for any other reason he is held in custody. I make orders accordingly.

Dated, signed and delivered this 27th January 2014.

S.N.MUTUKU

JUDGE