REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 39 OF 2013

MOHAMED MUSA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From original conviction and sentence at Senior Resident Magistrate's Court at Hola (M.O. Obiero, RM) in Criminal Appeal No 43 of 2010)

JUDGEMENT

Background

Mohamed Musa, the appellant, was charged with defilement contrary to section 8(1) 2 (sic) of the Sexual Offences Act. The particulars of this offence are that on the 24th February 2010, at [particulars withheld] in Ijara District within North Eastern Province unlawfully and intentionally caused his penis to penetrate the vagina of Z. M. A, a girl aged 9 years.

The appellant faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. It is alleged that on the same date and place as in the main charge, the appellant intentionally and unlawfully caused his penis to touch the vagina of Z M A a girl aged 9 years.

The case was subjected to full trial after which the trial magistrate found that there was proof beyond reasonable doubt on the main charge, convicted the appellant and sentenced him to life imprisonment. He has now appealed against that conviction and sentence.

Petition of appeal

The appeal was filed out of time with leave of this court. On 11th April 2013 the appellant filed what he refers to as amended petitions grounds of appeal (sic). He had not filed any petition prior to this date so this cannot be termed as amended. The petition is the first to be filed. In it the appellant has advanced eight grounds of appeal which I have reproduced here, poor grammar and all, as follows:

i. That the learned trial magistrate erred in law and fact in convicting me without considering that the alleged identification was not proved beyond reasonable doubts hence leading to mistaken identity.
ii. That the learned trial magistrate erred in law and fact in convicting me without considering that the mode of arrest was poor raising doubts whether the person arrested was the right person.
iii. That I was arrested 25 kilometres away from the scene of crime by armed people who ambushed me while relaxing under a shade and after interrogating me and finding that I was a stranger in that

area they opted to incriminate me with this case.
iv. That the trial magistrate did not consider that the description of dressing was given after I was arrested and exposed to the witnesses and PW1 and that there was no physical identification that could have led them to arrest the right person.
v. That there was contradiction and inconsistency in the prosecution case causing doubts.
vi. That the complainant said she did not know her assailant and she was not there when I was ambushed and arrested but only saw me when I was taken to the police station.
vii. That the trial magistrate erred in law and fact in shifting the burden of proof on me without considering that the prosecution did not meet the threshold of proof as required by law.
viii. That the identification parade which was the only crucial evidence relied on by the prosecution did not meet the criteria as required by the law.

When summarized, the grounds of appeal raise four major issues, namely:

i. Identification of the appellant as the person who defiled the complainant - grounds 1, 4, 6 and 8 raise the issue of identification of the appellant.
ii. Mode of arrest – grounds 2 and 3.
iii. Contradictory and inconsistent evidence – ground 5.
iv. Shifting the burden of proof to the appellant – ground 7.

Submissions

In his brief oral submissions, the appellant told the court that he was arrested on 25th April 2012 as he taking tea and tied with ropes; that the he was not told the reason for the arrest; that a girl was brought and told that I was the man who had defiled her; that the girl was brought where there were about 3-5 people and told to identify the suspect on a parade and she identified him; that he was arrested and taken to court where he found a red jacket and a kikoi which was said to be what he had been wearing and that he denied they were his.

The appeal was opposed by the learned state counsel. He submitted that the age of the complainant was not in dispute as it was confirmed by PW3; that under section 124 of the Evidence Act courts can convict on evidence of a single witness in sexual offences where victim is a child; that PW1's evidence was corroborated by that of the doctor who confirmed that PW1 had been defiled; that there are no discrepancies in the prosecution evidence; that the appellant did not advance any defence in the lower court; that the lower court properly convicted and sentenced the appellant and that the defects in the charge sheet, although not raised by the appellant, are curable under section 382 of the Criminal Procedure Code.

The appellant responded that he was sick when he was being tried hence the reason for not giving evidence in defence. He further responded that he was not identified by the clothes he was wearing.

Facts

Z.M.A, PW1 and the complainant, was herding goats on 24th February 2010 at about 10.30am in company of her younger siblings when a man attacked her. The man described as Somali was carrying a jerican and some luggage. He slapped PW1 on the cheek and pushed her to the ground and defiled her. The man left after defiling her. The attack was reported to R.M, PW2 and complainant's mother. PW2 enquired from the children who went home running where PW1 and was informed that PW1 had been attacked by a man. PW2 went to the scene and found PW1 lying on the ground. On checking her genitalia PW2 noted bleeding. She carried PW1 and went to report the matter to the police who referred her to hospital.

Following the description given to PW2 by PW1, PW2 went to tell her neighbour Hassan Mohamed Digale, PW4, who, in company of Amir Daud, PW5, followed foot prints from the scene to a place known as Warsame 25 kilometres from the scene. At Warsame they spotted a man seated under a tree who started running on spotting them approach. They chased him and arrested him. PW4 left the suspect

with PW5 and returned to a place called [particulars withheld]. In company of the police, PW4 returned to Warsame and showed the police the suspect.

The appellant did not testify in his defence. He told the court that he would leave it to court as he had no evidence to adduce.

Determination

Starting with the third issue in respect to the allegation that the trial court shifted the burden of proof to the appellant, this is not true. I have read the judgement of the lower court and I have satisfied myself that the trial magistrate analyzed the prosecution evidence fully and there is no indication that he at any time shifted the burden of proving this case to the appellant. There is no merit in this ground of appeal.

On the issue of contradiction and inconsistence of the evidence, I have noted contradictions in the description of the clothes worn by the appellant. PW1 testified that the person who attacked her was wearing a red cap, red jacket, black shirt and black kikoi. She stated further that the person carried a jerican without specifying the colour and that he also carried some luggage. She did not explain how the luggage was packaged. In court she was shown a red cap, red jacket, pink shirt, flowered kikoi and grey clothing material.

PW2 told the court that her daughter described the suspect as having worn black kikoi, red jacket, red cap, black plastic shoes, luggage covered in grey material and a white jerican. PW2 did not mention any shirt of whatever colour as having been mentioned by PW1. However, in court PW2 identified a red jacket, red cap, black flowered kikoi.

This description of clothing is crucial because it led to the arrest of the appellant.

PW4 said that PW1 had described to them the manner the suspect was dressed as red cap, red jacket, black kikoi, white five litre jerican and some luggage. In court he identified these items including a pink shirt. In his evidence he did not mention the pink shirt as being one of the clothes described to them by PW1 but he stated that they found the appellant wearing the clothes described by PW1.

PW5 said that PW1 described the clothes worn by the suspect as red cap, red jacket, yellow shirt, black kikoi, plastic pair of shoes and white five litre jerican. In court PW5 identified a red cap, red jacket, pink shirt, back kikoi.

Police Inspector Kimaru, PW6, produced as exhibits the red cap, red jacket, pink shirt, black kikoi and grey piece of cloth as exhibits 1 to 5 all inclusive respectively. The contradictions are noted in the colour of the shirt. The colour of shirt has changed from black as per PW1 to pink and even yellow by PW5. I have noted that the trial magistrate dwelt at length on this issue of the colour of the shirt and found that it did not go to the root of the prosecution case.

The complainant was found by the trial court to be credible and the court believed her evidence as truthful and based this conviction on the same after cautioning himself and taking into account the proviso to section 124 of the Evidence Act. This court did not have the benefit of observing the witnesses testify and therefore I will go by the view held by the trial court.

I have taken into account that PW1 is the sole witness on the issue of identity of the appellant. She described him as having worn a red cap, red jacket, black shirt and black kikoi. Shirts are clothing items generally worn under jackets and since the court was told that the suspect was wearing a red jacket not carrying. Therefore it is correct in my view to find that it may not have been possible for the complainant to clearly see the colour of the shirt worn by the assailant under the circumstances of the attack.

The description that remains a constant in all the evidence is the red cap and red jacket. The colour of the kikoi changed from black to flowered black kikoi. There was mention of a jerican by PW1 without stating the colour or the size. However the appellant was not found with a jerican.

To conclusively deal with this issue of contradictions in the description of the clothes worn by the assailant, it is important to consider all the other circumstances surrounding the identification of the assailant and the mode of arrest.

Pw1 did not know the person who attacked her. She said that she saw the man dressed in red cap, red jacket, black kikoi, black shirt and carrying a jerican and luggage. From the scene of the attack, PW4 and PW5 followed foot prints which led them to 25 kilometres away at a place known as Warsame. PW4 and PW5 did not describe the ground, was it sandy, rocky? How did they manage to follow footprints for 25 kilometres without losing track of them? This did not come out during the trial. However, after reaching Warsame, they spotted a man seated under a tree. On approaching the man spotted them and ran away obviously to escape. He was cornered in a manyatta and arrested. PW4 and PW5 told the lower court that the person was dressed as described by PW1. Evidence shows that the cap and jacket were red but the shirt was described as pink (PW4) and yellow (PW5). There was no jerican but the luggage was there as PW6 told the court that the appellant had other clothes in the luggage he was carrying.

The trial magistrate considered all these issues and was convinced that the appellant was positively identified. I take the view that PW1 gave a description of the person who attacked and defiled her. That description taken together with the footprints led PW4 and PW5 to the appellant. This took them from 2.00pm when they first got the report of the attack to 6.00pm when they found the appellant. The attack had taken place at 10.00am and that was enough time for the attacker to travel 25 kilometres away. The behaviour of the appellant on seeing PW4 and PW5 is relevant. He ran away obviously attempting to escape. Why would someone who was 25 kilometres away from the scene attempt to run away on seeing these two witnesses? My considered view is that the appellant was attempting to escape because he knew what he had done earlier that day.

I have cautioned myself on the sole evidence of the complainant on the identification of the appellant. I have taken into account the provisions of section 124 of the Evidence Act and the fact that the appellant was found wearing the red cap and the red jacket as well as the black kikoi. All these lead me to conclude that the appellant is the person who attacked and defiled PW1.

The age of the appellant is not in dispute. Her age is given in the P3 form as 9 years. There is no doubt that she was sexually assaulted as this has been confirmed by the evidence of Stephen Mwaniki, PW3, who examined her. Her mother, PW2, found her bleeding from the genitalia immediately after the defilement. This confirms without a doubt that she was defiled.

I have considered the evidence touching on the identification parade. This is a non-issue since the trial court rejected it.

In the end, my considered view after carefully re-examining and re-evaluating all the prosecution witnesses is that the appellant was positively identified as the person who attacked the complainant. The difference on the description of the colour of the shirt and the absence of the jerican does not go to the root of prosecution case especially after considering that the appellant was found wearing the red cap, red jacket and black kikoi. The appellant’s culpability is also reflected in his behaviour after PW4 and PW5 approached him.

I have considered the fact that the appellant did not offer any defence after the lower court put him on his defence. I am alive to the legal principle that the appellant does not bear the burden of proving his innocence but I note that during the hearing of this appeal, the appellant stated that he was sick and could not give his defence. This cannot be true because the record does not show this. The appellant did not inform the court that he was unable to given his defence because he was sick.

I wish to mention the manner in which the charge is drafted. It cites section 8(1) 2 of the Sexual Offences Act. The correct format would have been section 8(1) as read with subsection (2). However, this error is curable under section 382 of the Criminal Procedure Code.

Finally, I make a finding that the appeal has no merit and must be dismissed. The conviction is upheld

and the sentence confirmed. It is so ordered.

Dated, signed and delivered this 27th day of November 2013.

S.N.MUTUKU

JDUGE