



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 136 OF 2013**

**Appeal from the original conviction and sentence by the Acting Senior Principal Magistrate (C.A.S.MUTAI Ag SPM) in Criminal Case No. 248 of 2012 at Mandera Principal Magistrate's Court.**

OMAR MOHAMED IBRAHIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGEMENT**

**Background**

Omar Mohamed Ibrahim, referred to in this judgement as the appellant, was charged at Mandera Principal Magistrate's Court with attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act. The particulars of the offence are that on 24<sup>th</sup> July 2012 at Mandera Township in Mandera County intentionally attempted to cause his penis to penetrate the vagina of N K H a girl aged 14 years.

The case was subjected to full trial with the prosecution calling six witnesses in support of its case. The appellant was the only witness for the defence.

**Facts of the case**

N K H, PW1, a standard eight pupil aged about fourteen years travelled from her home (particulars withheld) to offices of Mandera Development Society situated in Mandera town to collect some money. She was told that money could only be released to her guardian. She left the place to travel to Bulla Jamhuriya Boys' Town to her uncle's home. She lost the way. She decided to ask for directions and knocked at the door of a certain house. The house was occupied by the appellant who appeared at the door. PW1 asked for directions and the appellant told her to wait for him to change his clothes. The appellant reappeared at the door wearing a *kikoi* and pulled PW1 inside the house. He threatened to kill her and undressed her leaving her wearing the inner dress. While holding a knife he demanded for sex from PW1 while holding her on the neck.

As the two were struggling the appellant's father arrived at the scene and PW1 got a chance to slip away. She ran into the home of S S, PW2, where the appellant followed her and demanded to have her back. PW1 refused to go with the appellant. The appellant was told to bring PW1's clothes which he did. This

commotion attracted neighbours making the appellant leave the scene. The matter was reported to the police and PW1 was issued with a P3 form. She was treated and the P3 form filled. In the meantime the appellant was arrested and charged with this offence.

The trial magistrate considered all the evidence and found the charge proved beyond reasonable doubt. He convicted and sentenced the appellant to 10 years imprisonment.

### **Petition of appeal**

By a petition of appeal filed on 21<sup>st</sup> August 2013, the appellant has listed twelve (12) grounds of appeal. These are self-made and badly drafted. To my understanding, the appellant is contesting that the complainant was a stranger to him and that he saw her first at the police station; that the complainant was lying that she had lost her way yet that was not the first time she travelled to the offices of the NGO; that the whole case is a conspiracy against him; that he was away at his brother's house at BPI and not at the scene on 26<sup>th</sup> June 2012; that the evidence is contradictory; that the trial magistrate relied on false evidence to convict.

The appellant's legal counsel Mr. Ingutya filed supplementary grounds of appeal on 8<sup>th</sup> November 2013 and urged this court to quash the conviction, set aside the sentence and set the appellant at liberty. He has listed six grounds of appeal summarized as follows:

- i. That there was no conclusive proof of the complainant's age.
- ii. That the ingredients of the offence were not proved.
- iii. That the evidence relied on was not corroborated.
- iv. That the case was not proved beyond reasonable doubt.
- v. That there were inconsistencies in the prosecution evidence.
- vi. That the benefit of doubt ought to have been given to the appellant.

Parties agreed to dispose of the appeal by way of written submissions.

### **Appellant's submissions**

Learned counsel for the appellant submitted that the prosecution did not prove the age of the complainant beyond reasonable doubt; that the dates given in the evidence, 14 and 15 years, are conflicting; that the birth certificate produced in evidence has no probative value as it does not show the date and month of birth; that the age assessment was not done to confirm the complainant's age and that failure by the prosecution to prove age of the complainant is fatal to their case. Learned counsel cited **Hilary Nyongesa v. Republic [2010] eKLR** where Justice Mwilu, as she then was, stated that age was such a critical aspect in sexual offences that it has to be conclusively proved. Counsel submitted that since age of the complainant was not proved beyond reasonable doubt, the conviction and the sentence of the appellant was baseless.

Secondly, it was submitted that the trial magistrate failed to conduct a *voire dire* examination on the complainant who was a minor. Counsel cited **Mwangi v. Republic in Criminal Appeal No. 471 of 2001 [2006] eKLR** where Justice Lesiit cited with approval the case of **John Muiruri v. Republic [1983] KLR 445** to emphasize the importance of conducting *voire dire* examination. Counsel submitted that failure to conduct this examination is fatal to the prosecution case.

Thirdly, it was submitted that the evidence is full of contradictions. The evidence of PW2 and PW3 is singled out as contradicting. Counsel submitted that PW2 and PW3 did not corroborate the complainant's evidence that she escaped to PW2's house then to PW3's house; that neither of the two witnesses seemed to have been aware that the complainant sought refuge in the other's house and each claimed to have escorted the complainant to the police station; that PW3 said that when she saw the complainant she was wearing a long dress and headscarf, yet the complainant said she did not have the headscarf; that the evidence of the two witnesses is not credible and a conviction cannot be based on it.

It was further submitted that the prosecution did not tender evidence to prove the attempted defilement as there is no evidence to show that the appellant attempted to penetrate the complainant. Counsel submitted that the evidence on record does not support the charge and therefore the ingredients of the offence were not proved.

### **Respondent's submissions**

The respondent opposed the appeal. Learned state counsel submitted that proof of age is not a requirement in a charge of attempted defilement under section 9 (1) of the Sexual Offences Act; that in any case the prosecution produced a birth certificate to prove age of the complainant.

It was submitted that the prosecution evidence was well corroborated; that the complainant's evidence is corroborated by that of PW2 who testified to seeing the appellant bring the complainant's clothes; that the complainant identified the appellant and in any case the evidence of the complainant was sufficient to base a conviction on as long as the court believed her evidence; that there was overwhelming evidence against the appellant to base a conviction on; that the appellant's allegation of a grudge are not true as was observed by the trial magistrate; that the complainant had bruises on her neck further corroborating the evidence that she had been attacked and that in the absence of a medical report to support allegations of insanity, the appellant is presumed to be sane under the law.

Learned state counsel urged this court to dismiss the appeal and uphold the conviction and sentence of the lower court.

### **Determination**

I have examined and analyzed the prosecution evidence afresh. I wish to state that I did not find the evidence contradicting in material facts and therefore I do not agree with the learned counsel for the appellant when he says the prosecution evidence was full of contradictions. I note that counsel for the appellant has misapprehended the evidence of PW2 and PW3. PW3, S M M, is the uncle to the complainant not the donkey cart puller as alleged by counsel. His evidence is clear that he lived in Bulla Jamhuriya Boys' Town. His evidence is that **"I am married to the complainant's aunt. Her mother is alive but her father is dead"**. In cross examination, PW3 said **"I was at a meeting at Arid Lands when the incident took place..... The complainant came alone. She went to the Mandera Education Development Society Office alone. We used to use taxi to take her there."**

That PW3 is the complainant's uncle is confirmed by the evidence of Mahamud Tifow Abdullahi, PW5, manager of Mandera Education Development Society, who testified that he called the guardian of the complainant one S M to go to the offices of the Society.

Simply put the evidence is that the complainant sought help to find directions to her uncle's home; the appellant pulled her into his house; he removed her clothes, according to her the appellant removed her underclothes and left her with inner long dress. She managed to escape to the house of PW2. There is evidence that she escaped first to the house of the donkey cart puller but ran out after the appellant followed her there. The donkey cart puller's name is not disclosed and I found no evidence from such a person. The complainant then ran into the house of PW2. She may have run out and back into this house. This is what she says she did. Although no other evidence supports her evidence I find that this anomaly does not affect the case in any material way.

PW2 confirmed that the complainant went to her house running and without her shoes, hijab and inner clothes. She told PW2 that someone was threatening to kill her. PW2 further confirms that the appellant followed the complainant and demanded to have her back from PW2's house. Let me capture the evidence of PW2:

**"When the complainant came over she was only wearing a long dress. She was not wearing her head dress/hijab nor was she wearing a petticoat and panties and was not wearing shoes (sic). She said that the accused had undressed her. I called the accused's parents. Later the**

**accused brought the complainant's clothes. The clothes which the accused returned was a headscarf and a white long trouser (sic). She wore these clothes in my presence."**

Further evidence from PW2 confirms that the appellant was known to her as a neighbour.

PW2 places the time as between 10.00am and 11.00am. On the other hand, PW3 came into the picture at 1.00pm when he returned from a meeting. He said he found the complainant crying. The complainant was with PW3's wives and children. He escorted her to the police station. I wish to correct counsel for the appellant that PW2 claims that she also escorted the complainant to the police station. PW2 said that two ladies and a boy escorted the complainant. I understood this to mean that they escorted PW1 to her uncle's home. PW2 said she went to the police station later to record her statement.

On the issue of age of the complainant, my reading of section 9 (1) and (2) of the Sexual Offences Act shows that age is not a factor for an offence under this section other than the requirement that the victim of the offence be a child. To my understanding the only requirement of age is that the victim be under eighteen years, this being the definition of a child under the Kenyan law.

I note that counsel for the appellant spent time and energy submitting on this issue. Had the offence been one under section 8, of the Sexual Offences Act, then his submissions would have been relevant.

What constitutes an offence of attempted defilement under section 9(1) of the Sexual Offences Act? There is sufficient evidence to show that the appellant bruised the complainant around her neck area. This evidence has been confirmed by the clinical officer Walter Kimutai Suter, PW4, who testified that the complainant had injuries on the neck with internal bleeding and scratch marks on the neck. This evidence corroborated PW1's evidence that the appellant held her by the neck as he threatened her and removed her clothes. There is evidence to show that PW1 clothes including her panties had been removed as testified by PW1 and PW2. The very act of pulling PW1 into his house where he was alone, removing her clothes and demanding sex from her or he kills her, chasing her to PW2's house and demanding for her leads me to conclude that the intention of the appellant was to have sexual intercourse with PW1. Since PW1 said that the appellant did not manage to have sex with her and this was confirmed by the clinical officer, the only logical conclusion was a charge of attempted defilement. I so find.

It was submitted that failure by the trial court to conduct a *voire dire* examination on the complainant is fatal to the prosecution case. Learned counsel for the appellant has submitted that the prosecution case must fail because the trial magistrate failed to conduct this examination. The requirement for a trial court to conduct this examination is based on section 19 of the Oaths and Statutory Declarations Act (hereinafter Cap 15). The requirement is to test whether a child of tender years understands the nature of oath so as to swear such a child before they testify or if such a child is possessed of sufficient intelligence to justify reception of his/her evidence and understands the duty of speaking the truth.

In the case of **Nyasani s/o Bichana v. Republic [1958] EA 190** it was held inter alia that failure to comply with the requirements of section 19 of Cap 15 may result in the quashing of a conviction when the other evidence is insufficient by itself to sustain the conviction. My understanding of this is that failure to conduct *voire dire* examination of a child of tender years may not of itself lead to quashing of a conviction where there is in existence other evidence on record sufficient enough to base a conviction on.

A child of tender years under the Children's Act is one aged 10 years and below. However, in **Kibangeny arap Kolil v. Republic [1959] EA 92**, the Court of Appeal held that a child of tender years is one aged 14 years (and below).

In the case before me there is controversy as to PW1's age. According to exhibit 2, the birth certificate, PW1 was born in 1998. There is no date and month and this led learned counsel to question its authenticity. Be that as it may, the evidence on record satisfies me that the appellant attempted to defile PW1. Other than her evidence, there is the evidence of PW2 who rescued her from the appellant. There is also the evidence of PW3 and the clinical officer.

The complainant was aged 14 years and over. My reading of her evidence has impressed me in the manner she was articulating what befell her. I find sufficient evidence to confirm that she was attacked by the appellant with the sole purpose of sexually assaulting her.

I conclude this issue by stating that failure of the trial magistrate to conduct a *voire dire* examination on the complainant does not affect the prosecution case given the ample evidence in support of the case.

Finally, I want to comment about the defence of the appellant. It cannot be true that he was away from the scene on the date in question. This defence must be an afterthought. He was seen at the scene by his close neighbour, PW2, as he pursued the complainant and demanded that she be released to him. I reject his defence.

I also reject his claim that there was a conspiracy to implicate him in this matter. PW1 did not know him before the date the offence was committed.

In the end, my finding is that the prosecution case has been proved beyond reasonable doubt. The appellant attacked the complainant with the intention of defiling her. I find his appeal lacks in merit and I hereby dismiss the same. It is so ordered.

**Dated, signed and delivered this 8<sup>th</sup> April 2014.**

**S.N.MUTUKU**

**JUDGE**