



REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 54 of 2012

ABDI MOHAMED ADAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. On 19th March 2012 Abdi Mohamed Adan (the appellant) was convicted and sentenced by Wajir Senior Resident Magistrate to serve 50 years imprisonment for the offence of defilement. The charge is drawn as follows: **Defilement contrary to section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 16th August 2011 at (withheld) in Mandera West District within Mandera County intentionally and unlawfully caused your penis to penetrate to the vagina of **F. K. S** a child aged 12 years (sic).

Grounds of appeal

2. The appellant is challenging the manner the charge is drawn and states that it is defective because it quotes the penalty section of the Sexual Offences Act and leaves out the section that creates the offence. He is also challenging the evidence generally and medical evidence in particular claiming that it does not support the charge. The appellant contends that the age of the complainant was not ascertained to guide the trial court in sentencing. Other issues raised by the appellant are that the case was not investigated. He claims that crucial witnesses were left out and that the appellant was denied a chance to mitigate, the sentence is harsh and the appellant was not positively identified. The appellant wholly relied on his written submissions to support these grounds of appeal.

3. While conceding that the section of the law quoted is wrong, the learned State Counsel opposed the appeal and stated that the errors in the charge can be cured by invoking section 382 of the Criminal Procedure Code and that the error did not occasion injustice to the appellant. He further submitted that the identification parade was not necessary since the complainant had recognized the appellant. On age assessment it was submitted that evidence in the lower court was adduced that the complainant was 12 years old and that the evidence of the prosecution was corroborated with the medical evidence confirming that penetration had taken place. It was also submitted that the appellant's footprints were followed up to his home.

Facts

4. **F. K. S** (PW1) narrated the sad story of what had happened to her on 16th August 2011. She told the lower court that she was herding family goats on that day at around 2.00pm when the appellant attacked her by hitting her neck and slapping her on the cheeks. The appellant is said to have knocked her down and stepped on her neck. He then proceeded to remove her clothes and used a knife cut her vagina. He then defiled her. She said that she attempted to scream but no sound could come out because the appellant was stepping on her neck. She said that the appellant left her bleeding. She reported the matter to her father **K. A. A** (PW3) who followed footprints to the home of one Baricho Salat where the appellant worked. The matter was reported to the police leading to the arrest of the appellant on 9th December 2011.

5. The doctor who treated PW2 said he examined her on 20th August 2011 which is four days after the offence. He testified that he observed blood stains on her clothes and that she was sick and very weak and had difficulties in walking. Her vulva was swollen and had a perennial tear which had mild bleeding. He concluded that penetration had taken place. This evidence confirms without a doubt that PW1 had been sexually molested. The doctor did not address the issue of injuries resulting from knife cut on PW1's genitalia.

6. The appellant denied committing the offence. He testified that on the alleged date of the offence he was away from the place the offence is alleged to have occurred. He said he was arrested while herding camels.

What are the issues?

7. The charge as drawn quotes the penalty section and omits the section that creates the offence. That is not all, the particulars of the charge are not crafted in terms of section 8 (1) of the Sexual Offences Act which states that **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."** Penetration is defined as **the partial or complete insertion of the genital organs of a person into the genital organs of another person.** Instead the particulars of the offence read that **"on the 16th August 2011 at (withheld) in Mandera West District within Mandera County intentionally and unlawfully caused your penis to penetrate to the vagina of F. K. S. a child aged 12 years (sic)."**

8. The record of the proceedings in the lower court show that the appellant fully participated in the trial and cross examined all the prosecution witnesses. He also gave his defence. It is my view that the appellant fully understood what offence he was facing. The Court of Appeal in **Yongo vs. Republic (1983) KLR 319** held that a charge is defective under section 214 of the Criminal Procedure Code where:

a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

b) It does not, for such reasons, accord with the evidence given at the trial; or

c) It gives a misdescription of the alleged offence in its particulars

9. In my view the evidence adduced during the trial of this case establishes without a doubt that the offence of defilement was disclosed. Other than adding the words intentionally and unlawfully, the wording of the charge as drawn does not seem to be at variance with section 8 (3) creating the offence, the only anomaly being that the section cited is 8 (2) instead of 8 (3). In addition to this the appellant fully participated in the trial and cross examined the witnesses and testified in his defence denying that he committed the offence. In view of this it is my considered opinion that the charge is not defective. Although it cites a different section of the law, which I would attribute to error in drafting, the appellant participated in the trial knowing very well the charges he was facing. There is no injustice occasioned to the appellant. Therefore, this ground of appeal has not merit and must fail.

10. In her evidence, PW1 told the trial court that she was twelve years. This is the same age indicated on the P3 form. No other evidence on her age was adduced either by the father or any other witness to support her evidence on age. The trial magistrate did not address this issue. He gave it a cursory mention in his judgement by repeating that the complainant was twelve years of age. My view is that this is not enough to prove the age of the complainant. Although proof of age does not have to be by documentary evidence (birth certificate or clinic cards) whatever other mode of proof must be disclosed in evidence. In this case there is no such evidence and therefore as the case stands the age of the complainant has not been established. I will return to this issue before concluding the judgement.

11. The appellant submitted that crucial witnesses including the elders, Baricho Salat the owner of the home where the footprints terminated and investigating officer were not summoned to testify for the prosecution. My understanding of the evidence in the lower court is that this case was not investigated. The only evidence from the police is that of PW2 PC Mwamburi from Takaba Police Station. His testimony in court touched on the arrest of the appellant and nothing else. I agree with the appellant that the case was not investigated. If any investigations were carried out this did not come out in evidence. Although the case for the prosecution is not rendered a nullity for failure to call the investigating officer, this witness is vital in cases where there are gaps in evidence. In my view for a case like this one where evidence leading to the arrest of the suspect relies on the trail of footprints or sandal prints that terminated at the home of one Baricho Salat, it required further evidence by the investigating officer in respect of the identity of the person who made those prints. This is made more complicated given that there were many people at the homestead where the alleged prints terminated. I agree with the appellant that crucial witnesses were left out. These include the owner of the home where the prints terminated, one Baricho Salat and the elders found in his home and the son of Baricho one Abdullahi who is mentioned as giving PW3 directions as to where the camels had been taken to graze. These witnesses were crucial to prosecution case given the existing gaps. In the case of **Michael Kinuthia Muturi (CA) -V- Republic** Criminal Appeal No. 51 of 2008 Court of Appeal (Nyeri) held:-

“Although no particular number of witnesses is required to prove a fact the failure to call certain witnesses in instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However in the instance case, the evidence on record was sufficient and therefore the omission by the prosecution to call the elders and the Investigating officer attracted no adverse inference”.

12. **Further on this point the court in BUKENYA & OTHERS VS REP., [1972] E A**, held that:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

13. It is true that the trial magistrate did not give the appellant a chance to mitigate. After the prosecutor addressed the court that there were no records on previous convictions in regard to the appellant the court went straight to sentence him. I wish to point out that a trial is not complete until the accused is sentenced making sentencing part of the trial. Mitigation of the accused ought to be taken into account because this is an element of a fair trial (**see Godfrey Ngotho Mutiso v. Republic Criminal Appeal No. 17 of 2008**). The trial magistrate failed to adhere to section 329 Criminal Procedure Code to give the appellant a chance to mitigate before sentence and in so doing denied the appellant fair trial.

14. I now turn to the issue of identification of the appellant as the person who defiled the complainant. I have stated elsewhere in this judgment that there is ample evidence to prove beyond all reasonable doubt that the complaint was defiled and badly injured. The unresolved issue is the identity of the person who committed this heinous crime. PW3 the father of the complainant testified to following prints of his goats to a place he suspected to be the scene of the crime because he said he found traces of blood on the ground. He then followed the foot/sandal prints to the home of one Baricho Salat. This was done the following day 17th August 2011 around 5.00am before the prints were disturbed. He found 20 people at Baricho's home. He told the court that some of the people looked at the prints and were satisfied with the print (this was not explained and it is not clear what the people were satisfied with). He brought the

complainant to that home with a view to identifying the person who had defiled her but she did not find the person among the 20 present. It is noteworthy that none of these people testified in court and therefore the court did not benefit from their evidence.

15. The appellant was not arrested until 9th December 2011 about four months later. The complainant told the court that she spotted the appellant herding camels at a different place from where she had been defiled. She was at the time herding the family goats. She said that when she saw him she was not afraid of him although they passed each other and he saw her. She told her father who went to inform the police. Thereafter the appellant was arrested. It is worth noting that the complainant described the appellant as a black man with shaven black beard dotted with white hair. This is evidence of a single witness. Although it was during the day (2.00pm) it is possible for a witness to be mistaken. The complainant suffered horribly and perhaps she may be traumatized for life. However the culprit ought to be positively identified. There are gaps in evidence in respect to the identity of the person who defiled the complainant. PW3 went to great length to describe the prints he followed to the home of Baricho but these prints were not traced to the appellant. I also find it highly unlikely that the complainant could meet the person who subjected her to such horror and not be scared of him or that the person does not attempt to escape. Four months are a long period and even a truthful witness could be mistaken on the identity of a suspect. The evidence on the circumstances surrounding the identification of the appellant as the person who committed this offence required corroboration. The trial court ought to have addressed its mind on the dangers of basing a conviction of the identification of a single witness in circumstances such as the ones in this case.

16. The trial magistrate seems to shift the burden of proof to the appellant when he stated that the appellant did not call evidence to support his defence of alibi. The relevant section of the judgment reads:

“The accused claimed that he was in Kotulo and moved to other areas during the alleged date of defilement. He did not call a single witness. He did not call Mr. Salat who was his employee or other people in Salat Boma. His alibi cannot challenge prosecution strong evidence.....”

17. The trial magistrate ought to have taken into account the fact that an alibi is a specific defence and the burden of proof never shifts to an accused person to prove his alibi. It is the prosecution who ought to prove the defence of alibi wrong. In Said v Republic [1963] EA 6 it was stated that:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable”

18. After re-examining the evidence adduced in the lower court and re-evaluating the same, I agree with the appellant's grounds of appeal challenging lack of evidence to prove age of the appellant, lack of investigations in this case, failure to be allowed to mitigate and evidence on identification. For the reasons given in this judgement I reach a conclusion that the conviction of the appellant was unsafe. The appeal is hereby allowed with the consequence that the conviction stands quashed, sentence is set aside and the appellant is set free unless there is any lawful reason why he should remain in custody. Those are the orders of this court.

S. N. MUTUKU
JUDGE

Dated, signed and delivered this 27th February 2013 in open court in the presence of the appellant and Mr. Mulama for the State.