REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 36 OF 2013

AHMED IBRAHIM ADAN……………………………………...…………………APPELLANT

VERSUS

REPUBLIC…………………………………………………………………RESPONDENT

APPEAL FROM ORIGINAL CONVICTION AND SENTENCE BY SENIOR RESIDENT

MAGISTRATE AT MANDERA (R.ODENYO, SRM) IN CRIMINAL CASE NO. 132 OF 2009

JUDGEMENT

Background

The appellant, Ahmed Ibrahim Adan, was charged with defilement of a child contrary to section 8 of the Sexual Offences Act. It is alleged in the particulars that on the 7th day of June 2009 at about 1800hours at [particulars withheld] of Mandera East District within North Eastern Province jointly with another not before the court, unlawfully penetrated S M M (particulars withheld) a girl aged 14 years.

The appellant denied the charges and the case was subjected to a full trial after which the trial magistrate found the offence proved and sentenced the appellant to 14 years imprisonment.

Petition of appeal

The appellant is aggrieved by this conviction and sentence and has preferred this appeal. Initially the appellant had filed on 15th August 2012 his petition of appeal with four grounds. With leave of this court, he amended his appeal on 24th July 2013. In this judgement, I have captured both sets of grounds of appeal which I have understood as follows:

i. The charge is defective.
ii. The evidence is inconsistent and defective.
iii. The case was not proved beyond reasonable doubt.
iv. The appellant’s defence was not considered.
v. The age of the complainant was not ascertained.
vi. Crucial witnesses were not summoned to testify.
vii. The case was fabricated due to a grudge.
viii. The investigations were poorly conducted.
ix. The appellant was not medically examined or his DNA profiled.

Submissions

He has submitted that the charge reads that two people defiled the complainant which is not possible unless it is gang rape; that the charge is brought under section 8 of the Sexual Offences Act without citing the subsections that give the definition and penalty of the offence and that this was prejudicial to him.

He has submitted that the age of the complainant was not ascertained nor assessed and therefore the prosecution did not discharge the burden of proving the age beyond reasonable doubt; that the owner of the pharmacy and the step mother of the victim were not called to testify; that the investigations were not properly carried out and the appellant was not examined by a doctor. The appellant is asking the court to quash the conviction, set aside the sentence and set him free.

Counsel for the respondent opposed the appeal. He submitted that the age of the complainant was given as 14 years and this was corroborated by PW4; that age can be proved by evidence other than the birth certificate; that courts have a discretion to summon or not to summon witnesses and the prosecution decides which witness is crucial to their case; that section 124 of the Evidence Act allows courts to convict on evidence of a single witnesses in sexual offences where the victim is a child; that the evidence of PW1 is corroborated by that of PW2, PW3 and PW4. Counsel further submitted that section 36 of the Sexual Offences Act ought to be read together with section 26 (2) of the same Act and it is discretionary on the court. Counsel urged this court to be guided by **Criminal Appeal No 203 of 2009 Alfayo Gombe Okello v. Republic** on the issue of defective charge and cure the same under section 382 of the Criminal Procedure Code.

Determination

Alive to the duty of this court while sitting on first appeal to examine and analyze all the evidence adduced in the lower court afresh with a view to making its own independent conclusion, I now wish to determine the issues raised in this appeal.

It is true the charge was brought under section 8 of the Sexual Offences Act without specifying the sub-section that gives the age of the victim. It reads as follows:

Defilement of a child contrary to section 8 of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are given thus:

On the 7th day of June 2009 at about 1800Hrs at [particulars withheld] of Mandera East District within North Eastern Province jointly with another not before court unlawfully penetrated S M M. (particulars withheld**) a girl aged 14 years.**

Section 8 defines the offence known as defilement. Section 8 (2), (3) and (4) specify the age of the victim of defilement and prescribe the sentence upon conviction that where the victim is aged elevens years or less; where the victim is aged between ages twelve and fifteen years and between sixteen and eighteen years respectively.

This was an error that the trial magistrate left un-addressed by calling for amendments of the charge sheet as allowed by law. I have given this issue due consideration in view of Section 134 and 137 of the Criminal Procedure Code. I find that the charge contains a statement of the specific offence together with such particulars necessary for giving reasonable information as to the nature of the offence charged. Of importance to this court is whether the appellant understood the charge he was facing and defended himself accordingly; whether the appellant was prejudiced during the trial in the lower court and whether the trial magistrate apprehended the charge the appellant was facing. In my view the appellant understood what he was being tried for and cross examined the witnesses in a manner that indicates that he understood the charges.

The trial magistrate in his judgement was of the view that the offence proved before him was defilement as stated at the conclusion of the judgement:

> **"In conclusion I do find that the prosecution has proved his case against the accused person beyond all reasonable doubt. Accordingly I do convict the accused person with the offence of defilement as charged."**

What the trial magistrate failed to do is to appreciate the age of the victim in order to determine the sentence to impose. This is reflected in his sentence. He sentenced the appellant to serve a jail term of fourteen years. Section 8 (2) of the Sexual Offences Act under which the appellant ought to have been charged provides a sentence of not less than twenty years.

Secondly on the issue of defective charge, the appellant has raised the issue that he was charged jointly with another and the correct charge would have been gang rape and not defilement.

The appellant is correct. The evidence shows the complainant was defiled by two persons in turns. The complainant, S M M, PW1 did not testify to being defiled by two persons but she told the court that the appellant was with another boy called Abdihakim Hassan Madey. She told the trial court that **"I and Ahmed fought…… Accused was with another boy called Abdihakim Hassan Madey."** In her evidence there is no indication that Abdihakim defiled her. The relevant part of her evidence on this is issue is captured as follows:

"Accused hit me using his fists on my cheek. I fell down on my back. Accused came on top of me tore my dress…… I was also wearing a short trouser as inner wear. Accused struggled with me to remove it. In the process I lost consciousness. The pant I wore tore…… Later when I regained consciousness, I found myself at a pharmacy. I was under a lot of pains in my private parts and loins."

She had no idea that two people were involved. The evidence of A M H Borne, aged 12 years who testified as PW2 and M D aged 13 years, PW3, brings out this evidence. They testified that they were near the river where PW1 was drawing water and they saw what happened. Both PW2 and PW3 told the court that they saw the appellant, whose name they did not state, knock the complainant down and lie on top of her and after he was done the other boy the two witnesses named as A took his turn. They told the court that they ran to PW1's home to report that she was being raped but on going back they found PW1 sprawled on the ground where she had been defiled but the two boys (appellant and A) had left. These two were minors but the trial court examined them before they testified and was satisfied that they should testify under oath. I have read their evidence and although I did not observe the two boys testify, they seem intelligent and their evidence is precise.

After due consideration of this evidence, it is true in my view that the offence committed was gang rape as defined under Section 10 of the Sexual Offences Act. Police Constable Bonaya Mzungu, PW5, testified that after recording statements of PW1, PW2 and PW3 he proceeded to look for the second suspect. He did not find him as he had escaped. It seems that police did not make efforts to track down the second suspect. Police too failed to prefer the correct charges against the appellant.

On this ground I do not agree with the appellant that the charge is defective for quoting section 8 of the Sexual Offences Act without specifying the sub-section. This error in my view is curable under section 382 of the Criminal Offences Act. On that point I also find that the appellant was not prejudiced.

However, there is more to the charge preferred against the appellant. It was brought under the wrong provisions of the law. It ought to have been brought under section 10 of the Sexual Offences Act which states as follows:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

I have agonized over this issue. I have considered the evidence of PW1, PW2 and PW3 and find it supporting a charge of gang rape contrary to section 10 of the Sexual Offences Act. I have also considered the evidence of Dr. Mohamed Abdilla, PW4, and I find it corroborating that of PW1, PW2 and PW3 that PW1 was defiled. Her hymen had been broken and she was bleeding from her genitalia and her clothes were blood stained.

The trial magistrate did not use the provisions of section 214 of the Criminal Procedure Code to have the charge amended and there is no alternative charge against the appellant. This makes the work of this court sitting on appeal rather difficult.

In my view I do not think gang rape under Section 10 (supra) is a minor offence to defilement under section 8 (1) read with (3) of the Sexual Offences Act. **In Raphael Oyendi Omusinde v. Republic Criminal Appeal No. 23 of 1991 (unreported)** the Court of Appeal handled the issue concerning the powers of High Court sitting on appeal and had this to say:

"In altering the finding in an appeal against conviction and substituting therefor a conviction for an offence other than that charged, the High Court in its appellate jurisdiction can only act within the provisions of sections 179 to 191, both inclusive, of the Criminal Procedure Code: and for the offence of attempted robbery contrary to section 297(2) of the Penal Code with which the appellant was charged, such alteration and substitution are only possible under section 179, supra. Under the latter section, the substituted conviction can only be for a minor and cognate offence to that charged."

Sections 186 Criminal Procedure Code is one of the sections falling between sections 179 and 191 Criminal Procedure Code. It provides as follows:

When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.

This section would have provided this court with the solution it is seeking but the age of PW1 comes into play. Evidence shows she was aged 14 years. This is what she stated in her evidence and this is what the P3 form indicates in Part 1 normally completed by the police officer. In Part 11 Section "c" the doctor indicates her age as 15 years. While testifying in court PW4 who examined her told the court that she was aged 14 years. Her parents would have laid issue to rest had they testified as to when PW1 was born. I find that if I were to take her age as 14 years she is clearly outside the provisions of section 186 (supra).

I have considered the defence of the appellant and find that it does not cause any doubts in my mind that he, in company of A H M at large, defiled PW1 in turns.

Before finding a solution to this appeal, I wish to address the other grounds of appeal. I do not find the evidence of the prosecution case inconsistent and I do not find this case unproved. On the contrary there is evidence proving this case beyond reasonable doubt. On crucial witnesses being left out, the appellant was referring to the step mother of PW1 and the owner of the pharmacy where PW1 was attended to first who were not called to testify. It is true they were not called but it is not the number of witnesses summoned that matter in a trial but the veracity and credibility of the evidence of the witnesses who have testified that matters. Besides, failure to summon these two witnesses did not prejudice the appellant.

I find no evidence that this case was fabricated against the appellant and there is nothing in evidence to show there existed a grudge against the appellant. On failure by the court to order for DNA test in respect to the appellant the law Section 36 Sexual Offences Act givens courts discretion to or not to order for this depending on the relevance of this test and the nature of the case. I find no prejudice on the part of the appellant on this issue.

The ground that the case was poorly investigated does not hold any water and I find it has no merit.

In my considered view, I can take two options in order to ensure that justice is served in this case: I can go either by way of section 179 (1) of the Criminal Procedure Code and convict on a lesser charge other than the charge preferred or Section 354 (3) (a) (i) of the same Code and order a retrial of this matter under Section 10 of the Sexual Offences Act. If I take this latter option, there is the danger in that the trial in the lower court was concluded on 27th August 2009 when the appellant was sentenced. Witnesses may not be available and memories of those available may have been clouded by time.

I will therefore go by way of Section 179 (1) of the Criminal Procedure Code and convict the appellant on a minor offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act although he was not charged with it. Consequently, the conviction in this case is quashed and the sentence imposed by the trial magistrate set aside. In its place, I enter conviction against the appellant for committing an indecent act with a child under section 11 (1) (supra). I further substitute the sentence with 14 years imprisonment. The sentence will run from the date he started serving the sentence appealed against. It is so ordered.

Dated, signed and delivered this 16th day of December 2013.

S.N.MUTUKU

JUDGE