REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 74 OF 2012

Appeal from original conviction and sentence in Criminal Case No. 103 of 2012 of Principal Magistrate's Court at Mandera (Mr. C.A.S. Mutai, Principal Magistrate).

ABDINSIR GUHAD BORE……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

Abdinasir Guhad Bore, the appellant, was charged before the Principal Magistrate with defilement contrary to section 8(1)(3) of the Sexual Offences Act No 3 of 2006. The offence is alleged to have been committed on 2nd April 2012 at [particulars withheld] village in Mandera County. It is alleged that he intentionally caused his penis to penetrate the anus of R.H.H a child aged 5 years.

The appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. He is alleged to have intentionally touched the buttocks R.H.H.

Facts

R.H.H, PW1, aged five was sent by her mother F.N, PW2 to buy meat from one S in the neighborhood. This was on 2nd April 2012. She testified that while at S's house the appellant carried her and placed her on a bed. He removed her panty and defiled her. In her own words:

> **"He carried me to S's house and placed me on the bed. He removed my panties. He placed something on my behind (points at her anus). He laid me prostrate. This thing was from his pocket. I have never seen something like that before. I felt pain……I saw blood**."

PW1 went home and told her mother what had happened. Her mother PW2 confirmed sending PW1 to buy meat from S's house at 8.20am on 2nd April 2012. PW2 told the court that PW1 delayed in coming back until 9.00am when she went home crying and without the meat. She informed her mother that the appellant had injured her.

O H M, PW3, was also present when PW1 went home crying and said she had been assaulted by the appellant. PW3 accompanied the daughter and mother to the home of the appellant and found him

washing clothes. PW1 identified him as the person who had assaulted her. PW3 held the appellant by the collar but he slipped and ran away.

The matter was reported to the police at Mandera Police Station where she was issued with a P3 form by Police Constable Abdi Farah Subane, PW4. She was taken to hospital. PW4 in company of other police officers arrested the appellant from his house. He was taken to Mandera Police Station and charged with this offence.

Dr. Abdul Malik Wanyama, PW5, told the court that he examined PW1 and found a laceration and a tear on the anus measuring 1.5cm long. He assessed the injury and classified it as grievous harm. The doctor also assessed her age and found her to be five years old.

The appellant testified on oath and gave a brief statement that he did not know the complainant and that on 2nd April 2012 at 9.00am nothing unusual happened. He denied committing the offence. He called his mother, A N, DW2, who told the court that her son the appellant was with her at home and not leave the homestead. She said she does not know the complainant and that she did not see the appellant do anything.

The trial magistrate considered this evidence and held the view that although the evidence of the complainant is evidence of a single eye witness the offence was proved. He was alive to the dangers involved in relying on the evidence of a single witness and cautioned himself before relying on the evidence of the complainant.

Petition of Appeal

The appellant is dissatisfied with the judgement of the lower court and has preferred this appeal. The appellant has through his counsel filed a petition of appeal and eleven grounds of appeal namely:

i. The learned magistrate erred in law and fact in convicting the appellant against the weight of the evidence.
ii. The learned magistrate erred in law and fact by accepting the evidence of the prosecution witnesses without giving sufficient reasons to that effect.
iii. The learned magistrate erred in law and fact by failing to consider the appellant's evidence in defence.
iv. The learned magistrate erred in law and fact in finding the appellant guilty yet all the ingredients of the offence were not proved.
v. The learned magistrate erred in law by shifting the burden of proof to the appellant in respect of the charges against the appellant in contravention of trite law.
vi. The learned magistrate erred in law and fact by failing to appreciate and find that the prosecution had failed to prove its case beyond any reasonable doubt.
vii. The learned magistrate erred in law and fact by convicting the appellant without that no medical examination was done on the appellant to ascertain if he indeed committed the offence.
viii. The learned magistrate erred in law and fact by failing to weigh the credibility of prosecution witnesses thereby causing and allowing incredible evidence to form the basis of conviction.
ix. The learned magistrate erred in law and fact by convicting the appellant on insufficient evidence without warning himself of the dangers therein.
x. The learned magistrate erred in law and fact by convicting the appellant on uncorroborated evidence.
xi. The learned magistrate erred in law and fact by sentencing the appellant on both counts.

Submissions

At the hearing of the appeal on 17th October 2013 counsel for the appellant Ms Abongo told the court that she was not able to argue the appeal because she was indisposed. She proposed to file written submissions and allow the court to consider the same and deliver judgement. The learned State Counsel Mr. Orwa did not oppose this proposal. He too told the court that he would file his submissions. The court allowed both

counsels to file their submissions on or before 31st October 2013 and gave the date of judgement as 25th November 2013. Counsel for the appellant did not file her submissions as directed by the court on 31st October 2013. As at the time of writing this judgement one week after 31st October 2013 the submissions for the appellant were not in the file. The learned State Counsel had however filed his submissions on 23rd October 2013.

The learned state counsel submitted that by dint of section 124 of the Evidence Act, corroboration is no longer required as a matter of law in sexual offences in cases where the child victim is the sole witness for the prosecution. He cited **Criminal Appeal No. 81 of 2008 Godfrey Waswa v. Republic** to support submission that it is discriminatory to require corroboration in evidence of girls and women in sexual offences. He submitted that the evidence of PW1 was corroborated by that of the doctor PW5 who confirmed injuries on PW1's anus and further that the evidence of PW2 and PW3 that the girl was walking with difficulty corroborates that of PW1.

Counsel submitted that where the defence of alibi is not raised at the time of pleading to the charges, courts are required to weigh the defence of alibi against that of the prosecution witnesses.

Counsel submitted that examination of an accused in sexual offences is not necessary and that the court has discretion under section 36 Sexual Offences Act to order for such examination. He submitted that the charge was erroneously drawn under section 8(1)(3)Sexual Offences and that this error is curable under section 382 of the Criminal Procedure Code. He cited the case of **Criminal Appeal No. 296 of 2010 Fappyton Mutuku Ngui versus Republic** where the High Court dealt with a similar issue and found that the charge is curable under that section.

On the issue of sentence the learned state counsel submitted that PW1's age was assessed and she was found to be aged five years bringing the case under the ambit of section 8(1) as read with subsection (2). The sentence under subsection (2) is life imprisonment.

In the absence of submissions from the appellant, this court will consider the grounds of appeal and substantive issues raised in those grounds as well as the submissions by the respondent. To my mind the appellant is raising the issues touching on the following:

i. Insufficiency of prosecution evidence.
ii. Credibility of prosecution witnesses.
iii. Lack of corroboration of the evidence.
iv. Lack of proof of the case beyond reasonable doubt.
v. Lack of proof of the ingredients of the offence.
vi. Failure to consider the Appellant's defence.
vii. Failure to order for medical examination of the appellant.
viii. Sentencing

Determination

I have reminded myself that court sitting on first appeal has a duty to examine and evaluate all the evidence afresh allowance being given that this court did not have the benefit of observing witnesses as they testified.

The ingredients of the offence of defilement are found in section 8(1) of the Sexual Offences Act which reads as follows:

> **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

In a case of defilement, the court needs to determine firstly whether there was penetration; secondly whether the complainant is a child and thirdly whether the penetration was by the appellant. Penetration

itself is defined under Section 2 of the Sexual Offences Act as **"the partial or complete insertion of the genital organs of a person into the genital organs of another person".**

Genital organs are defined under section 2 the Sexual Offences Act thus: **"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.**

I have carefully examined and evaluated the evidence on record specifically that of PW1, her mother PW2 and that of the doctor PW5. PW2 checked her daughter and found her bleeding from the anus. She also saw lacerations on the anus and noticed that PW1 had difficulty walking. PW5 said that PW1 was walking with a slight limp and her anus had lacerations and a tear measuring 1.5cm long. He concluded that PW1 had been sexually defiled. I have no doubt in my mind that defilement has been proved beyond reasonable doubt. There was anal penetration and anus is a genital organ under section 2 of the Sexual Offences Act.

The next issue is whether the appellant is the one who defiled PW1. She went home crying and without the meat she had been sent to buy. She told her mother that the appellant had injured her. PW3 who was present when PW1 returned home put it this way:

> **"F sent the child so that she could buy meat from a neighbour. After some 40 minutes the child R.H.H came home when she was crying (sic). She did not come with the meat which she had been sent for. The mother asked her who had assaulted her. The child who is the complainant said that she had been assaulted by the person who had hit our vehicle on the wall. We have a vehicle which is a taxi. This person was Abdinasir. Abdinasir and the father had come home when he was being interviewed he knocked the vehicle on the wall (sic). We then went to the homestead of the accused person while in the company of the complainant and the complainant's mother. On arrival there we found the complainant (I think he means the appellant) when he was cleaning his shirt (sic). The complainant was asked by the mother if the accused is the one who had assaulted her. The complainant admitted that the accused had assaulted her."**

Evidence further shows that after the appellant was confronted by PW3 he slipped and escaped.

The evidence on identification of the appellant as the person who defiled PW1 is evidence of a single witness. PW1 described the appellant to her mother and PW3 who understood whom she meant. They took her to the appellant's home at the home where she had been sent to buy meat. She identified the appellant and upon being confronted he escaped. The appellant's mother, A N, DW2, confirmed the butchery was in the same plot where her home was but another woman was selling the meat.

The proviso to section 124 of the Evidence Act provides thus:

> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

The trial magistrate was alive to the requirement to warn himself on the evidence of PW1 and he so warned himself. He was convinced that the evidence of PW1 was reliable. I have considered the evidence of PW1 and other circumstances surrounding this case such as the fact that the butchery was situated in the same plot as appellant's home; that his mother admitted she did not see all the people who went to the butchery; that PW1 described the appellant to her mother and PW3 and accompanied them when they went to appellant's home; that they found him and PW1 confirmed it was him who had injured her. After carefully considering this evidence I find that I can only make one inference that it is the appellant who defiled PW1. I am alive to the fact that this evidence ought to be treated with caution and I have treated it as such. This settles the issue on identification of the person who defiled PW1. PW1 is confirmed to be aged five years by the evidence of PW5 who assessed her age. She is therefore a child under the Sexual Offences Act and the Children's Act.

I find that the ingredients of the offence have been proved beyond reasonable doubt.

The issues on insufficient evidence, uncorroborated evidence, and credibility of the prosecution witnesses are considered together. I have considered these issues and I find that they have no merit given the analysis of the evidence above. I find no basis that the prosecution witnesses suffered any credibility deficiency. Each of the prosecution witnesses gave a concise testimony on what he/she knows about this case and besides I have stated above that PW1's evidence is well corroborated.

The appellant's defence was a general denial. His mother DW2 testified that the appellant spent the day at home with her. This is an alibi defence which has not been raised by the appellant himself. Even supposing that what she stated is true, this defence was not raised at the time of pleading to the charges. It was being raised at the defence testimony stage and therefore this court has to examine it against the evidence of the prosecution. After my careful analysis of the same I find that the evidence by the prosecution displaces the alibi defence of the appellant.

I have noted that the trial magistrate considered the defence of the appellant and in view of this I find that this ground has not merit.

It is true that the trial court did not call for the medical examination of the appellant. My understanding of Section 36(1) of the Sexual Offences Act is that it gives the court discretion to order for the medical examination of an accused person in order to gather evidence and to ascertain whether or not the accused person committed an offence. In this case no prejudice was occasioned on the appellant by this omission. As I have stated above there is ample evidence and directing for samples to be taken was not necessary.

On the issue of the sentence, I have confirmed that the appellant was convicted on the main charge of defilement. This ground of appeal has no merit. On my own examination and evaluation of the evidence on record I come to the conclusion that there is ample evidence against the appellant. The prosecution has proved its case beyond reasonable doubt. The trial magistrate addressed his mind to the relevant legal principles and arrived at the proper conclusion that the appellant is guilty of the main charge of defilement.

I however fault the trial magistrate for failing to direct that the charges be amended in light of the evidence that the complainant was aged 5 years. The amendments would have placed the charges under Section 8(1) as read with subsection (2). I have noted however that the trial magistrate sentenced the appellant to life imprisonment which is the sentence prescribed under section 8 (1) read with 8 (2) of the Sexual Offences Act.

Consequently, the appeal is hereby dismissed for lack of merit. I have no reason to interfere with the sentence meted out by the lower court. I so order.

Dated, signed and delivered this 9th day of December, 2013 in open court.

S. N. MUTUKU

JUDGE