REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 255 of 2009

MOHAMED MOHAMUD HASSAN…….....……APPELLANT

VERSUS

REPUBLIC……..…….……RESPONDENT

(From original conviction and sentencing in Criminal Case No. 24 of 2009 of Senior Resident Principal Magistrate's Court at, Hon. R. Odenyo on 11th May 2009).

JUDGMENT

The Appellant was charged with the offence of defilement of a child contrary to Section 8 of the Sexual Offences Act. The particulars of the charge as contained in the charge sheet are that on 4th January 2009, at about 1100 hours at (name of place withheld) of Mandera East District within North Eastern Province, the Appellant unlawfully penetrated S.U.M., a girl aged 7 years, (initials used to protect the identity of the complainant who is a minor).

The appellant denied the charge but after a full trial he was convicted and sentenced to life imprisonment. This appeal arises from the said conviction and the appellant filed his Petition of Appeal together with written submissions on 19th June, 2009. ln the substituted grounds of appeal, the Appellant raises four grounds of appeal; namely,

a) The trial Magistrate conducted the case contrary to Section 207(1) of the Criminal Procedure Code during the plea taking process,

b) The trial Magistrate denied the Appellant his right to call defence witnesses despite his request,

c) The charges against the Appellant were not proved, and

d) The trial Magistrate rejected the Appellant's defence contrary to Section 169(1) of the Criminal Procedure Code

On 11th November 2010, when the appeal was argued, Ms. Gateru, learned State Counsel opposed the

appeal. She submitted that the Appellant was correctly convicted on the basis of testimony of an eye witness, PW1 whose was corroborated by PW3. Learned State Counsel also submitted that the complainant was defiled by someone known to her. She urged the Court not to interfere with the mandatory sentence imposed by the trial Court since the prosecution evidence was sufficient to support a conviction

On the first and second grounds of appeal, the Appellant submitted that he was not accorded a fair trial contrary to Section 198 and Section 207 (1) of the Criminal Procedure Code and Section 77(2) (b) and (f) of the Constitution. He submitted that the charges were not read to him when he was first arraigned in court and further that the trial Court did not explain the particulars of the charge to the Appellant thus rendering the entire trial a nullity. He added that the record of the Court did not indicate that the proceedings were interpreted to him.

An recap of the typed record of proceedings on 20th January 2009 reads in part as follows:

"… Accused – Present

Interpreter – Abdikadir

Accused: Not true

Pro: I have 2 witnesses

Court: Case to commence"

On the face of it, the charges seemed not to have been indicated to have been read to the Appellant. I have confirmed from the original handwritten the record of the proceedings. The following part was omitted in the typed copy of proceedings,

"The substance of the charge(s) and every element thereof has been stated by the Court to the accused person, in the language that he understands, who being asked whether he/she admits or denies the truth of the charge(s) replies -

Not true "

I find therefore, that the charge was read to the Appellant in accordance with the law. Furthermore, the record shows that the Appellant was accorded interpretation. It is therefore clear that the trial Magistrate conducted the process in accordance with the law.

The Appellant further submitted that upon the trial Court's finding of a case to answer, he was denied the right to call witnesses. I find that this claim by the Appellant is unfounded in that from the record it is clear that the provisions of Section 211 of the Criminal Procedure Code were explained to him. On the date of defence hearing, the Appellant proceeded to give a sworn testimony at the end of which he indicated, *"…I have not seen my witnesses. I close my case."* Thus, the Appellant, on his own volition, waived his right to call witnesses. This ground of appeal therefore fails.

On the third and fourth grounds of appeal, the Appellant submitted that the evidence of PW2, a minor, being unsworn and of a child of tender age bore no credence to the case as per the provisions of Section 124 and 125 of the Evidence Act. He challenged the circumstances surrounding his arrest and arraignment. He pointed out the discrepancy in the date of arrest stated by PW1 and PW3 as 5th January 2009 on the one hand, and the date given by PW5 as 9th January 2009 on the other hand. The Appellant also contended that PW7 testified that the case was referred to him for investigations on 21st January 2009 and yet the Appellant had already been arraigned in court on 20th January 2009. He further alleged that the he was not taken for medical examination to establish if he committed the offence.

With regard to evidence of PW2, the complainant, the trial Court on its own motion determined that PW2 was not in a position to give evidence due to shyness. The trial Court had the opportunity to observe the demeanour of the witness to reach that conclusion. The issue for my consideration is therefore, whether, in the absence of the testimony of PW2, the charges were proved beyond reasonable doubt. I find that the evidence presented by the prosecution is credible and strong in that PW1 was an eye witness whose testimony is therefore direct. PW1's testimony was corroborated by PW3 who came to the crime scene soon after PW1 and saw the complainant bleeding from her private parts. PW1 and PW3 both saw the Appellant, and more so PW1who found the Appellant defiling the child and who fled upon seeing PW1.

There were indeed discrepancies regarding the date of arrest given by PW1 and PW3 as 5th January 2009, while the police indicated that they arrested the Appellant on 9th January 2009. I do not have the benefit of examining the Occurrence Book to determine the date. However, the P3 Form indicates that the date the matter was reported to the police in Mandera was 10th January 2009. This supports the fact that the offence was initially reported at the Administration Police Camp on 9th January 2009, as stated by PW4.

The issue, therefore, is whether the discrepancy on the date of arrest is so material as to render the prosecution witnesses incredible. I find that this discrepancy does not go to the root of the case, namely, proving that the complainant was defiled and that the offence was committed by the Appellant. I find that in light of the strong prosecution evidence, and particularly, the strong eye witness testimony, the discrepancy is not material to the fact that the person who defiled the complainant was positively identified, and further, that the elements of defilement were ascertained by both PW1 and PW3 and corroborated by PW6.

Both PW1 and PW3 saw the Appellant and testified that the child was bleeding from her private parts. PW6 who produced the P3 form testified that he examined the child on 15th January 2009 and found that her vulva was swollen, and that the she was still in pain. It was safe for the trial court to convict on the basis of the testimony of other witnesses even without the child's testimony. Section 124 of the Evidence Act was consequently not applicable in this case and further, there was nothing to show that the prosecution witnesses were not credible. The fact that PW7 was seized of the matter after the Appellant was arraigned in court does not affect the evidence by the prosecution in that PW7 did not contradict the evidence of PW5 who also investigated the matter.

On the issue of the appellant's defence. I find that the trial magistrate considered the defence and concluded that, in the presence of the strong prosecution testimony, *"a casual alibi defence cannot do in the circumstances.*" The Appellant did not challenge the evidence of the prosecution witnesses and particularly that of PW1 and PW2.

Having considered the record of the trial court - and the submissions by both parties, I find that the charge against the Appellant was proved beyond reasonable doubt. The sentence meted out was within the law and mandatory under Section 8(2) of the Sexual Offences Act. The Appeal is therefore dismissed.

Orders accordingly.

SIGNED DATED and DELIVERED in open court this 14th day of March, 2012.

A.MBOGHOLI MSAGHA
JUDGE