REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 31 of 2012

(Formerly Malindi High Court Criminal Appeal No. 125 of 2011 being an appeal from original conviction and sentence

in Hola Senior Resident Magistrate's Court Criminal Case No. 130 of 2009)

HAMISI DHADHO SALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. Hamisi Dhadho Salim (the appellant) was tried by the Resident Magistrate at Hola where he was charged with defilement of a girl between the age of sixteen and eighteen years contrary to section 8 (1) (4) of the Sexual Offences Act 2006 or in the alternative with indecently assaulting her contrary to section 11 (1) of the same Act. The offence is alleged to have been committed on diverse dates between 7th February and 2nd May 2009 at (place withheld) in Tana River District (now County). The victim is one **F.S** who testified as PW1.

2. The appellant, through his counsel Mr. Gekanana, has raised five grounds of appeal challenging the conviction only. His contention is that the trial magistrate failed to properly consider the evidence of the prosecution and the defence; that the trial magistrate shifted the burden of proof to the appellant; that the trial magistrate relied on circumstantial evidence which was not strong enough to proof appellant's guilt; that the trial magistrate failed to consider that the age of the complainant was not ascertained; that the trial magistrate based the conviction on insufficient grounds that did not prove case beyond reasonable doubt. Learned counsel for the appellant submitted orally in support of the grounds of appeal that the trial magistrate brought in matters that were not in evidence and that the evidence does not proof the case beyond reasonable doubt. He further submitted that there is no evidence to support the alternative charge.

3. The appeal was opposed by the state with the learned state counsel submitting that the trial magistrate did not find evidence in proof in respect of the main charge because there was no medical evidence to support that charge; that there is evidence to support the alternative charge and that there is corroboration of PW1's evidence by that of PW2.

4. The facts of this case, as can be ascertained from the evidence on record, are that the appellant went to the home of **S.F** (PW1) and told her to accompany him to his home. PW1 accompanied him and on arriving at the appellant's house, the appellant's mother prepared supper for them. After feeding, the mother left the two together and went away. PW1 did not go home. The appellant took her to bed,

removed her dress and pants, removed his trousers and pants and had sexual intercourse with her. PW1 says she was forced to have sexual intercourse with the appellant and this injured her genitalia leading to bleeding. They spent the night until the following morning and had sex again that night. PW1 told the court that it was her first time to have sex. PW1 told the court that she left to go home in the morning which was on 8th February 2009. She further told the court that later on a date she could not remember but in February 2009 the appellant went to PW1's home and took her to their home where they spent the night again and had sex that night and that on 12th February 2009 the police went to appellant's home where PW1 was and arrested the appellant and both were escorted to Hola Police Station where she was issued with P3 form and referred to hospital for examination.

5. My view is that the appellant is raising three major issues; that of evidence not being sufficient to prove the charges beyond reasonable doubt; shifting burden of proof to the appellant and the age of the complainant. I have carefully read the evidence adduced before the trial court and re-evaluated it afresh in order to make my independent findings on the same. I take cognizance of the fact that I do not have the advantage of having observed the witnesses as they testified and therefore I am not able to comment on their demeanour.

6. The prosecution called three witnesses in support of their case. It is informative to note that none of the three witnesses is a police officer. The record shows that the prosecutor applied for an adjournment on 4th March 2010 to call the investigating officer and this was granted. However the prosecutor told the court on 31st March 2010 when the case came up for further hearing that the investigating officer had refused to attend court and he opted to close the prosecution case. The appellant testified without swearing and called one witness. The appellant's evidence relate to how he was arrested on 12th February 2009. He narrated how one **S. B** told him to accompany him to do some work and how he was taken to Handampia Primary School and later to police station on claims that he had taken the said **S.B's** daughter. He called Omar Ali Maro who had nothing of value to add to the defence case in respect of the alleged offences.

7. On the issues raised on appeal, I have carefully examined the evidence. I do not understand why it was necessary for the trial court to conduct a voire dire examination on PW1 who said she was fifteen years old. At that age any child or young person is intelligent enough to understand the nature of oath unless in the opinion of the court the child seems not to understand in which case this would be an exception to what is expected to a normal child of that age. The evidence of PW1 and PW2 is full of contradictions. First PW1 tells the trial court that the appellant told her to accompany him to his home on 7th February 2009 and that she returned home on 8th February 2009. She went on to state that the accused was arrested on 12th February 2009. On cross examination she stated that the date was 9th February 2009 and that they also had sexual intercourse on 24th February 2009 even after saying the appellant was arrested on 12th February 2009. Her further evidence on cross examination is that the first time they had sex was about 7.00pm on 24th February 2009! PW2, PW1's mother's evidence is also confusing. She said she noticed PW1 her daughter was missing on 7th February 2009 and she started looking for her. That her daughter went missing for two weeks.

8. Further evidence in support of the prosecution case is that the P3 form was not filled until 4th February 2010 and that on examining PW1 the doctor found no injuries. We are talking of a period of about one year! What delayed the medical examination to one year later? The evidence of the trial court does not offer an answer. The investigating officer would have shed some light on this matter but the court did not have benefit of this evidence. I am even surprised that the learned counsel for the appellant did not notice the anomaly in the trial court's prosecution case. The trial magistrate too did not address the issue. My conclusion in the matter is simple that the evidence is so flawed that it cannot be relied on to base a conviction on. The evidence of PW1 and that of her mother PW2 is not reliable given the contradictions on the dates of the offence, the period PW1 was missing from home and the long unexplained delay why it took a year before PW1 was medically examined.

9. On the shifting of burden of proof, the appellant's counsel did not clarify how the trial court did this

but given the flaws in evidence in support of the prosecution case, this court need not go further to examine whether the trial court shifted the burden of proof.

10. On the age assessment, it is true that in offences of defilement under the Sexual Offences Act, age of the victim is everything. It dictates what penalty to impose. In this case, as correctly pointed out by the learned counsel for the appellant, the age of the complainant was not ascertained either by having it assessed by a doctor or by producing evidence to prove when she was born. I wish to point out that even without this ground of appeal the evidence on record does not support the charges as I have explained in this judgement.

11. The upshot of my analysis of the evidence adduced in the trial court is that the magistrate ought not to have convicted the appellant on the alternative charge. There are contradictions in the evidence that make a conviction either on the main charge or in the alternative charge unsafe. After my careful analysis of all the evidence, grounds of appeal, submissions by both learned counsel for the appellant and the learned state counsel I find the conviction on the alternative charge without basis for the reasons that I have given. On that basis I hereby allow the appeal, quash the convictions, set aside the sentence and order release of the appellant forthwith unless he is being held for any other lawful reason. I so order.

STELLA N. MUTUKU, JUDGE

Dated signed and delivered this 26th November 2012