REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 164 OF 2009

LESIIT J,

ALLOW MOHAMMED…….....……..APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(From Original P.M Court Criminal Case No. 228 of 2009 at Moyale; Charles Obulutsa Principal Magistrate).

JUDGEMENT

The appellant ALLOW MOHAMMED faced three counts of attempted defilement of a child contrary to section 9 (1) of the Sexual Offences Act. He Faced alternative counts to each of the three counts of indecent act contrary to section 11 (1) of the Act. The appellant was found guilty and convicted of the three main counts of attempted defilement and sentenced to 15 years imprisonment on each count. The sentences were ordered to run consecutively.

The appellant was aggrieved by the conviction and sentences and therefore filed this appeal. The appellant was represented by Counsel Mr. Nyamweya. Counsel relied on the supplementary grounds of appeal filed on 7th May, 2010 in which five grounds were raised as follows:

1. That the learned Magistrate erred in law and in fact in relying on the evidence which had no evidential value, was unreliable, contradictory, uncollaborated, inconsistent and at variance with the charge sheet.

2. The trial Magistrate erred in law and fact in failing to consider the evidence of the accused.

3. The learned Magistrate erred in law in failing to recognize and appreciate that the guilt must be established beyond reasonable doubt.

4. The learned Magistrate erred in law in fact in awarding a sentence that was manifestly excessive in the circumstances.

5. The learned Magistrates erred in law and fact in failing to find that all complainants and witnesses were members of the same family.

The appeal was not opposed by Mr. Kimathi, learned counsel for the state.

The facts of the prosecution case were that three sisters complained of defilement by the appellant at their home in moyale. From the evidence of the complainants aged 11 years, 15 years and 17 years, they woke up from sleep in the night to find their clothes lifted, their panties removed and the appellant lying on top of them. PW1, H aged 15 years said that the incident occurred on 6th June 2009 at 11 pm. PW2, F aged 11 years said the incident occurred on 2nd June 2009, at 11 pm. PW3, M aged 17 years old said that the incident took place on 4th June 2009 at 11pm. At the time of the incident the complainants were staying with PW 5 E, their step – mother and an elder sister, PW4 one F.H, the wife of the accused.

The accused was also staying with them because he was the husband of F PW4. PW4 left the home on 2nd June 2009 and only returned on 8th June 2009. She knew nothing of the incident. PW5 confirmed that on 4th June 2009 she heard PW3 screaming in the night. PW5 confirmed she also heard Hadija PW1 screaming at night on 6th June 2009. None of the complainants told her anything but she said she flashed her torch each time and saw the appellant sleeping next to the respective complainant.

The complainants said they did not want to report the matter to anyone until their father who was away returned. He came back to receive the news from his three daughters PW1, 2 and 3, that the appellant had defiled them. He was Mohammed Edin, PW6. He reported the matter to the police.PW7 was the police officer who received the report from Mohammed PW6 on 8th June 2009. He also arrested the appellant for this offence.

The three children were escorted by PW9 P.C Mosabi to Moyale hospital and were examined by Dr. Kochi who also filled P3 forms for each of them. The P3 forms were produced in evidence by Abdullah Jaldesa PW8 who worked at Moyale District hospital with Dr. Kochi. The reports were negative for defilement. All three children had their hymen intact. In the case of H PW1, she had a slight discharge which was regarded as normal. The P3 forms were produced as PExh 1, 2 and 3.

The accused gave a sworn defence. In his defence he denied the allegations against him. He said he had a misunderstanding with his father in law and that as a result he wanted to take his wife away from him by having him jailed.

I have considered the appeal and analyzed and evaluated the evidence adduced before lower court.

In the case of **OKENO V. REPUBLIC [1972] EA 32,** the role of a first appellate Court is given as follows:

“An appellant on first appeal is entitled the evidence as a whole to be submitted t a fresh and exhaustive examination [Pandya vs. Republic] (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantiala M. Ruwala V. Republic [1957]EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial curt has had the advantage of hearing and seeing the witnesses, (See Peters V. Sunday Post, [1958] EA 424.)”

Mr. Nyamweya represented the applicant in this appeal. One of the grounds taken is that the evidence of the three child complainants was full of inconsistencies and errors. Counsel urged that while the three complainants told their father that the appellant had broken their virginity, to court, they claimed that the appellant had attempted to defile them.

Mr. Nyamweya submitted that a report of defilement is what was reported to the police, including PW 9 who received it. Counsel urged that the complainants’ contention that they had been defiled was contradicted by the medical officer who examined them.

Mr. Nyamweya argued that in view of the fact the witnesses were all related, and in view of

contradictions in the evidence of the complainants, the learned trial magistrates should have found the complainants evidence unreliable.

Mr. Kimathi for the state conceded to the appeal. On the issue of the evidence of the children, Mr. Kimathi urged that since they had changed their story from alleging defilement to saying it was an attempt, the appeal ought to be allowed.

I have considered the complainant by the appellant that the complainants' story of sexual assault was full of errors and contradictations.

I have taken into account three factors. The first is the tender age of the children complainants. The Medical Officer who examined the three complainants and filed their P3 forms assessed their ages as 11 years (PW2) 13 years (PW1) and 17 years (PW3). They were young especially PW1 and 2. The second factor is that the three were found to be virgins. They were proved not to have been involved in any sexual activity in their lifetime. The third is the fact they each woke up to find the appellant lying on top of them with their clothes lifted and panties removed. Given these three factors it can be said that there was a possibility that these three children did not know what virginity is and how it is broken. The fact they were each woken up from sleep to find the appellant on top of them (at different dates and time was enough for them to believe that they had been defiled.

The complainants testimony in court is clear as to what they accused the appellant of having done to them. I do not find any inconsistency in their testimony. I find that nothing turns on this point.

The second ground argued is that the ages of the complainants was not ascertained. That is not true. There was medical evidence of their age through PW8. That evidence was not contradicted by other cogent evidence. It was in itself sufficient to establish the age of the complainants. I find nothing turns on this ground.

Mr. Nyamweya made heavy weather of the complainants and witnesses being close relatives. It can not be helped that he complainants are all sisters and the appellant their brother in law. The evidence of the complainants received corroborations from their father PW6 who had been away at the time of the alleged assault, to the effect that the complainants reported the assault to him immediately he returned. It was corroborated in material particulars by PW5, their step – mother who also heard the screams by Macaye, PW3 on the night of 4th June 2009 and by PW1 on the 6th June 2009. PW5 confirmed she was able to recognize the appellant when she flashed a torch on him. PW5 stated that the appellant was the person offending the two complainants in their sleep, on the nights they complained of the attack.

The evidence adduced by the prosecution was that at the time of the attack, the 3 complainants were living with the step – mother, PW5, herself only 22 years old, in the nomadic simple structures put up as the family moved from place to place to follow pastures. PW5 was the only "adult". PW 6 their father had gone for an important reason to Moyale for a few days. PW4, wife of he appellant and sister of complainants had gone to visit her mother. In the circumstances, it is clear there were no other persons who witnessed the incident. The failure to have other witnesses not related to the parties herein cannot be used against the prosecution case. Nothing turns on this point.

Mr. Nyamweya submitted that the evidence of PW4, wife of the appellant proved his innocence and supported the appellant's defence that the case was a frame up by his father – in – law in order to take away his wife from him.

Mr. Kimathi took a different view. His submission was that the evidence of the wife of the appellant ought not to have been taken without his consent. That in taking it, it prejudiced the appellant.

Section 127 (3) (b) of the Sexual Offences Act provides, Quotes section 127 (3) (b) of Act here.

With due respect to the learned state counsel, the law allows a spouse of an accused person to testify against him in all cases where such accused is charged with offences under the Sexual Offences Act. The

law declares such spouse both a competent and compellable witness. Mr. Kimathi's argument is not the legal position and is therefore dismissed.

PW4's evidence was that she had gone to her mother's place leaving the appellant, her husband at home. She left for her mother's place before the alleged assaults and returned after the same. Her evidence was neither for nor against the appellant. PW4 did not however say she was forced to live with the appellant as Mr. Nyamweya submitted. She merely said that she was told to live with him.

I find no evidence of nay grudge between the appellant and PW6 or any other of the other witnesses. Nothing turns on this ground.

I will look into the issue of the age of the complainants vis a vis the charges as framed. The appellant was charged with Attempted Defilement of the complainants contrary to section 9 (1) of the Sexual Offences Act The said section stipulates:

" A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

Under section 3, the interpretation section of the Act, a child is defined

"Child" has the meaning assigned thereto in the Children Act"

The children Act, under section 2 thereof defines a child as "Child" means any human being under the age of eighteen years"

The important thing here is that the prosecution has to adduce evidence to establish that all three complainants were children as defined under the Act. That was proved to the legal standard through the medical evidence of PW8 and the complainants' own testimonies.

I find that the evidence adduced by the prosecution in this case proved the charge against the appellant beyond any reasonable doubt. I agree with the learned trial a magistrate's conclusions in rejecting the appellants defence and convicting him for the offences charged.

In regard to the appeal against the sentence, the learned state counsel submitted that the state would not oppose the sentence being ordered to run concurrently.

The counsel for the appellant urged court to find the sentence was harsh and should be set aside.

Section 9 (3) of the Sexual Offences Act provides that person convicted for the offence under section 9 (1) of the Act is liable to imprisonment for a term not less than 10 years.

The appellant was sentenced to 15 years imprisonment in each count and the sentences ordered to run consecutively.

The offences committed were serious. They were committed against young children related to the appellant through marriage. That act was serious and the repercussions quite bad. I have considered that the appellant is 29 years old. The sentence of 45 years means he will leave prison as an old man of 74 years. I do not think the offence calls for such severe sentence. I will not disturb the sentences of 15 years imprisonment on each count. I will however order that the sentences should run concurrently.

Having considered this appeal I find that the appeal against conviction has no merit and is dismissed. The appeal against sentence is allowed in part. The appellant will have his sentence of 15 years imprisonment on every count to run concurrently.

Those are the orders of this court.

Dated, Signed and Deliverance this 13th April 2011.

LESIIT, J.

JUDGE