



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA NO. 78 OF 2009

(From: Original Criminal Case No. 20 of 2009 Wajir; A. INGUTYA SRM)

LESIT J.

AHMED MOHAMED ALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant was charged with Attempted Defilement contrary to Section 9(1) as read with S.9(2) of Sexual Offences Act. The particulars of the charge are that on the 17th night of January 2009 at around 21.30 hours at A[...] Location in Wajir East District attempted to have carnal knowledge of D.M.H., a girl of seven years. There was an alternative charge of Indecent Act with a child contrary to section 11 (1) of the same Act. The appellant was convicted for the main count of Attempted Defilement and sentenced to 25 years imprisonment.

The appellant has raised seven grounds of appeal which can be summarized into four. Firstly that the learned trial magistrate ought not to have believed the evidence of PW2, the mother of the complainant child on grounds they were related. Secondly that medical evidence did not support rapture of the hymen. Thirdly that the provisions of S.211 of the CPC were not complied with. Fourthly that the sentence of 25 years was excessive.

The facts of the case were that the appellant, an uncle of the complainant was left taking care of the complainant and other children as they slept, by the complainant's mother PW2. The appellant carried the complainant from the piece where she was sleeping with other children to a different place. He removed her trouser then sat on her and poured seminal fluid on her. The complainant cried out prompting the mother to return home. The complainant was taken to hospital and examination confirmed

presence of seminal fluid but not defilement.

The appellant denied the charge in his defence. He stated that the complainant's mother fabricated the case against him because he had continuously declined to have sex with her.

I have carefully considered the appellants appeal and have subjected the entire evidence adduced in the lower court to a fresh analysis and evaluation. I am guided by the case of **OKENO V. REPUBLIC [1972] EA 32** where the court of Appeal set out the duty of the first appellant court thus:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to 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 (Shantilal 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 court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The appellants made a simple submission in which he contended that the case was a fabrication against him by a certain woman. He said the complainant was under his care and had cared for her and her family for five years.

The appeal is opposed. Mr. Kimathi learned State Counsel submitted that the prosecution had proved the charge against the appellant on the required standard. Counsel submitted that the evidence of complainant could be believed as provided under S.124 of the Evidence Act. Counsel further urged that the complainant's evidence was corroborated by PW2 the mother of the child, and PW3 the doctor who examined her.

I will begin with grounds of appeal raised by the appellant. The appellant contended that the medical evidence adduced did not support rapture of the hymen. The appellant was misled. The charge against him was not defilement but attempted defilement. The prosecution's duty was to establish that the appellant had done **“an act which would lead to penetration”**. The complainant's evidence was that the appellant sat on her naked body and “poured” sticky and watery fluid on her. The evidence of the complainant received corroboration from PW2, complainant's mother, and PW3 the Clinical Officer that there was found seminal fluid on the complainant's private part.

The appellant contends that S.211 of CPC was not complied with. That section provides:-

“211. (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps,

to compel the attendance of the witnesses”.

I have looked at the proceedings of the lower court. After the prosecution closed its case, the learned trial magistrate ruled:-

“Court: Accused has a case to answer. S.211 explained to accused in Somali”

Appellant responded as follows:-

“Accused: I will be sworn. I have no witnesses.”

I find that the learned trial magistrate complied with the provisions of S.211 of the CPC. That compliance is fully demonstrated in the appellant’s exercise of his rights under that section by opting to give a sworn defence and to call no witness.

The appellant is unhappy that the evidence of PW2 was relied on. The appellant contended that PW2 was related to the complainant and had fabricated the case due to an existing grudge between them.

I have considered the entire evidence before the court. The learned trial magistrate believed the complainant’s evidence that the appellant had carried her from her home in her sleep, removed her trousers and sat on her in the process of which he wetted her. The learned trial magistrate observed thus concerning her evidence:

“The girl was surprisingly articulated and bright. Her evidence came across as raw facts from the lips of a child. I am, therefore, convinced beyond doubt that the minor told the truth. I find the prosecution case prove beyond any reasonable doubt.”

I find that the learned trial magistrate subjected the complainant’s evidence to the right tests and came to the correct conclusion that she could be believed and that her evidence could found a conviction. I find that the evidence against the appellant was not just that of PW2 but also of the complainant.

I noted that in cross examination the appellant did not put to PW2 that she had fabricated the case against him or that she had a grudge against him because of his refusal to have sex with her as he claimed. I find that the appellant’s contention that PW2 fabricated the case against him is an afterthought. PW2 was a credible witness. Her evidence was consistent with PW3’s evidence that the complainant had semen on her private parts few hours after the alleged offence. PW2 had seen the appellant running away from the scene where he had taken the complainant. The appellants conduct was conduct of a person with a guilty mind.

I agree with the learned trial magistrate and the learned State Counsel that the evidence against the appellant supported the main charge of attempted defilement to the required stand of proof beyond any reasonable doubt. The learned trial magistrate was correct to reject the appellants defence.

I find no merit in appellants appeal against the conviction.

In regard to appeal against sentence S.9(2) of the Sexual Offences Act provides for a sentence of not less than ten years. The appellant was sentenced to 25 years imprisonment. In sentencing the appellant the learned trial magistrate:-

“Court: Noted (that is appellants plea for leniency) Accused to serve 25 years in prison”

With due respect to the learned trial magistrate, he did not record what it is he considered before passing sentence. That falls short of the expectation of a court before passing sentence. A court must record what it considered in assessing the sentence suitable to the charge and the accused before them in the case. Having failed to record, what went into consideration this court is unable to tell what the learned trial magistrate considered. In the circumstances I find the learned trial magistrate exercised his discretion arbitrarily. I set aside the sentence of 25 years imprisonment imposed against the appellant.

I have considered appellants apparent age is 45 years. I have considered this was his first offence. It is serious as the appellant attempted to defile a young girl of 7 years. The girl was related to the appellant as a niece. The appellant breached his position of trust which the family had of him. I find a sentence of 11 years imprisonment appropriate for this sentence.

In the result, the appellant's appeal against conviction has no merit and is dismissed. The appeal against sentence is allowed. The sentence of 25 years imprisonment is set aside. In substitution the appellant will now serve an imprisonment term of 11 years

Those are my orders.

Dated, Signed and Delivered at Meru this 26th day of May, 2011.

LESIIT, J.

JUDGE