



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 39 OF 2018

ABDI IBRAHIM BULLE ISSACK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at Wajir in Sexual Offence Case No. 10 of 2018 delivered by Hon. A. K. Makoross (SRM) on 6th July, 2018

JUDGEMENT

1. The appellant was charged with defilement contrary to section 8(1) (3) of the Sexual Offences Act. The particulars being that on the 21st day of April 2018 in Wajir East Sub-County within Wajir County the appellant intentionally caused his penis to penetrate the vagina of HMH (name withheld) a child aged 14 years.
2. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars being that on the 21st day of April 2018 in Wajir East Sub-County within Wajir County, the appellant intentionally touched the vagina of HMH (name withheld) a child aged 14 years with his penis.
3. The appellant denied both charges and the matter proceeded to full trial.
4. After full hearing appellant was convicted and sentenced to serve 20 years' imprisonment as minimum sentence.
5. Being aggrieved by the above decision he lodged instant appeal which can be set out as –

I. Charges were defective.

II. The prosecution's case was not proved as required by law.

III. The court ignored appellant's defence.

6. Parties were directed to canvass via submissions. The appellant filed submissions and the prosecution relied on the evidence on record.

THE PROSECUTION'S CASE

7. The brief evidence of **MHB (PW1)** was that on the 21/4/2018 he heard his daughter (the complainant) calling for help at around 3.00 am. The said complainant was sleeping in a dash within the compound and when he rushed to the said dash, he found the complainant lying facing up with her panties lowered to her ankles and her dress pushed up to the neck. He enquired what had happened and the complainant told him that Abdi Ibrahim Bulle (the appellant herein) had come to her and tried to remove her clothes.
8. He and some neighbours then followed the footprints left at the scene and the same led them to the home of the appellant herein where they confirmed that the tracks, they had been following matched the shoeprints of the appellant herein. They then reported the matter to the chief who in turn directed them to the police.
9. He identified a grey dress as the one worn by the complainant on the material day and further identified a P3 form dated 21/4/2018 as the one filled after the complainant had been examined.
10. The complainant **HMH** came as the second prosecution's witness and testified that on 21/4/2018 the appellant had come to the room where she slept at around 3.00 am and after covering her mouth proceeded to remove her panties. He then held her neck and pushed up her

dira and then had sex with her.

11. This led her to shout for help and her father who was asleep next door came and she told him what had happened. By then the appellant had ran off and her father followed his footprints and the same led to the appellant's home.

12. She further testified that she had been able to identify the appellant because the appellant had a torch and had put it on as he left thus allowing her to see his face.

13. Robert Otieno (PW3) is the Clinical Officer who examined the complainant. He stated that he carried out the examination on 21/4/2018 and noted that the complainant had pain on her neck with no external bruising. All other systems were normal.

14. On examination of the genitalia he found that the clitoris was mutilated and that the hymen was missing. There was also a bruise on the anterior focheate and light milky discharge on the genitals.

15. In cross examination he stated that he had assessed the injury as grievous harm because of the psychological trauma. That the hymen was torn with presence of white milky discharge hence he had concluded that defilement had occurred and finally that he could not tell if the hymen was freshly torn.

16. It is worth mentioning that at this stage in trial, a member of the public who identified himself as the father of the appellant brought it to the attention of the court that the appellant was mentally ill.

17. The court took this to be an express assertion that the appellant was not fit to stand trial and thus sent the appellant for psychiatric evaluation to test the truth of that information. The resulting report was that the appellant was fit for trial and the court thus proceeded with the matter from where it had left off.

18. FNo. [xxx] PC David Mutua was the investigating officer in this matter. He stated that he had received the complainant herein on 21/4/2018 at around 10.00am and after getting the details of the complainant herein booked the same in the Occurrence Book and took the complainant to the Wajir Referral Hospital for medical examination and age assessment. He thereafter arrested the appellant herein.

19. He produced the age assessment report as Pexh 2 and the dress earlier identified by PW1 as Pexh 1. He was also not cross examined.

DEFENCE CASE

20. When placed on his defence, the appellant simply denied committing the offence and added nothing more.

21. In cross examination he stated that he did not know the complainant before. That he did not know of a reason why the complainant had charged him. That it is possible for a total stranger to testify about him. That he lives in Shelete and that he has never been to Elben.

22. Fatuma Omar Ibrahim (DW1) and **Ali Muhammed Issack (DW2)** were clear that they had not been present when the alleged offence took place and had only heard from other parties that the appellant had defiled a child.

23. They were however unequivocal that the appellant was mentally ill at the time of committing the offence and had even been restrained to prevent him causing mischief.

ISSUES FOR DETERMINATION

24. After going through the evidence on record the court finds the issues are:-

I. Whether the charges were defective.

II. Whether the prosecution's case was proved as required by law.

III. Whether the court ignored appellant's defence.

25. It was not disputed that the complainant was a child at the material time. An age assessment was produced as Pexh 3 and even though it was not specific on the age, it shows that the complainant was under the age of 18.

26. That finding tallied with the complainant's own testimony that she was 14 at the time and further tallied with the trial court's own observation of the complainant at the time she was giving testimony.

27. All the medical records pertaining to the complainant also gave her age as 14 years and the trial court therefore found that it was demonstrated to the required standards that the complainant was a child within the meaning of the Sexual Offences Act at the material time. This court finds no fault in that finding.

28. The medical documents also left no doubts that the complainant had been a victim of an act causing penetration. The post rape care form which was produced as Pexh 1 showed that at the time of examination the complainant's hymen was torn with presence of whitish discharge

in her vagina.

29. There was also a bruise on the upper forehead and it was the clinical officer's professional opinion that penetration had occurred. That evidence corroborates the evidence of the complainant who stated that the appellant herein forcefully had sex with her.

30. There was therefore evidence sufficient to prove that the appellant was a victim of an act causing penetration and thus this court agrees with trial court finding that penetration was so proved.

31. On whether it was the appellant who committed the offence, the complainant stated that this was so and was firm that she was able to identify the appellant by the light of a torch that the appellant had. To be precise, it was her evidence that the appellant lit the said torch as he prepared to leave and she was thus able to identify him.

32. Her evidence was corroborated by her father (PW1) who stated that when they followed the tracks of the intruder it led to the home of the appellant and matched the shoe threads belonging to the appellant.

33. Both witnesses knew the appellant before that day and it was therefore unlikely that they could be mistaken about the identity of the person who had attacked the complainant.

34. The trial court found that, both of the witnesses were consistent and firm in their testimonies and gave the trial court the impression that they were honest and reliable. It believed them. I therefore have no doubt that it was the appellant herein who committed the offence.

35. The appellant simply stated that he did not commit the offence but I find this defence to be a mere denial of the facts. His denial did not in any way displace the strong evidence brought against him and/or raise any doubts in the mind of the trial court that he was the one who committed the offence.

36. Furthermore, he admitted in cross examination that no previous quarrel existed between him and the prosecution's witnesses and there would therefore be no reason why the said witnesses would want to give false testimony against him.

37. The trial court considered the evidence on alleged mental illness of the appellant, and arrived at the conclusion that the actions of the appellant on the night of the commission of the offence are not those of a mentally ill person.

38. To be clear, he went to the dash where the complainant slept in the dead of the night when he knew chances of discovery were minimal, then had the presence of mind to cover her mouth to prevent a cry for help and further had the presence of mind to slip off before the complainant's father (PW1) arrived at the scene.

39. The actions of the appellant showed a clear plan and execution of that plan which is inconsistent with the doings of a mentally ill person. The medical evidence also prescribed him to be mentally fit.

40. Thus, the court finds no merit in appeal and makes the following orders;

i. The appeal is dismissed, conviction is upheld and sentence confirmed.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

.....

C. KARIUKI

JUDGE