



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 99 OF 2014

MARJAN MUSA MUKOMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa CM Criminal Case No. 12 of 2014- M. Wachira CM)

JUDGEMENT

1. The appellant was charged in the Chief Magistrate's court at Garissa with defilement contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 24th December, 2013 in Lagdera District within Garissa County intentionally caused his penis to penetrate the vagina of KAA (name withheld) a child aged 13 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 of the offence were that on the same day and place intentionally touched the vagina of KAA with his hands against her will.

3. He pleaded not guilty to both counts. After a full trial, he was convicted on the main count of defilement and sentenced to serve 20 years imprisonment.

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal on 24th November, 2014. Before the appeal was heard however, he filed amended grounds of appeal and written submissions. His amended grounds of appeal which are relied upon are as follows:-

- 1. The trial magistrate erred in convicting him without proof of the complainant's age.**
- 2. The trial magistrate erred in convicting him without taking into account that medical evidence failed to prove penetration as required by the law.**
- 3. The trial magistrate erred in convicting him in the absence of very crucial witnesses.**
- 4. The mode of arrest was poorly done and against the law.**
- 5. Trial magistrate erred in convicting him without considering that the evidence adduced by the prosecution witnesses was contradictory and full of inconsistencies.**
- 6. The prosecution case was not proved beyond reasonable doubt as required by law.**

5. At the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered. He added orally that he was arrested by somebody he did not know who alleged that he raped his daughter. He stated also that during that period in question people used the excuse or allegation of defilement to get passage to Europe. He further stated that he could not defile someone in a hotel where there were many people, and that the prosecution failed to bring to court a very crucial witness, a young brother of the complainant whose name is H.

6. The learned Principal Prosecuting Counsel, Mr. Okemwa submitted that four witnesses were called at the trial by the prosecution. With regard to age of the complainant, the counsel said that the complainant and her mother confirmed that she was 13 years. Though there was no birth certificate an age assessment report was prepared by one Abdi and was produced in court.

7. With regard to identification of the culprit of the crime, counsel submitted that there was no doubt on identity of the appellant as the

complainant knew the appellant before. Counsel submitted however that, it was not clear from the evidence on record whether the appellant was identified as the person who had defiled the complainant. Counsel added that it was not clear from the evidence on record whether the complainant washed dishes in the house or in the hotel, which created some doubts.

8. With regard to penetration, counsel submitted that the evidence was contradictory since the complainant stated that force was used to defile her, while the medical practitioner who filled the P3 form stated that sex was consensual as there were no signs of violence.

9. Counsel concluded by saying that he was privy to information that in Dadaab there existed a common practice of fabricating sexual assaults as a way of getting passage to Canada, and emphasized that from entries in the P3 form it was not established that intercourse occurred.

10. This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences. See the case of OKENO -VS- REPUBLIC [1972] EA 32.

11. I will start by stating that the alternative charge of incident act was defective in that the particulars of the charge did not indicate the age of the complainant. In my view, the particulars of the charge should have contained the age or approximate age of the complainant. That said, since the appellant was not convicted on that charge, my observations remain so and will not affect the results of the appeal.

12. In sexual offences of defilement, three ingredients had to be proved. First, the age of the complainant. Secondly, the prosecution has to prove penetration. Thirdly, the prosecution has to prove the identity of the culprit. Each of these elements is required to be proved by the prosecution beyond any reasonable doubt which is the standard of proof required in criminal cases.

13. With regard to age, the complainant PW1 stated during examination on her intelligence that she was 13 years old. She did not repeat that statement in her unsworn evidence.

14. Her aunt PW2 L A M also stated that the complainant was 13 years of age. None of the two witnesses stated the date or year when the complainant was born. A hand written medical card was produced in court by PW4 Police Constable Stephen Wainaina in which it was recorded that the complainant was between 13 and 14 years of age. That document was purportedly stamped by the Medical Superintendent Dadaab Sub-County hospital and signed on 2nd April 2014. The identity and qualifications of the person who made that document were however not given on the document. The document in my view was hearsay evidence which could not be verified.

15. In my view, the age of the complainant was not established by the prosecution beyond reasonable doubt as required by law. If the prosecution wanted to rely on the handwritten note, it should have called the maker to produce the same or the prosecution should have laid a basis for producing it in the absence of the maker in terms of the requirements under Section 77 of the Evidence Act (Cap. 80) through a witness who would explain knowledge of the handwriting and the identity of the maker of the document. As it is, the maker of the purported age assessment report is not known. It is hearsay evidence of documentary nature and cannot be relied upon.

16. I thus find that the prosecution failed to prove the age of the complainant to the standards required in law.

17. The second issue relates to proof of penetration. The complainant was very clear that she was forcefully defiled by the appellant on 24th December, 2013. The complainant was taken for medical examination two days thereafter on 26th December, 2013. The medical entries in the P3 form did not establish penetration, as there were no tears or bruises, and no discharge. The only entry in the P3 form that suggests sexual activity was that high vaginal swab showed epithelia cells with a few blood cells, from which finding the medical officer came to the conclusion "that it was probably to a high degree that penetrative sexual intercourse took place, and that it was highly suggestive that if this was so, then it was consensual since the victim had no signs of injury".

18. Two issues arise from the above medical report. First, whether there was sexual penetration. In my view, it was not established beyond reasonable doubt that there was penetration or sexual intercourse from the above findings. The findings of red blood cells and epithelial cells in my view could be caused by various things, other than sexual activity.

19. Secondly, there is a contradiction between the evidence of the complainant who said that she was forcefully sexually assaulted and the finding of the doctor that if sexual intercourse did occur then it must have been consensual. That contradiction would show that the credibility of the evidence of the complainant was highly doubtful. The contradiction with the medical evidence operates in favour of the appellant. It is my finding that penetration was not proved beyond reasonable doubt by the prosecution.

20. I now turn to the identity of the appellant as the culprit. The appellant stated that he was framed and that it was common practice in Dadaab Refugee Camp for people to implicate others in order to get passage to Europe. The Prosecuting Counsel also stated that he was aware that there existed cases of people implicating others sexually in the refugee camp so that the alleged victims get passage to Canada.

21. My main concern is that the complainant stated that a certain young man came to rescue her and then the appellant ran away. According to her, this happened after she loudly cried for help. That young man in my view was a very crucial witness who would have connected the appellant with the offence. Unfortunately the prosecution did not call this young man to testify in court nor did they give any reason for the failure to do so. I am guided by the case of BUKENYA -VS- UGANDA[1972] EA 47 to find that the failure of prosecution to call this crucial witness means that the trial court should have come to the conclusion that his evidence would not have supported the prosecution evidence. On that account also this appeal will succeed as the appellant has not been positively identified as the alleged culprit of the offence.

22. I thus find merits in this appeal. I allow the appeal, quash the conviction, and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 6th February, 2018

George Dulu

JUDGE