



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.71 OF 2016

ABDULLAHI OSMAN HARET APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 576 of 2015 by Hon. M. Wachira (CM))

JUDGEMENT

BACKGROUND

1. The appellant was tried and convicted by the learned magistrate at Garissa.
2. He was charged with one main count and an alternative count. The main count was for defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that on 4th June, 2015 within Garissa County, intentionally and unlawfully caused his penis to penetrate the vagina of S.N.O. (name withheld) a child aged nine (9) years.
3. 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 being that on the same day and place intentionally and unlawfully touched the vagina of S.N.O (name withheld) with his hands against her will.
4. He denied both charges, and after a full trial, he was convicted on the main charge of defilement and sentenced to life imprisonment.

THE APPEAL

5. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial appeal in December 2016. Before his appeal was heard however, he filed amended grounds of appeal and written submissions which he relied upon. His grounds of appeal are as follows –

- (1) The trial magistrate erred in law and fact in convicting him without considering that the prosecution failed to summon very crucial witnesses in court whose evidence was essential in establishing the truth of this case in the interest of justice.**
- (2) The trial magistrate erred in law and fact in convicting him without consideration that penetration through the human genital organ was not proved as there was an old FGM scar found as contained in the doctor's report.**
- (3) The trial magistrate erred in convicting him without considering that the complainant's age was not proved beyond reasonable doubt.**
- (4) The trial magistrate erred in law and fact in convicting him without considering that there was no proper identification of him at the scene of crime.**

SUBMISSIONS OF THE PARTIES

6. At the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered. He also added orally that he had been in jail for four (4) years and asked the court to be sympathetic to him as his relatives were poor and asking about his case.
7. The learned Principal Prosecuting Counsel Mr. Okemwa supported the conviction and sentence and said that the prosecution had proved all the elements of the offence through consistent and believable evidence.

CONSIDERATIONS

8. This is a first appeal. As a first appellate court, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences bearing in mind that I did not have the opportunity to see witnesses testifying to determine their demeanour and give due allowance to that fact. (See the case of **Okeno v Republic [1972] EA 32**.)

9. I have re-evaluated the evidence on record, both for the prosecution and defence. The prosecution had an obligation to prove the age of the complainant, penetration, and the identity of the culprit beyond any reasonable doubt. With regard to the age of the complainant, I am of the view that the prosecution proved beyond any reasonable doubt that the complainant PW2 was a minor aged about nine (9) years. I appreciate that no birth certificate or age assessment report or other documentary evidence on age of the complainant was produced in court. The father of the complainant PW1 N O H also did not either state the age of the complainant or give an indication of the date or year of her birth.

10. However, the complainant PW2 during voire dire examination by the trial court stated that she was aged nine (9). She repeated the same story in her sworn evidence. In addition to the above, the learned magistrate also saw the complainant while testifying in court. I have no doubt that the magistrate saw that the complainant was young. In my view, the age of complainant was proved by the prosecution beyond any reasonable doubt, even though no documentary evidence was produced in court, as age may at times be established in the absence of documents.

11. I now turn to penetration. The complainant PW2 went for medical examination two (2) days after the incident on 6th June 2015. The P3 form was filled by Dr. Kasogo who did not testify in court because she had by then gone for training, and the form was produced by PW3 Dr. Abdul Malik.

12. I have perused the P3 form. The doctor noted presence of an FGM scar, but and no tears or lacerations were seen on the vulva, though the hymen was missing and the vagina looked red.

13. In my view, the above findings on their own, did not establish that penetration did occur. The doctor infact did not say or give any findings on penetration. Therefore in my view, penetration was not proved by the prosecution beyond any reasonable doubt. In my view, it cannot be said that merely because the hymen was missing, or there was reddening of the vagina, then there must have been sexual penetration two (2) days earlier.

14. The more important reason why this appeal will be allowed is because of the identification of the appellant. Though PW1 the father of the complainant said that he reported the matter to the chief and they searched for the appellant, neither the chief nor any other independent witness was called to testify in support of that allegation. These witnesses would certainly have provided necessary corroboration. The complainant also said that she identified the appellant by voice. According to her, the appellant was an uncle, which was also admitted by the father PW1. The appellant according to PW2 met her and other siblings outside the house before they went in to sleep, and while she was asleep in the house, she felt somebody penetrating her through the vagina. The appellant on his side gave a sworn testament of defence stating that, there existed a grudge with his brother PW1, because of the sale of family camels.

15. I note that the appellant did not cross examine the complainant's father PW1 and the complainant PW2, but cross examined the doctor PW3. He also cross-examined PW4 Cpl John Mate who took over investigations from PC Kaimenyi. It is to this witness PW4 that the appellant asked questions on who had arrested him and PW4 said that it was the chief and village elders.

16. The evidence of identification of the appellant as the culprit was that of a single witness the complainant PW2 and it was voice identification.

17. Indeed the proviso of section 124 of the Evidence Act (Cap. 80) does not require corroboration of such evidence from the victim of a sexual offence provided it is believable and the trial court believed the same, for reasons to be recorded. In the present case, the evidence of voice identification in my view, is not conclusive. Voice identification can be satisfactory and a basis for convicting an accused person. See the case of **Choge vs Republic [1985] KLR 1**. However care must be taken before convicting on the same.

18. In the circumstances of the present case, it is apparent that the complainant PW2 merely identified the appellant as the perpetrator of the offence because she saw him earlier on outside the house that evening before she went asleep.

DETERMINATION

19. In my view, both penetration and the identity of the appellant in this case were not proved by the prosecution beyond any reasonable doubt. I thus find that the conviction of the trial court is not safe and cannot be sustained, and has to be quashed and the sentence set aside.

20. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered in open court at Garissa this 11th July, 2018.

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George Dulu

JUDGE