



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 106 OF 2015

SALAT ABDI ADEN APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 1887 of 2014 by Hon. M. Wachira (CM))

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Garissa with 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 were that on the 11th December 2014 in Dadaab District within Garissa County intentionally and unlawfully caused his penis to penetrate the vagina of U.A.A.(name withheld) a child aged 6 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 No. 3 of 2006. The particulars of the offence were that on the same day and place intentionally and unlawfully touched the vagina of U.A.A. (name withheld) a girl aged 6 years with his hand against her will.

3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to life imprisonment. He has now come to this court on appeal against both conviction and sentence.

4. He filed his initial petition of appeal in November 2015. Before the appeal was heard however he filed an amended petition of appeal and written submissions which he relied upon. The grounds in the amended petition are as follows:-

(1) The magistrate wrongly convicted him without considering that the doctor said that the vagina showed an old FGM scar and was unable to confirm penetration.

(2) The trial magistrate erred in convicting him while all the witnesses gave evidence which was different from what the complainant said.

(3) Trial magistrate erred in convicting him without considering that the age of the complainant was not ascertained.

(4) The person who arrested him did not testify at to how and why he was arrested.

(5) The magistrate convicted him wrongly as he was not examined to establish the truth of his allegations.

(6) That he was not caught in the act or in the house as PW1 alleged, so there is high possibility of mistaken identity.

5. At the hearing of the appeal, the appellant relied on his written submissions and elected not to make oral submissions.

6. Mr. Okemwa the learned Principal Prosecuting Counsel supported the conviction and said that prosecution called 5 witnesses and proved that the complainant was 6 years old through the evidence of her mother and the doctor. He stated that the date of birth of the complainant was entered in the Refugee Registration Form as 1st of January, 2008.

7. With regard to penetration, counsel submitted that though the doctor PW1 said in court that it was not easy to say that the hymen was intact because of FGM, she maintained in oral evidence that there was evidence of forceful sexual penetration. Counsel noted however that such penetration is not indicated in the P3 form.

8. With regard to identification, counsel submitted that the complainant and the appellant were neighbours and that the appellant was an

employee of the father of the complainant and thus there could be no possibility of mistaken identity. Counsel however urged the court to consider that the appellant talked of an existing animosity with the father of the complainant due to his demand for his pay.

9. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my independent conclusions and inferences. In doing so, I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See **Okeno vs Republic [1972] EA 32.**

10. I have re-evaluated the evidence on record. The prosecution called 5 witnesses while the appellant gave sworn defence testimony. The prosecution version is that the incident occurred at night when the appellant entered the house where the complainant and another child were sleeping and defiled her. The complainant said that she screamed and an auntie PW3 came to her rescue. The incident was reported to the police and the appellant was arrested. In his sworn defence the appellant said that he had repaired a vehicle of the father of the complainant for 15,000/= and he was only paid 5,000/= and as a result they fought with the father of the complainant thus creating the animosity and the arrest.

11. This is a defilement case. The complainant has thus to be aged below 18 years. The prosecution is required to prove this element and two other elements beyond any reasonable doubt. The complainant testified as PW2 and said that she was 6 years old. She was not sworn. The auntie K A H PW3 said that she lived with the complainant because her mother had passed away. She did not give the complainant's age but relied on the Refugee Registration Form showing that she was born on 1st January, 2008. This age was not challenged by the appellant in court. The learned magistrate must have seen the complainant physically in court. I am satisfied that the age of the complainant was proved by the prosecution beyond any reasonable doubt based on the evidence on record, to be 6 years.

12. The second ingredient to be proved by the prosecution was penetration. I have seen the P3 form and the crucial entry states as follows:-

“Vulva has multiple bruises, majora and minora absent following FGM, vagina closed, with scar tissue and impossible to examine the hymen.”

13. It is noteworthy that there is no mention or indication of any form of penetration in the P3 form. In fact the finding was that the vagina was closed. Though the doctor PW1 Dr. Sara Kesogha said in court that the multiple bruises were fresh, which was evidence to show recent forceful sexual penetration, the entries in the P3 do not support that statement. In my view, that was an oral addition in court. Therefore in my view, it was not established from the evidence on record that there was penetration to the standard of proof required in criminal cases beyond any reasonable doubt. The probability is that the entries in the P3 form were correct instead of what the doctor said in the open court.

14. Assuming there was penetration, was the appellant the culprit? From the evidence on record, the prosecution did not prove that the appellant was the culprit. There was clear contradiction between the evidence of the complainant who testified as PW2 and the evidence of PW3 K A H and PW4 Amaal Abdillahi Hassan. While the complainant PW2 said that the incident occurred during the night and she screamed for help and called her auntie K PW3 who came and washed her, PW3 said she woke up at 3 am but did not find the appellant where he was eating miraa outside the house. It was her evidence that when she called him he immediately got out of the house and she did not know what had happened to the children. According to her, it was after she prepared the breakfast the next morning after day break that the complainant told her that she could not wake up because she had been defiled by the appellant. Therefore, though the complainant said that K came because of the screams, K had a totally different story. In addition, the complainant did not in her evidence identify anybody as the culprit. She merely stated as follows:-

“The person came on top of me and inserted his penis inside my vagina and I felt pain in my vagina. I screamed for help and called my auntie K.”

15. The versions of these two prosecution witnesses were thus at great variance and did not establish that the appellant was the culprit. In addition to the above, PW4 Amaal Abdillahi Hassan stated that it was at 6.30 am when she heard screams from the house of K. She stated that she went there and saw K telling the appellant, **“Leave me alone! Leave me alone!”** It is thus clear that the interaction between K and the appellant was in the morning after day break. It cannot be said therefore that the incident occurred at 3 am.

16. In totality therefore the prosecution did not establish beyond any reasonable doubt that the appellant was the culprit, even assuming that defilement occurred.

17. Consequently, 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 19th day of September, 2018.

.....

George Dulu

JUDGE