



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 26 OF 2015

SHEIKH ELEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Hola Senior Resident Magistrate Criminal Case No. 278 of 2014 by Hon. M. D. Kiprono (SRM))

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Hola with defilement contrary to section 8 (1) as read together with subsection (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between 1st August 2013 and 1st July 2014 at unknown times in Tana North Sub-County within Tana River County intentionally caused his penis to penetrate the vagina of M.I. (name withheld) a girl aged fifteen (15) years. In the alternative he was charged with committing and indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that between the same dates, times and place intentionally touched the vagina of M. I. a girl aged fifteen (15) years with his penis.

2. He denied both charges. After a full trial he was convicted on the main count of defilement and sentenced to serve twenty (20) years imprisonment.

3. The appellant has now come to this court on appeal. He has appealed against both conviction and sentence on the following grounds:-

(1) That he is an old man aged fifty (50) years.

(2) That he is the sole bread winner of his family of two wives and five children who are still young.

(3) The girl who is alleged to have been defiled was twenty (20) years old and was earlier married by another man.

(4) That he married the complainant according to Islamic Sheria and paid the dowry in the presence of witnesses.

(5) Sentence imposed was too harsh.

(6) There was a conflict between the complainant's mother and her father thus the whole story was a twisted one.

4. At the hearing of the appeal, the appellant was represented by Mr. Nyagah who also filed a petition of appeal for the appellant subsequent to the appeal initially filed by the appellant. The grounds of appeal filed by Paul Mugwe Nyagah were three (3) and are as follows;

(1) That the learned magistrate erred in law and in fact in having the charges read to the appellant in a language he did not understand.

(2) The learned magistrate erred in law and fact in not considering that the appellant disputed the age assessment report in that the complainant was aged above eighteen (18).

(3) The learned magistrate erred in law and fact in not considering that the appellant was meant to believe that the complainant was above the age of eighteen (18).

5. In his submissions Mr. Nyagah said that the main basis of the appeal was the age of the complainant. According to counsel, the prosecution did not discharge its duties of establishing that the complainant was below eighteen. There was no evidence to prove beyond reasonable doubt that the complainant was fifteen years as alleged.

6. Counsel submitted that PW1 Mohamed Ali who claimed to work for Hola District Hospital did not even indicate his academic background and work experience but was out to show that the complainant was fifteen years of age. The age assessment report produced does not indicate who signed it on behalf of the Medical Superintendent. The said document also did not give or indicate the methodology used to determine the age.
7. There was also no evidence of age tendered by the mother of the complainant. According to counsel therefore, section 60 of the Evidence Act was not satisfied.
8. In any event, counsel argued that the father of the complainant informed the appellant that she was twenty years and a wedding was conducted as supported by the evidence of DW2.
9. Counsel felt that it was curious that the parents of the complainant did not testify in the matter. He said that the appellant was honest and tendered as believable defence.
10. Mr. Okemwa the learned Principal Prosecuting Counsel stated that prosecution was required to prove three elements in a defilement case. From the evidence on record there was no dispute that the complainant and the appellant were married. Sexual penetration did occur and the complainant gave birth to a child. The evidence on record was that the complainant was married to the appellant as a third wife.
11. Counsel disclosed to the court that the complainant had gone to the DPP Office and stated that she had been persuaded by her relatives to send a complaint to court.
12. He agreed with Mr. Nyagah that the major issue was on age. According to him, the complainant disclosed to him at his office that her family made her allege that she was below eighteen years.
13. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. In doing so, I am required to bear in mind that I did not have the opportunity to see witnesses testify and determine their demeanour and give due allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32**.
14. I have re-evaluated the evidence on record and considered the submissions of counsel on both sides. The charge sheet talks of dates between 1st August 2013 to 1st July 2014, this period according to the evidence both for the prosecution and the defence, was a period wherein the appellant and the complainant lived as a husband and wife after undergoing a marriage ceremony under Islamic rites.
15. According to the evidence on record, sexual intercourse did take place between the complainant and the appellant. As a result, the complainant gave birth to a baby boy shortly before she made a report to the police indicating that she wanted to go back to school.
16. The issue therefore is the age of the complainant. Was the complainant proved by the prosecution to be below eighteen years of age? This is an important ingredient of the offence of defilement, as one who is above the age of eighteen (18) cannot be defiled according to the Sexual Offences Act No. 3 of 2006.
17. The complainant testified as PW2 and said that she was forcefully married to the appellant as a third wife when she was fifteen years of age. PW1 Mohamed Ali of Hola District Hospital who claimed to have assessed the age of the complainant to be fifteen years on 14th October, 2014 neither indicated his qualifications and experience, nor did he indicate the methodology used to assess the age of the complainant, though he produced an age assessment report and a P3 form.
18. In the whole of her evidence, the complainant did not state her age but only acknowledged that her age assessment was done and that she was then fifteen and born in 1999. She complained that her age mates were schooling in Class 4 and 5 while she was now married.
19. It was noteworthy that none of the parents of the complainant testified in court. The prosecution also did not give any information as to why those important witnesses did not testify. From the evidence on record therefore, it is apparent that the age of the complainant was not proved by the prosecution beyond reasonable doubt to be fifteen (15) years. It is also curious that the complainant is said to have gone to the DPP's Office before the appeal was heard to say that she was influenced by her relatives to implicate the appellant with the offence.
20. Even if the complainant was fifteen (15) years of age, there would still be a defence available to the appellant under section 8 (5) Sexual Offences Act. The complainant clearly behaved like an adult for a number of years from 2012, as I have seen a letter in the file from her headmaster one called J K. M dated 8th November, 2012 from [particulars withheld] Primary School indicating that the complainant who was then in Std. 4 had eloped and disappeared from school, and that in fact she was eloped by one Abdi Gobu of Bisabi village, Bura Tana. The defence of the appellant was that he was given the impression that the complainant was above eighteen and that is why he married her as a third wife and they cohabited for more than a year. In my mind therefore, the statutory defence provided in section 8 (5) of the Sexual Offences Act for the offence of defilement is applicable in this case. In my view, with the defence of the appellant on record including that of two (2) defence witnesses was sufficient to discharge him of culpability for the offence. The fact that the complainant was small bodied, or was a school girl is not sufficient reason to charge somebody and convict him or her for defilement.
21. The offence of defilement was not proved to the required standard. I thus 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 at Garissa this 18th day of September, 2018.

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George Dulu

JUDGE