REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 57 OF 2016

BM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 306 of 2016 by Hon. T. O. Tanchu (SRM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Garissa with defilement of a girl contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 20th March 2016 at [Particulars Withheld] Centre Tana North Sub-County within Tana River County intentionally caused the penetration of his private part namely; penis to penetrate the vagina of S J a girl aged 14 years.

2. In the alternative, he was charged with 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 S J.

3. He was charged with a second substantive count of deliberate transmission of HIV contrary to section 26 (1) (a) of the Sexual Offences Act, the particulars of the offence being that on the same day and place intentionally, knowingly and willfully had carnal knowledge by allowing penetration of his private part namely penis into the vagina of S.J. without the use of protection therefore exposing her to infection of HIV.

4. He was further charged with a third count of resisting arrest contrary to section 253 (1) of the Penal Code. The particulars of the offence were that on the 21st March 2016 at [Particulars Withheld] Centre Tana North Sub-County within Tana River County willfully being charged with the offence of defilement resisted arrest by P.C. Victor Madegwa and P.C. Simon Irungu.

5. He denied all the charges. After a full trial, he was convicted on counts 1 and 2, for defilement and deliberate transmission of HIV, and acquitted of Count 3. He was sentenced to serve 20 years imprisonment for defilement and 15 years imprisonment for transmission of HIV, and sentences were ordered to run concurrently, which was a total imprisonment term of 20 years.

6. The appellant has now come to this court on appeal. Though he filed his appeal in 2016, it took long for the file to be placed before the Judge by the Deputy Registrar, thus delay in hearing the appeal.

7. Before the hearing of the appeal, the appellant filed written submissions, which I have considered. At the hearing of the appeal, he relied on his written submissions and left the rest in the hand of the court and the Almighty God.

8. The learned Principal Prosecuting Counsel Mr. Okemwa on his part submitted that medical report and oral evidence had conclusively established the age of the complainant. As for penetration, counsel stated that penetration was confirmed by the evidence of the prosecution that the appellant took the complainant by the hand to his house and defiled her the whole night and later threatened to kill her. Counsel was also of the view that the medical evidence confirmed that penetration had occurred.

9. With regard to identification of the appellant as the culprit, counsel submitted that the appellant and the complainant knew each other well before and there was thus no possibility of mistaken identity.

10. This is a first appeal and as a first appellate court, 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 see witnesses testify in order to determine their demeanor. See the case of **Okeno vs Republic [1972] EA 32**.

11. The appellant was convicted on two counts. The charge of deliberately infecting the complainant with HIV, in my view, was not proved

against the appellant beyond any reasonable doubt as required in criminal cases. Though the charge clearly stated that the appellant *"knowingly and intentionally"* infected the complainant with HIV, the evidence on record does not indicate that the appellant knew that he was HIV positive; therefore he could not knowingly and intentionally infect the complainant, as knowledge of the HIV status by the appellant was an important ingredient which the prosecution was required to prove. Not using sexual protection devices such as a condom is not an offence *per se*. The complainant also having been found to be HIV negative, even if the appellant knew his status; the offence proved would have been that of an attempt not transmission of HIV. Having found that there was no evidence on record to establish that the appellant knew his HIV status, I find that the trial court wrongly convicted him for the offence. I will thus quash the conviction and set aside the sentence for this charge on that account.

12. I turn to the offence of defilement. The evidence of the prosecution was that the complainant and the appellant spent a night in the appellant's house and had sexual intercourse. The complainant PW1 however, gave contradictory evidence on the dates which necessitated the prosecutor to amend the charge after the closure of the prosecution case. The charge should preferably have been amended before closure of the prosecution case. Since the charge was amended, it should have been read to the appellant to respond. The record does not however show that the appellant was given a chance to plead to the amended charge, or say anything he wanted to say about it. That was a fatal mistake by the trial court which rendered the proceedings a mistrial, and the appeal will succeed on that account.

13. In addition to the above, the reason why the appellant was arrested was not because of the alleged defilement, but because he allegedly assaulted the complainant at her sister's residence, claiming that she was his wife and wanted to go and sleep with her. In my view, the offence which he should have been charged was that of assault not defilement. It appears that the defilement charge was an afterthought after the assault incident.

14. Finally, what remains on record on the alleged defilement was the evidence of the complainant as against that of the appellant. In my view, the evidence of the complainant was not adequate, nor was it corroborated or consistent to justify a conviction of the appellant for this serious offence. Though section 124 of the Evidence Act (Cap. 8(1)) does not require corroboration of the evidence of victims in sexual offences, the evidence of the complainant herein was shaky and contradictory and should not have been believed by the trial court to sustain the conviction for defilement. The conviction of the trial court for defilement is therefore not sustainable, and I will quash the conviction and set aside the sentence.

15. Consequently, I allow the appeal, quash the conviction and set aside the sentences on both counts. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 3rd day of October, 2018.

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George Dulu

JUDGE