REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 72 OF 2016

GEORGE MAINA..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrates Criminal Case No. 1847 of 2012 – M. Wachira CM)

JUDGMENT

The appellant was charged in the Chief 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 diverse dates between May and 12th November 2012 in Garissa County unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of L B D a child aged 15 years. In the alternative he was charged with committing an indecent act with a child contrary to section 1 (1) of the Sexual Offences Act No. 3 of 2006. (This should be section 11 (1). The particulars of the offence were that during the same period and at the same place unlawfully and intentionally touched the vagina, breasts and buttocks of L B D with his penis.

He denied both charges. After a full trial he was convicted on the main count of defilement and sentenced to serve 20 years imprisonment. He was acquitted of the alternative count of indecent act.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. His grounds of appeal were filed by Onono and Co. Advocates in December 2015, after he had filed his initial grounds of appeal. The grounds of appeal filed by the advocate are as follows:-

1. The learned Chief magistrate erred by ignoring or down playing, without reason, the material inconsistencies, contradictions and gaps in the prosecution case to the detriment of the appellant.

2. Having regard to the inconsistencies, contradictions and gaps in the prosecution case the learned chief magistrate erred by failing, neglecting or refusing to give the appellant the benefit of doubt which in the circumstances he was clearly entitled to.

3. The learned magistrate erred by believing the complainant when the complainant was an unreliable and truthful witness.

4. The magistrate erred by failing to give due weight to the unexplained failure by the complainant to raise any alarm in the circumstances when such action was expected and a logical action to take.

5. The learned chief magistrate erred by drawing material conclusions unsupported by actual evidence to the detriment of the appellant.

6. The chief magistrate erred by ignoring, without reason, crucial areas of evidence which would have given necessary weight, substance and credibility to the prosecution case had they been explored by the investigating officer and evidence collected and presented to the court.

7. In evaluating the entire case for the prosecution the learned chief magistrate erred by ignoring the unavoidable ethnic and religious divide separating the complainant and the appellant to the detriment of the appellant as well as the fact that the offence alleged is supposed to have occurred in an open area within a section of Garissa predominantly populated by members of the complainant's ethnic community.

8. The learned chief magistrate erred by unlawfully shifting the burden of proof from the prosecution to the defence.

9. Generally the conviction was against the available evidence.

Before the appeal was heard, the appellant in person filed written submissions. I have perused and considered the said written submissions. The appellant emphasized the insufficiency of the evidence. He also stated in the submissions that the evidence of the prosecution was inconsistent and untrustworthy. In addition, he submitted that crucial witnesses such as Dr. Farah who conducted medical examination in December 2012 was not called to testify. In any event he stated that the mere absence of the complainant’s hymen did not prove that he was the culprit.

At the hearing of the appeal, the appellant elected to rely on his written submissions. He opted not to tender oral submissions.

The learned prosecuting counsel Mr. Okemwa submitted that the prosecution called all relevant witnesses to establish the age of the complainant and penetration. Counsel submitted however that there was something wanting in the evidence of PW1 and PW2 which was raised by the appellant. According to counsel, the evidence of abortion and penetration was not straight forward. Though victim said she had an abortion in Sirisia Bungoma, but no DNA test was conducted. Counsel stated that the movement of a Somali girl from Garissa to Bungoma mystified the prosecution allegation, as such would have been unusual.

In summary, the prosecution evidence is that the appellant is a resident of Garissa town operating a shop. The complainant PW1 L B D (not real name) was a 15 year old girl at the time of incident in 2012 attending primary school. The complainant normally passed the shop of the appellant while going to school and back home. They became familiar with the appellant.

One day, as the complainant passed near the appellants shop he poured water on her face and held her hand led her to his shop and defiled her. This was in May 2012. The appellant then told the complainant to be passing by that shop regularly in the afternoon. She continued doing so and they indulged in sexual intercourse on several occasions. Around November 2012 the complainant realized that she was pregnant. She infomred her school teacher and her mother was informed about it. The appellant then, in an attempt to exonerate himself, took the complainant to Sirisia in the company of two women where an abortion was procured. The complaiant came back after 10 days, and a complaint made to the police and the appellant was charged with the offence.

When put on his defence, the appellant gave sworn testimony. He stated that he owned a kiosk made of iron sheets where he dealt with scrap metal. He stated that he knew the complainant and had seen her many times pass her shop but did not defile her.

In cross examination, he said that he used to see her walk to a nearby school but did not know her name.

From the above evidence, the learned magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt and convicted him on the main count of defilement and sentenced him to serve 20 years imprisonment. There from arose the present appeal.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not see the witnesses testify to determine their demeanor and give due allowance to that fact. See the case of ***Okeno Vs. Republic (1972) EA 32.***

I have evaluated the evidence on record. In a case of defilement, the prosecution is required to prove first of all the age of the complainant. Secondly the prosecution is required to prove that penetration, even if partial, did occur. Thirdly the prosecution is required to prove that the accused is the culprit.

Was the age of the complainant proved? The evidence on record by the complainant is that she was 15 years of age at the time of the incident. She was attending primary school. The mother PW2 HF did not know the year when the complainant was born. However she produced a birth certificate indicating that complainant was born on 5th of May 1998. Therefore in 2012 the complainant was about 15 years. This agrees with the age that the complainant gave to the court.

In my view the age of the complainant was proved by the prosecution beyond any reasonable doubt. I will only add that it serves no purpose to retain the original birth certificate of the complainant as an exhibit in the court file in this case. I will thus order the Deputy Registrar to release the birth certificate to the Director of Public Prosecutions Garissa who hand it over to the complainant or the mother. What should be retained in the file is the photocopy of the same.

The second element to be proved by the prosecution was whether penetration did occur. The evidence on record is that there was a tear of the hymen. However there was no indication that tear was recent. There was evidence of an abortion. PW4 Philip Gitia Kahuga who testified on the abortion documents stated that he found features of an incomplete abortion. He could however not tell the age of the features that were found in the uterus. He produced his report and exray photographs.

All in all the tear of the hymen could be caused in my view by sexual intercourse or even by other factors. The incomplete abortion would suggest that sexual intercourse did take place. In my view, on the totality of the evidence on record, indeed the complainant was involved in sexual intercourse with a man.

Was the appellant the culprit? It is evident from both the prosecution and the defence testimony that the complainant and the appellant knew each other before. The complainant used to go to a nearby school passing the shop of the appellant. The appellant admitted that he knew the complainant but denied that he knew her name or that they were close to get involved in sexual intercourse. It was the complainant’s testimony that the appellant engaged in sexual intercourse with her on numerous occasions between May and November 2012. The appellant denied this. It was the story of one person the complainant as against the other the appellant.

The burden is always on the prosecution to prove beyond reasonable doubt that an accused person is guilty of the offence charged. The accused does not have a burden to prove his innocence. The complainant stated in her evidence as follows ***“from then I went to his house routinely around midday for about 5 months when the pregnancy showed. I knew I got pregnant because I missed periods after accused started having sex with me. The teacher asked me about the pregnancy. I went to the accused and told him I was pregnant and the teacher asked me about it.”***

It is clear from the above evidence of the complainant that the first person to talk to the complainant about the pregnancy was the teacher. The prosecution did not bother to find out what transpired between that teacher and the complainant and whether indeed the complainant informed the teacher that the appellant was the person responsible for the pregnancy.

The mother of the complainant PW2 HH stated as follows ***“I recall in June 2012, (L) became sick. She told me she was sick. I took her to hospital as she was vomiting a lot. She was in primary school. The***

teacher called me and informed me the child was pregnant. I cried and went home.”

Both the evidence of PW1 and PW2 was that it was the teacher who first noted the pregnancy. That teacher was not called to testify. In my view that witness was so important as regards who might have caused that pregnancy, that the failure by the prosecution to call her was ominous. She was the one who asked the complainant about the pregnancy. She was also the person who informed the mother PW2 about the pregnancy. In my view the failure of the prosecution to call this teacher who was the first person to discover the pregnancy to explain in court what they discussed with the complainant about the person responsible for of the pregnancy created a serious doubt, the benefit of which should be given to the appellant. This teacher was certainly the most crucial witness for the prosecution other than the complainant herself. I rely on a case of **Bukenya Vs. Uganda [1972] EA 549**, and give the appellant the benefit of the doubt that is created in my mind that the evidence of this teacher might have been in contradiction with the other evidence of the prosecution case.

To conclude, I find that the prosecution failed to call a crucial witness and ended up failing to prove its case against the appellant beyond reasonable doubt. I thus find merits in the appeal, quash the conviction and set aside the sentence of the trial court. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

I also order that the Deputy Registrar should release the original birth certificate of the complainant to the DPP office Garissa for them to hand it over to the complainant or her mother, and retain a photocopy of the same in the trial court file.

Dated and delivered at Garissa this 6th day of April 2017

GEORGE DULU

JUDGE