



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 61 OF 2016
BISHAR AHMED MOHAMUD-----APPELLANT
VERSUS
REPUBLIC-----RESPONDENT

(From the conviction and sentence in Wajir SPM Criminal Case No. 24 of 2016 E.Cherono SPM)

JUDGEMENT

The appellant was tried in the magistrate's court for defilement contrary to section 8(1)(3) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on 6th February 2016 at about 18.00 hours at [particulars withheld] Wajir East sub county intentionally caused his penis to penetrate the vagina of FAO aged 14 years. After a full trial he was convicted of the offence and sentenced to serve 20 years imprisonment.

Dissatisfied with the decision of the trial court, he has come to this court on appeal through counsel. His counsel relied on amended grounds of appeal which are as follows:-

1. The learned magistrate erred in law and fact in failing to take cognizance of the fact that the appellant was unrepresented by a legal counsel and therefore failure to understand the gravity of the offence and the penalty it attracts.
2. The learned magistrate erred in law and fact in failing to take cognizance of the fact that the prosecution failed to summon a crucial witness a minor aged between 8 and 10 years, who was an eye witness at the time of commission of the alleged offence and who would have given candid evidence as to whether indeed such an offence did actually occur.
3. The learned magistrate erred in law and fact in convicting the accused person on the evidence of a single witness, notwithstanding the fact that the medical report failed to show any traces of commission of the said offence.
4. The learned magistrate erred in law and in fact in failing to take cognizance of the fact that there ought to have been lacerations on the complainant's genitalia, since the accused is alleged to have used force on her.
5. The learned magistrate erred in law and fact in failing to take judicial notice of the accused assertion that the complainant was a married woman and therefore the age assessment report was compromised and should not have been relied upon.
6. The learned magistrate erred in law and fact in failing to take into consideration that the accused

had a previous existing grudge with the complainant's family.

7. The learned magistrate erred in law and in fact in failing to take into cognizance the fact that the investigating officer admitted that she never visited the scene of the crime and therefore could not give an undertaking that the facts reported to her corroborated the details on the ground.

8. The learned magistrate erred in law and fact in failing to subject the complainant to voire dire examination before admitting her on oath.

9. The learned magistrate erred in law and fact by convicting the accused person on contradictory evidence.

10. The learned magistrate erred in law and in fact by failing to take cognizance of the fact that the prosecution failed to prove that actual penetration did occur.

11. The learned magistrate erred in law and in fact in failing to take judicial notice that the ingredients of assault alleged by the complainant were not proved.

Counsel for the appellant Stephen Gakonyo Wanyoike also filed written submissions and cited several authorities. Counsel relied on the written submissions filed.

The Principal Prosecuting Counsel Mr. Okemwa opposed the appeal and stated that all the three ingredients of the offence that is age, penetration and the culprit had been proved through the evidence of five prosecution witnesses. The age of the complainant was 14 years, supported by an age assessment report. On witnesses, counsel emphasized that sexual offences were normally committed in secrecy. Counsel further added that there was no requirement to prove physical assault in a defilement case.

In response to the Prosecuting Counsel's submissions Mr. Wanyoike learned counsel for the appellant submitted that no voire dire examination was conducted by the trial court. Counsel pointed out that in the present case, the complainant stated that there was an eye witness who was not called by the prosecution at the trial. Counsel added that the medical evidence was not conclusive on penetration.

I have to start by reminding myself that 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 conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanour. See **OKENO VS REPUBLIC [1972] EA32.**

I have re-evaluated the evidence on record. I have considered the submissions both by the appellants counsel and the prosecuting counsel. The case against the appellant was hinged on the evidence of one witness the complainant PW1 FAO, a child of 14 years. The incident occurred during daytime. The medical evidence from the Clinical Officer PW3 Joseph Githura did not conclusively establish penetration. PW1 is the person who testified that she was penetrated. She said the culprit was the appellant whom she knew before. She said she was in the company of a younger sister aged 8 years when the incident occurred in the bush where she was herding her father's livestock.

The appellant denied the allegations on oath, and put up a defence of alibi that he was elsewhere harvesting firewood for sale at the alleged time and day. He has now come to this court on appeal.

The learned magistrate did not conduct voire dire examination of the complainant before swearing her to give evidence because she was not a child of tender years. Section 125(1) of the Evidence Act states-**"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease(whether of body or mind) or any similar cause."**

With regard to receipt of evidence of children, section 19(1) of the Oaths and Statutory Declarations Act [cap 15]states as follows- **"where in proceedings before any court or persons having by law or**

consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or any such persons, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty to speak the truth.

It is clear to me that where the court has reason to believe that a child of tender years does not understand the nature of an oath but understands the duty to speak the truth, the court may receive his or her evidence though not on oath. The Court of Appeal had stated severally before that tender years was below the age of 14 years. The Children Act of 2001 however put tender years as below 10 years. In the case of **SAMUEL WARUI KIRIMI VS REPUBLIC Nyeri Criminal Appeal No16 of 2014**, the Court of Appeal held that a child of 12 years should have gone through *voire dire* examination before testifying in order to protect an accused person's right to a fair trial. The Court of Appeal considered how various courts had dealt with the requirement for *voire dire* examination of children of tender years, and held that the age of 10 years in section 2 of the Children Act served a different purpose of protecting children, not meant to remove the hereto accepted age of 14 years. In my view in the interests of complying with the Constitutional requirements for fair trial under Article 50, and since children below 18 years lack legal capacity, courts should generally subject them to *voire dire* examination in order to determine whether they should tender evidence and if so whether it should be on oath.

Where such *voire dire* examination is not conducted and the witness is a crucial and decisive witness like the present case, then the value to be placed on such evidence by the court will be greatly diminished.

The more important point on appeal is the failure of the prosecution to call a crucial witness to testify at the trial without any explanation. The complainant stated clearly in evidence that she was together with her 8 years old sister when she was defiled by the appellant. The prosecution did not call this eye witness to testify nor give any reason for their failure to do so. This failure seriously puts to question the reliability of the evidence of the complainant PW1, even if she was an adult requiring no *voire dire* examination, especially because the medical evidence did not establish sexual intercourse, as the genital area of the complainant was normal. In the case of **BUKENYA VS UGANDA [1972]EA549** the Court of Appeal for East Africa stated- **“While the Director is not required to call a superfluity of witnesses, if evidence is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution's case”**

In the circumstances of this case I so find. The appeal will succeed on that account.

With regard to the burden of proof, the magistrate stated as follows-**“The accused did not call any witness to support his defence of alibi that he was not at the scene on 6/2/2016.**

In my view the learned magistrate erred in imposing a burden on the appellant to prove his defence of alibi. That amounted to shifting the burden which was always on the prosecution to prove their case against an accused person beyond any reasonable doubt, even where an accused raises the defence of alibi see the case of **ANISETH VS REPUBLIC and MACHARIA VS REPUBLIC [2001]KLR 155**. The appellant herein explained what he was doing in the entire period till he was arrested. No witness said that he tried to escape to avoid arrest. On that reason also the appeal will succeed.

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 forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 2nd May 2017

George Dulu

JUDGE