REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 4 OF 2015

ABDULLAHI MOHAMMED MADETOW....APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

(From the original conviction and sentence in Criminal Case No.11 of 2013 of the Senior Resident Magistrate's Court at Moyale by Vincent O Andet – Ag.Senior Resident Magistrate)

JUDGMENT

The appellant, **ABDULLAHI MOHAMMED MADETOW**, was Charged with an Offence of defilement contrary to section 8(1) (4) (sic) of the Sexual Offences Act of 2006. The particulars of the offence were that on 14th January 2013 at ***[particulars withheld]*** village in **Mandera** County, the appellant intentionally caused his penis to penetrate into the vagina of **R.A.Y**, a child aged 17 years. The appellant was found guilty of the offence and sentenced to serve 15 years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Mukira Mbaya the learned counsel who relied on 7 grounds in the supplementary petition of appeal dated 25th November 2015 as follows:

1. The trial and the ensuing conviction were a nullity in law for failure to avail to the appellant statements of prosecution witnesses.

2. The trial and the ensuing conviction were also a nullity in law as there was no proper or useful interpretation in that:-

(i) it is not clear whether interpretation was in Kiswahili or / and in Borana neither of which the appellant understood

(ii) the language understood by the appellant was Somali

3. The learned trial magistrate misdirected himself on the law by concentrating on the evidence of the appellant in convicting him, thereby failing to depend on the strength of the prosecution case, which misdirection occasioned injustice to the appellant.

4. That the learned trial magistrate m misdirected himself on the law and the facts by ignoring the evidence of PW3 Nuria Shukri Mohammed which implicated a different person, and the evidence of PW4 Abdrahaman Hussein who exonerated the appellant which misdirection occasioned injustice.

5. The learned trial magistrate erred in law and in fact in admitting into evidence the age assessment report, Exhibit 7 which:-

(a) was not signed

(b) was not produced by the maker, if any known;

(c) was allegedly made on the same day it was produced in court, to wit, 11th March 2013 thereby prejudicing the rights of the appellant and occasioning injustice to him.

6.The evidence of the complaining person was riddled with material contradictions vis-a-vis that of **PW3 Nuria Shukri, PW5 Ali Yaro Isaak** and **Pw4 Abdirahaman Hussein** thereby obliterating any corroboration such as to render the complaint not credible and consequently it was unsafe for the trial magistrate to convict.

7. There were reasonable doubts as to the real reason for the arrest of the appellant whether he was pointed out for the arrest and who actually did the pointing out, matters which were crucial to the trial, and the trial magistrate failed to consider or evaluate.

The state opposed the appeal through Mr. Mwangangi the learned counsel.

Briefly the facts of this case were that as the complainant was looking for their missing goats she met with the appellant who was in company of another man. One version has it that the appellant engaged her in a romantic talk and the two made some reference to them marrying. Another version is that when the two met, the appellant dragged her into some bushes and defiled her.

In his defence the appellant contended that he indeed met with the complainant. Since they knew each other before, they talked and agreed that they were going to marry. They had consensual sex. He then escorted the girl to her home.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

It was contended for the appellant that the failure to be supplied with statements of prosecution witnesses rendered the trial a nullity for it offended the provisions of article 50 (2) (j) of the Constitution. The article provides as follows:

"(2) Every accused person has the right to a fair trial, which includes the right—

(*j*) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

The learned magistrate was faulted in not informing the appellant of this right and by not supplying the

statements. This right cannot be waived by any other person but the accused person himself. The waiver can only be express and can never be due to the ignorance of its existence by the accused person. The trial court has a duty to explain to an accused of this right and to cause him to be supplied with copies of such evidence. The failure by the trial court to discharge its obligation, was prejudicial to the appellant.

It was contended for the appellant that the proceedings were conducted in a language he did not understand. It was contended that he did not understand Borana language. This contention is self defeating; When the appellant addressed me and informed the court that he had a counsel, he did so in Borana language through an interpreter. My perusal of the record indicate that he was proficient in Borana language and he fully participated in the trial.

In cases of defilement, age is very important aspect that requires to be proved, for sentence to be meted out is pegged on the age of the victim.

In the case of **Francis Omuroni versus Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000.** It was observed as follows:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

Closer home in the case **of *Kaingu Elias Kasomo vs Republic*** in *Malindi* the Court of Appeal in **criminal appeal No. 504 of 2010** stated as follows:

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."

The court concluded that *"prove of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.*

The complainant and her mother gave her age as 16 years whereas the charge sheet stated that her age was 17 years. This was before she was medically examined. She was examined on 11.3.2013 the same day the report was produced. Several issues arise in the age contradictions;

(a) What informed the investigating officer to indicate the age of the complainant as 17 years before examination?

(b) The report on age assessment was produced on the date the doctor had requested to attend court but did not. It was not produced by him and no basis was laid to have the report produced on his behalf. This raises some reasonable doubts as to the credibility of this report.

It is not clear therefore what the age of the complainant could be. She could as well be 18 years or even above. When the appellant said that he did not know that the girl was a child, the trial court was duty bound to record his observations and indicate whether any reasonable man would have taken the girl to be above the age of 18 years or not.

The appellant contended that the sexual intercourse was consensual. Any girl below the age of 18 years cannot have the capacity to give consent. This was what the trial magistrate's judgment was premised on. Now that we have raised an issue with the age of the complainant, I will endeavor to establish if indeed the intercourse was consensual.

In the course of cross examination it emerged that the complainant and the appellant were not strangers to each other. She conceded that he had gone to their home where he was offered some tea. In her evidence in chief she had said she had not known him before. While testifying, she gave an impression that two men were involved in dragging her to the bushes but she hastened to say the other one just stood by and never participated. One wonders why she kept talking in plural. Although she gave an impression that when she met the appellant and his companion she was immediately pounced on and dragged into some bushes, it emerged that her father passed by when she was talking with the appellant. This ought to have raised a red flag in the mind of the trial Magistrate.

The medical evidence of ***Hussein Maalim Mohammed PW2*** *is that she had a swollen head and multiple bruises on the elbow joints as well as on the genitalia. I am suspicious as to what caused the injuries testified of except the ones on the genitalia. This is because she never testified on the same. Is there a possibility her parents beat her for returning home late especially after her father had found her talking with the appellant and had asked her to take the goats she had at the time home?*

The injuries on the genitalia can easily be explained. The appellant conceded he is the one who inflicted them on her. Indeed the medical report in respect of the appellant indicate he had mild bruises on his penis. This may mean that either the complainant was a virgin or there was no ample preparation. Lack of ample preparation may denote use of force or lack of experience.

The complainant's evidence has raised a number of material contradictions and which makes her an unreliable witness. The Court of Appeal in the case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JJA held:

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

The contradictions I have observed in the complainant's evidence makes her unreliable when she claims she was forced to have sex. The circumstances of this case suggest otherwise.

I therefore find that it was unsafe to found a conviction on the evidence on record. I quash the conviction and set aside the sentence meted out by the learned trial magistrate. Consequently, the appellant is set at liberty unless if otherwise lawfully held.

DATED at Marsabit this 10th day of February 2016

KIARIE WAWERU KIARIE

JUDGE