REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 42 OF 2014

NASIR HUSSEIN IDLE..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

From original conviction and sentence in Criminal Case No. 440 of 2013 of the PM's Court at Wajir – L. Kassan PM)

JUDGMENT

The appellant was charged in the subordinate court at Wajir with attempted defilement Contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 16th October 2013 at Riba location in Wajir East District within Wajir County intentionally attempted to cause his penis to penetrate the vagina of N A I a child aged 15 years. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the same Act. The particulars of the offence were that on the same day and place intentionally touched breast/vagina of N A I a child aged 13 years.

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

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. His grounds of appeal are as follows:-

1. That he pleaded not guilty to the charge.
2. That he was arraigned in Wajir court with trumped up charges.
3. That PW1 and PW2 were the complainant's family members and they gave false testimony to incriminate him.
4. That the investigating officer did not have proof on the claims made.
5. That the medical officer who examined the complainant clearly pointed out in court that the complainant was not defiled as there were no injuries on the body and her clothes were not torn.
6. That the verdict of 20 years imprisonment was too harsh and excessive considering that there was no tangible evidence.

At the hearing of the appeal, the appellant submitted orally that he did not commit the offence charged. He said that though he was initially taken to the police for defilement, after the child was taken to the doctor, the charge was changed to an attempt. He stated that only one witness testified against him, though he was taken to court 10 times, no witness came to testify. According to him, the parent (father) of the complainant stated that he had three witnesses but only brought one who talked lies in court.

He submitted that during his defence, he was given 3 options and thought that the court would not condemned him for keeping quiet because he knew that the case was a fabrication. He said that he was not even given time to mitigate before being sentence to serve 20 years imprisonment. He maintained that he did not commit the offence.

Learned Prosecuting Counsel Mr. Orwa, opposed the appeal. Counsel submitted that the appellant was charged with an attempt after the doctor had confirmed that no defilement had occurred. Counsel added that the prosecution called 5 witnesses to prove their case and the appellant choose to keep quiet in his defence, and as such the prosecution evidence was not challenged.

Counsel submitted further that the appellant was an employee of the father of the complainant, and emphasized that PW4 was an eye witness and his evidence was not challenged. According to counsel, there was no evidence of an existing family grudge between the appellant and the family of the complainant.

In response to the Prosecuting Counsel's submissions, the appellant submitted that the alleged eye witness was only one and that the others were police, human rights people and the father of the complainant. He stated that it was not true that he did not cross examine witnesses expect the doctor. On remaining silent, he said that it was because he knew that there was no case against him. He maintained that keeping silent was not admission of the offence.

The facts are as follows:-

During the trial, the prosecution called six witnesses. PWI was the complainant who stated that she was aged 14 years. That on 16th October 2013 at night, as she was at home sleeping with three other young children, she woke up and saw the appellant sleeping next to her. According to her, the appellant wanted to defile her. By then the appellant had removed her long dress and pulled it over her head, though she was also wearing a skirt. When the appellant realized that she had seen him, he ran away.

It was her evidence that the appellant used to look after their camels and slept in their camel shed which was about 70 metres away. According to her she saw the face of the appellant in the moonlight. She stated that the appellant was wearing a maroon coloured kikoi which he had put on his shoulder.

She screamed and Adan Osman (PW 4) came out of his house and she went and slept there. She said that she told Adan Osman that the person who looked after the camel had wronged her, but she did not tell him his name though she knew it. She later told the story to the mother and father and learnt that the appellant had been beaten. According to her the appellant had looked after their camels for 3 months. It was her evidence that she went to the police station at Wajir Bor and also the doctor saw her.

In cross examination, she stated that she saw the appellant going to the place where he usually slept.

PW2 was A H, the father of the complainant. It was his evidence that he had two families, one in Wajir Town and one in the rural area.

On the 16 of October 2013 he went to Riba in Wajir to look after his camels. In the morning the complainant came and said that the man who was taking care of the camels had defiled her. He was surprised and shocked and reported the matter to the area chief. He then waited for the appellant to come to the dam and, when he came, he was beaten by the complainant's mother and brother. Many people came to rescue the appellant. They then took the complainant to the hospital and a P3 was issued. He stated that the appellant had worked for him for three months.

In cross examination, he stated that the appellant had defiled the complainant at 3.00 am. He stated that the complainant gave the story to other neighbours but nothing was done. He denied owing the appellant Kshs 1,700/-.

PW3 was Sheikh Abdi Assistant Chief of Riba. He stated that on 16th of October 2013, he came back to

Wajir and PW2 informed him that his daughter had been raped by a man who cared for his camels. He advised him to bring the complainant and the appellant. On the next day, the complainant and the appellant were brought to him and he took them to Wajir Bor police station.

In cross examination, he stated that the father of the complainant came to him at 6.00 pm while the incident had occurred between 3.00 am and 6.00 am. He stated that the appellant had been arrested at the dam. He said he did not interrogate the appellant.

Pw4 was Adan Mohammed a Duksi teacher and a pastoralist. It was his evidence that on 16th October 2013, while at home, the complainant who was a neighbor's daughter screamed and he went for her. According to him, the assailant ran away. He flashed a torch at him and asked the complainant what the problem was and she said Nasir had defiled her.

He then took her to his home and stated that he noted sperms on the front of the dress. According to him, the complainant continued crying until the next morning and she went to her father in town.

He stated that when he flashed a torch he saw that it was the appellant. He saw his face and clothes 10 metres away. According to him the appellant wore a white short and green kikoi. The appellant was running away when he flashed a torch at him.

In cross examination, he stated that he saw the appellant running away when he flashed the torch. He said that there were three house in the compound. He said neighbors wanted to beat the appellant but he rescued him. He said that he was the one who informed neighbours about the incident. He maintained that he saw sperms. He agreed that the complainant was his sister (cousin).

PW5 was Subdow Hassan an officer at Wajir District Hospital, whose designation was not recorded in evidence. It was his evidence that he filled a P3 form and signed it.

He stated that on 18th November 2013 the complainant was brought to the hospital by relatives on a complaint of attempted rape. He examined her found no blood stains, no injuries and no strange fluid in her private parts. There was no penetration. He produced the P3 form. The appellant did not cross examine him.

PW6 was PC Maraka Paul of Wajir Police Station. It was his evidence that the OCS gave him instructions to go to Wajir Bor on allegations of defilement. He went and he found the appellant who had been arrested having defiled a child. Statements had been recorded. They took the appellant and charged him.

In cross examination, he stated that he found the appellant at the station already arrested after having been brought by the members of public. He stated that they recorded three witness statements and then added others. He confirmed that the doctor said there was no penetration and that it was an attempted rape.

On the basis of the above prosecution evidence, the learned trial magistrate found that the appellant had a case to answer. The court thus explained the three options available to the appellant under Section 211 of the Criminal Procedure Code (cap.75). The appellant elected to remain silence and call no witnesses.

In the subsequent judgment, the appellant was convicted and sentenced.

This being a first appeal, I have to start by reminding myself that I am duty bound to reevaluate the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno -vs- Republic (1972) EA 32***.

The appellant has appealed on a number of grounds. The main ground has to do with identification.

Courts have held that in cases where the conviction of an accused person depends on identification which he challenges, then the court has to be very careful in examining the circumstances and conditions of the

identification before convicting on the basis of that evidence of identification. In the case of ***Wamunga – vs- Republic (1989) KLR 424, at page 430 the court of Appeal*** stated thus –

"whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before conviction of the defendant in reliance on the correctness of the identification".

The incident herein occurred at night. The complainant stated that she saw the appellant in the moonlight. Certainly, if there was moonlight, it would be outside the house. The complainant did not state that moonlight had penetrated into the house where she saw the appellant lying next to her. She also did not give the intensity of the moonlight.

She stated that the appellant wore a maroon kikoi on his shoulder. This evidence of what the appellant wore, was contradicted by PW 4 who said that the appellant wore a green kikoi.

PW4 said that he flashed a torch and saw the appellant ran away towards where he slept. The complainant also said the appellant ran to the house where he slept. Though PW4 stated that he flashed a torch at the appellant as he ran away, he did not say that the appellant turned to look at him. As such it is unlikely that he saw his face. PW 4 does not give any further explanation as to how he identified or recognized the appellant, whom he knew before. The evidence of visual identification was thus scanty and contradictory.

The evidence of the prosecution witnesses is that the appellant slept in the camels boma which is just 70 metres from the house where the defilement is said to have taken place. Both the complainant and PW4 knew him before as an employee of the father of the complainant. It also the evidence of the prosecution that there were other homesteads nearby.

It is curious that with all those surrounding circumstances, no attempt was made to visit the nearby place where the appellant used to sleep that night, to find out whether he was there and possibly to ask him about the incident. In my view the conduct of PWI the complainant and PW4 Adan Mohamed leaves a lot to be desired with regard to their credibility. In my view it would have been natural for them to find out where the appellant was at that time, and enquire from him about the incident. Their failure to do so or to call the assistance of neighbours from nearby homesteads, makes their evidence or testimony uncredit worthy.

In my view, the evidence of identification of the appellant as the culprit is not free from the possibility or error, it is also not free from the possibility of fabrication.

In the judgment the trial court seemed to make suppositions and thus shifted the burden of proof on the appellant. The magistrate stated as follows:-

"there is strong eye witness testimony from PW4 who shone at the assailant and saw that it was the accused person. He knew the accused person and the complainant confirmed to him that indeed the assailant was the accused person. There could be possibility that suspect quickly put on his shirt after the complainant screamed and kikoi. Since it was at night, there is a possibility that the complainant or PW4 did not mark the colour of the kikoi that the accused wore".

In my view this suppositions or possibilities made by the trial court were not proper. The burden is always on the prosecution to prove the element of the crime beyond reasonable doubt – see the case of ***WOOLIMINGTON –vs- DPP (1932) AC 462***. The burden is not discharged by merely creating a possibility.

It is also important to note that the medical evidence was that there was no evidence of a sexual assault. PW4 however insisted that he saw traces of sperms on the dress of the complainant. The complainant herself did not say so. In my view PW4 was a witness who was bent on exaggerating the incident. As

such he could not be relied upon as a truthful witness.

The appellant had a right to choose to keep quiet. That is his Constitutional right. However the fact that an accused person kept quiet did not mean that he or she had admitted the offence. The court still had a duty to evaluate the prosecution evidence on the record and make a finding as to whether the prosecution had proved its case beyond reasonable doubt. If not then the court had a duty to acquit the accused person.

In the present case the appellant elected in his own wisdom not to tender evidence in his defence. It was his right to do so. The evidence on record, without the suppositions made by the trial court was not adequate to sustain a conviction of the offence charged. The conviction cannot therefore stand.

Consequently, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawful held.

Dated and delivered at Garissa this 3rd February 2016.

GEORGE DULU

JUDGE