REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 23 OF 2015

ANDREW WANJOHI KAMARA..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in criminal case No. 112 of 2014 of the PM Magistrate's court at Hola- MD KIPRONO –SRM)

JUDGMENT

The appellant was charged in the subordinate court at Hola with defilement contrary to Section 8(1)(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 1st April 2014 at [particulars withheld] Scheme Bura in Tana North District within Tana River County, intentionally caused his penis to penetrate the vagina of NNW a girl aged 16 years. 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 NNW a girl aged 16 years with his penis. He denied both charges. After a full trial he was convicted on the main charge of defilement. He was sentenced to serve 15 years imprisonment.

Dissatisfied with the decision of the trial court the appellant has appealed to this court. He filed his initial grounds of appeal on 11th March 2015. However on 6th October 2015 he filed amended grounds of appeal, which he relied upon. The amended grounds of appeal are as follows:-

1. The learned trial magistrate erred in law and facts to convict him without considering that the court denied him the rights to a fair trial whereas he did not understand the language used in court by all the witnesses during the hearing of the case.
2. The learned trial magistrate erred in law and fact to convict him without considering that the medical evidence failed to prove complainants allegation by scientific examination.
3. The age of the complainant was not ascertained beyond reasonable doubt.
4. The learned trial magistrate erred in law and fact to convict him without considering that the witnesses evidence adduced in court was contradictory and full of inconsistences.
5. The learned trial magistrate erred in law and fact to convict him without considering that there was a vendetta between him and the complainant’s family.
6. The alleged child was being used as a snare or trap to catch and destroy the life of the appellant’s family, whereas the complainant was married with a child.
7. That the case was not investigated to the required standard.

The appellant also filed written submissions to the appeal which I have perused and considered.

During the hearing of the appeal the appellant relied on the written submissions filed.

Learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the record was clear that the charge was read to the appellant in the language he understood and further he cross examined witnesses which confirmed his understanding of the language used.

On penetration, counsel submitted that the Clinical Officer examined the victim and confirmed penetration since the hymen had been broken. Counsel emphasized that the P3 form was filled the next day and that DNA test was not necessary or mandatory to prove penetration.

On ground 3, counsel submitted that the child clinic card of the complainant established her age at 16 years. Counsel submitted also that there were no contradictions in the evidence of the prosecution and that the appellant did not indicate to prosecution witnesses a case of a grudge. Counsel submitted that PW1 only had issues with the wife of the appellant and not the appellant.

Counsel also submitted that the failure of the prosecution to call Chege and the headman to testify, did not weaken the prosecution case. Counsel sought to rely on section 143 of the Evidence Act.

In response to the prosecuting counsel submissions, the appellant stated that they had a family problem with the complainant due to land at the Bura Scheme and that their family wanted to finish his family.

In summary the evidence for the prosecution was that NNW, a 16 years old girl born in 1997 who was epileptic, lived at Bura village [particulars withheld] in Tana River County. She dropped out of school and had a small child.

On 1st of April 2014 at 1.30 Pm she was hawking vegetables and went to the home of the appellant whom she knew before. She asked him if he needed vegetables and he said he would buy only if she entered the house.

While outside the house, she experienced a bout of epilepsy and fell down unconscious. When she regained consciousness, she found herself in a house on a bed with the appellant defiling her. She screamed but the appellant refused to open the door. On her insistence he gave her biker and underpants and she rushed home.

A person called Chege informed the Aunt of the complainant P N about the incident and the matter was then reported to the police. The complainant was examined by PW5 Daniel Innocent Kapombe a Clinical Officer. Nor lacerations were noted, nor sperm cells were noted. The Hymen was broken. The complainant was already a mother of a child. The appellant was thus arrested and charged in court.

When put on his defence, the appellant stated in unsworn statement that indeed the complainant went to his house to sell vegetables. He refused to buy vegetables and the complainant asked whether his wife was present. He told her that only his son was present and at that point the complainant fell down and remained unconscious for 3 minutes. Thereafter she gained consciousness and left.

Because the complainant had made his brother be jailed before this incident, the appellant went and reported the incident to the Kenya Police Reserve and the Headman. He was however later arrested.

This is a first appeal. As a first appellate court I am required to examine the evidence afresh and come to my own conclusion and inferences see the case of ***Okeno -vs- Republic (1972) EA 32.***

The appellant has raised several issues on appeal. The first is to do with the language used in court. He says that he did not understand the language used. I have perused the proceedings and indeed the language used in court was not indicated. That was a mistake on the part of the trial court. The language used in court and by all witnesses should have been recorded.

Having said so, I find that the appellant fully understood the language used as he pleaded not guilty to the charges and cross examined witnesses at length I thus dismiss that ground and find that there was no unfair trial as alleged.

The appellant complains that the evidence of the prosecution witnesses was contradictory and full of inconsistencies. I have perused the entire record and find no contradictory or inconsistent prosecution evidence. Each of the witnesses on the prosecution side said what they knew. The totality of the evidence was basically that the incident occurred and each one of the prosecution witnesses said what they saw, did or knew about the incident. I dismiss that ground.

The appellant has complained that there was a vendetta between the complainant's family and his family and that the child or complainant was being used as a trap. In my view the evidence on record does not at all suggest that a trap was laid for or against the appellant. The issue is merely whether what the complainant was saying about the appellant was true, considering that she had an ailment of epilepsy.

This leaves me to the issue of proof of the offence of defilement. The age of the complainant in my view was proved on the basis on the medical clinic form on her clinic attendances when she was a child. It was clear that she was born in 16th October 1997. The offence occurred in 1st April 2014 which was slightly more than 17 years after. In my view therefore the age of the complainant was proved beyond reasonable doubt, to be 17 years, and as such a minor who was below 18 years of age.

I now turn to the issue of penetration. The complainant was not a virgin and she already had a child. She stated that the appellant penetrated her. She was taken to hospital the next day. No traces of spermatozoa or semen were seen in her private parts. DNA test was not conducted to show whether she had any recent sexual intercourse and whether the same had a connection with the appellant.

The fact that PW3 J K M said that he saw the complainant emerge from the house of the appellant holding her biker in her hands is not proof that penetration did infact occur, especially taking into consideration the fact that he stated that the complainant was in unstable state of mind. In my view, it is quite possible that in her own unstable state of mind, the complainant might have removed some of her clothes because of her momentary confusion, and not because of any defilement act by the appellant.

In addition to the above, the Aunt of the complainant PW2 P N said that she was informed by J C about the incident. It must be because of this information, that the appellant was arrested. This crucial witness Julius Chege was not called by the prosecution to testify in court by the prosecution nor was any explanation given for the

failure to do so. This creates a doubt in my mind because only the said Julius Chege would be able to explain why he reported that the appellant had defiled the complainant and also given the circumstances.

The failure of the prosecution to call this crucial witness to clarify the circumstances for his report leads me to the conclusion that his evidence would not be supportive of the other prosecution evidence, if he came to testify. I am duty bound to give the benefit of the doubt to the appellant. I rely on a case of ***Bukenya -vs- Uganda (1972) EA 549*** and give the benefit of the doubt created by the prosecution to the appellant.

This appeal on conviction will succeed because in my view the prosecution failed to prove penetration, and secondly because the prosecution failed to call a crucial witness who would tender evidence on the circumstances which led him to report defilement of the complainant, though nobody witnessed the act. In my view this is a case where there was need for the prosecution to bring independent witnesses such as Julius Chege due to the fact that the complainant herself was not in a stable state of mind, and could have confused issues and said she was defiled mistakenly because of her epilepsy ailment.

Consequently I allow the appeal, quash the conviction and set aside the sentence imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 11th day of May 2016.

GEORGE DULU

JUDGE