



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 85 OF 2015

(From original conviction and sentence in Criminal Case No. 134 of 2013 of the CM Magistrate's Court at Garissa- M. WACHIRA – CM).

MUKTAR YAHYA ADEN..... APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court at Garissa 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 25th January 2013 at around 11.00 am in Ifo 2 Refugee camp in Dadaab District within Garissa County intentionally attempted to cause his penis to penetrate the vagina of N a child aged 14 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 N a child aged 14 years with his penis. He denied both charges. After a full trial he was convicted on the main count of defilement and sentences to serve 15 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his initial petition of appeal in May 2014. In September 2015 however, he filed an amended petition of appeal as well as written submissions. His grounds of appeal are as follows:-

1. That the learned magistrate erred in law and fact to convict him without putting into consideration that the age of the complainant was not prove beyond reasonable doubt.
2. The learned magistrate erred in law and fact by convicting him without considering that there was no identification at the scene of crime.
3. The trial magistrate erred in law and fact in convicting him on contradictory and inconsistent evidence.
4. The trial magistrate erred in law and fact in convicting him without considering that his mode of arrest was not ascertained ie where he was arrested and by whom.
5. The prosecution case remained unproved, hence raising doubts on the credibility of the prosecution witnesses evidence.
6. The trial magistrate erred in law and fact in sentencing him harshly and excessively.

As I have stated above in this Judgment the appellant also filed written submissions to the appeal. I have perused and considered the said written submissions.

In addition to the above, the appellant stated orally during the hearing of the appeal, that he was assaulted and taken to hospital. He stated also that though the complainant initially said that she had been defiled

by him in court she talked of an assault. In addition he submitted that no P3 form was produced and as such the allegations against him were false allegations.

He stated also that though PW2 said that the appellant was in a group of people totalling 5, the complainant said that the people were 6 which was a contradiction.

In addition, PW2 said that the incident occurred at 11.00 am while PW3 talked of 10.00 am. Further the report at the police station was that the complainant was aged 14 while in court she said that she was aged 16 years. According to him, these were serious contradictions.

The appellant also contended that important witnesses were not brought to court to testify. He lastly submitted that he had been implicated in the case because the complainant wanted to be transported and relocated by the United Nations.

In responses to the appellant's submissions, the learned Prosecuting Counsel Mr. Orwa submitted that he had perused the record carefully and left the matter to the court to decide. Counsel did not state whether or not he opposed the appeal.

In brief the facts of the case are as follows. On the 25th of January 2013 at around 10.00 or 11.00 am, six girls including the complainant NDI were fetching firewood in the bush at Ifo 2 Refugee Camp in Dadaab when a man approached them. That man talked on the mobile phone telling other people that he had found many women in the bush and inviting them to come there. However nobody else appeared and the man started following the women.

The complainant fell down as she ran away and the man caught up with her. PW2 O I managed to run away and reported the incidence to elders. PW3 A R F also managed to run away and later came back to the scene with an aunt. According to this witnesses, by then the appellant had removed his trousers and was in the process of undressing the complainant, when people arrived and he ran away. A report was made to the police and the appellant was arrested and charged.

When put on his defence, the appellant gave sworn testimony. He said that he went to the bush to fetch firewood and met people who arrested him for rape. He denied committing the offence. He was not cross examined.

This is a first appeal. As a first appellate, court I am required to reevaluate the evidence on record and come to my own conclusions and inferences, but taking into mind that I did not see witnesses testify to determine their demeanor – see the case of *Okeno -vs- Republic (1972) EA 32*.

I have re-evaluated the evidence on record. The learned prosecuting counsel Mr. Orwa has not indicated whether he opposes the appeal.

The incident occurred during broad day light. The eye witnesses PW1, PW2 and PW3 certainly had an opportunity to see the assailant well. However their evidence with regard to identification is lacking.

They did not say that any of them identified the appellant by appearance as the culprit at the scene. None of them stated that she could identify the appellant. The prosecution did not appear to have asked them any question regarding the identity of the culprit.

Assuming that it was true that the complainant was assaulted with the intention of defilement as alleged, the prosecution still had to prove that the culprit was the appellant. He gave a sworn defence that he was in the bush trying to gather firewood when he was arrested. He was not cross examined.

None of the eye witnesses stated that they could identify him as the culprit. In those circumstances one cannot say with certainty that the appellant was the culprit, even if he was arrested in the bush. In my view, it is quite possible that another person attempted to defile the complainant and ran away and the appellant was arrested merely because he was found in the bush a short while thereafter. In my view his

defence which was not challenged through cross examination could as well be true. The appellant is entitled to an acquittal on that account.

Another issue relates to the way the appellant was arrested. No evidence was tendered by the prosecution on whom or by whom, where and how the appellant was arrested. The investigating officer PW4 Corporal Kayana Kana stated that on 25th January 2013, he four men reported at the police post that girls had gone to look for firewood and four men chased them. He stated that one of the girls fell down and that the appellant caught up with her intending to rape her. He also stated that people rescued the girl and that he did investigations and the accused was charged.

The evidence of the investigating officer does not touch on how, when and where the appellant was arrested. It was quiet possible therefore that the appellant was arrested when he was fetching firewood as stated in his sworn defence. No one came to testify as to where and in what circumstances the appellant was arrested. The arresters of the appellant were crucial witnesses who should have been called by the prosecution to testify – see the case of *Bukenya –vs- Uganda (1972) EA 549*. Failure by the prosecution to call them lead this court to make an adverse inference on the case. On that account also, there is a doubt as to whether the appellant was the culprit, the benefit of which doubt should be given to the appellant.

On the above two findings of this court relating to the identity of the appellant and the circumstances and reasons for the arrest, this appeal will have to succeed as the prosecution failed to prove beyond reasonable doubt that the appellant was the person who attempted to defile the complainant.

I thus 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 June 2016.

GEORGE DULU

JUDGE