REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 43 OF 2016

(From original conviction and sentence in criminal case No. 286 of 2014 of the P.M's court at Mandera- D.K.Mutai –R.M).

ADEN ABDILLE DULLO .... APPELLANT

V E R S U S

REPUBLIC .... RESPONDENT

JUDGMENT

The appellant Aden Abdille Dullo was charged in the magistrate's court at Mandera 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 19th June 2014 at ***[particulars withheld]*** within Mandera County intentionally attempted to cause his penis penetrate the vagina of RYJ a girl aged 17 years. In the alternative, he was charged with committing an 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 RYJ a child aged 17 years.

He denied both charges. After a full trial, he was convicted of the offence of attempted defilement and sentenced to serve 10 years imprisonment. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal on the following grounds:-

1. That the learned magistrate erred in convicting him without considering that the charge was fatally defective.

2. That the trial magistrate erred in convicting him without considering that the prosecution case was not proved beyond reasonable doubt.

3. That the trial magistrate erred in convicting him without considering that some crucial witnesses were not brought to court to adduce their evidence.

4. The trial magistrate erred in convicting him without considering the circumstances in which the alleged offence was committed.

5.The trial magistrate erred in convicting him without considering that the allegations of the complainant were surrounded with concocted imaginations.

The appellant also filed written submissions to the appeal, which I have perused and considered. At the hearing of the appeal, the appellant said that he was unfairly convicted as the case was a frame up based on hearsay evidence.

Learned Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that this being a first appellate court, it should re-consider the evidence on record and come to its own independent conclusions.

Counsel submitted further that the prosecution called 5 witnesses and produced exhibits. According to counsel, the evidence of the prosecution witnesses especially PWI the complainant, was consistent and believable. In addition, PW2 gave corroborative evidence and the medical report confirmed the offence. Counsel emphasized that a birth certificate was produced to prove that the complainant was about 16 years of age at the time of incident. Counsel pointed out that the incident occurred in broad day light and as such there was no possibility of mistaken identity.

In response to the Prosecuting counsel's submissions, the appellant said that he was an uncle of the girl and that though the girl said another uncle was present at the scene, the said person was not called by the prosecution to testify. He also complained that the police officer who visited to the scene did not to testify in court.

This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record as is required of me. I have perused the Judgment and considered the submissions on both sides.

The first complaint of the appellant is that the charge is defective. The appellant has not indicated in what particular aspect the charge is defective. I have perused the charge sheet and in my view there is no defect on the charge. I dismiss that ground of appeal.

The appellant has complained that the prosecution did not prove its case against him beyond reasonable doubt. Indeed, the burden is always on the prosecution in every criminal case to prove its case against an accused person beyond any reasonable doubt. An accused person does not have any burden to prove his innocence. See the case of ***Leonard Aniseth –vs- R (1963) EA 206.***

I have perused and considered the evidence on record. PWI the complainant stated that the incident occurred on 19th June 2014 at around 12.00 noon. According to her father PW2 Y M J, the complainant had gone to ***[particulars withheld]*** area to stay with a member of the family. PW4 M Y J a brother of the complainant, said that the complainant had disappeared after indicating that she intended to go to Wajir and was later found at Fatuma's place where the people there informed them that the appellant had attempted to defile her. All the three agreed that the complainant was away from her father's homestead, when the incident occurred.

According to PWI the complainant, the appellant attempted to penetrate her vagina but was not able to do so, and ended up ejaculating on her bikers which were torn. The biker was produced in evidence by PW5 PC Christine Dama as exhibit 1. According to PW5 the complainant was taken to hospital while still wearing the said torn biker. However no attempt was made to establish that indeed the appellant ejaculated on the said biker.

From the evidence on record, in my view the complainant PWI, tried to move away from her home at Mandera to go to Wajir. She did not however manage to go to Wajir. It is possible that she met the appellant.

Whatever else happened, however, it was for the prosecution to prove beyond reasonable doubt that the charge against the appellant was sustainable. From the evidence on record the allegation was that the appellant ejaculated on the biker of the complainant. It was thus important for the prosecution to have taken the biker to the Government Analyst to establish whether or not the same had stains of semen and whether the said semen originated from the appellant. Though the prosecution produced the said torn biker in court, they failed to close this gap of establishing whether indeed stains of semen of the appellant were on the biker, and as such one cannot say that the case against the appellant was proved beyond any

reasonable doubt. On that account the appeal of the appellant will succeed.

The appellant has also complained that crucial witnesses were not called to testify. He says that the police officers who visited the scene and arrested him were not called to testify. Having perused the evidence on record, I find that the only police officer who was called to testify was the Investigating Officer PW5 Christine Dama. She became aware of the incident on 20th June 2014, which was a day after. She could thus not testify and give first hand evidence on the circumstances under which the appellant was arrested. In my view, though the arresting officers were not witnesses to the incident, they would have been able to explain and give the circumstances under which the appellant was arrested. From their evidence it would be known why and in what circumstances the appellant was arrested. They were not called to testify, and the prosecution made no attempt to explain why these crucial witnesses did not testify.

On perusal of PW5 evidence, it is clear that the greater part of it was hearsay evidence. She stated that she was informed that the complainant was at her Uncle's place on 19th June 2014 and that a cousin in the house grabbed her from behind and fell her down and attempted to remove her trousers. She also stated that later the complainant's Uncle came and called the appellant who then put on his trousers and went out. She also stated that later the complainant explained the incident to her aunt leading to the arrest of the appellant.

This evidence was largely hearsay evidence, since other than the complainant PWI, none of the people mentioned as the source of that information came to court to testify. Such evidence cannot be the basis for a conviction in a criminal case.

For the above reasons, 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 lawfully held.

Dated and delivered at Garissa this 8th November 2016.

GEORGE DULU

JUDGE