REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 89 OF 2012

DEKOW ADEN ABDI .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(*From the judgment in WAJIR PM Criminal Case*

***No. 200 of 2009 delivered on 18/11/2009 A. Ingutya SRM*)**

JUDGMENT

I will start by stating that the present appeal was initially filed in the Meru High Court as appeal No. 268 of 2009. The appeal was later transferred to Nairobi and became Nairobi High Court Criminal Appeal No. 60 of 2011. The file was later transferred to Garissa and became Garissa High Court Criminal Appeal No. 89 of 2012. The appeals in the High Court at Meru and in the High Court in Nairobi were not heard. The appeal was thus heard in Garissa.

The appellant was charged in the subordinate court at Wajir with defilement contrary to Section 8 (I) as read with Sub-Section (3) from the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 6/07/2009 at 3.00 pm at Wajir [particulars withheld] Location in Wajir District within the North Eastern Province intentionally and unlawfully penetrated ZMH a child aged 14 years. In the alternative, he was charged with indecent act with a child Contrary to Section 11 (I) of the same Act. Particulars of offence were that on the same day, time and place committed an indecent act with ZMH a child aged 14 years. He denied both charges. After full trial, he was convicted and sentenced to serve 20 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant appealed initially in person. However, on 1/07/2014 his advocate M/S C. P. Onono filed a supplementary petition of appeal. This is the petition of appeal that was relied upon by counsel during the hearing of the appeal. The listed grounds of appeal are as follows:

1. That the appellant was prejudiced in his defence in that he was unable to follow the language of the court proceedings.
2. That there was no proof of the age of the complainant.
3. That the learned Senior Resident Magistrate erred in that he relied on the evidence of a single identifying witness without warning himself of the dangers thereof.
4. The Learned Senior Resident Magistrate erred in that he failed to bear in mind that the alleged offence happened in the dead of the night and in conditions which were not favorable for positive identification of the assailant
5. That generally the conviction was against the weight of the evidence.

During the hearing of the appeal, learned counsel for the appellant Mr. Onono abandoned grounds 2, 3 and 4 of the petition of appeal. He only argued ground no. 1 and 5 of the appeal.

Counsel argued that the appellant did not understand the progress of the proceedings. Counsel emphasized that the appellant was unrepresented at the trial. The appellant was brought to court on 7/07/2009 and on the 1st page of the proceedings; the language used was not indicated. Secondly, counsel argued when PW1 the complainant testified, the testimony was said to have been in Kiswahili. In counsels view therefore it was not clear whether the language used in court and by witnesses was English or Kiswahili or Somali or whether there was interpretation of one language to another. According to counsel the appellant knew Kisomali. In counsels view, though the appellant was said to have cross examined the complainant, the failure by the court to record the language used could not be cured because it was not clear to anybody what language was used. Counsel also submitted that PW2 testified in the Kiswahili language which was not interpreted to the appellant. Again, though the appellant was recorded as having cross examined this witness, there were no records of the language used by the witness and whether it was interpreted to the appellant.

The learned counsel submitted further that the proceedings continued on 29/07/2009 and the language of the court was not indicated though PW3 was recorded as having testified in Kiswahili. Counsel contended that though the appellant appeared to have cross examined this witness, there was no indication that the language used was interpreted to him. Again on the 3rd and 13th August 2009 the language of the court was not indicated. The doctor who testified on 19/08/2009 also testified in English. Counsel submitted that this being a sexual offence, it was imperative that the accused should follow what the doctor said. This did not happen because the doctor's evidence which was core for the proof of the offence was given in English without any indication that it was being interpreted to the appellant.

Counsel submitted further that the appellant was recorded as having given his defence in Kisomali language. Counsel however complained that there was no evidence of translation of what he said in his defence. Counsel asked the court to note that instead of defending himself to the charge the appellant dealt with the issue of tribalism. In counsel's view, what the appellant solid in his defence was a confirmation he did not understand the proceedings. This was why, according to counsel, the appellant engaged in irrelevance in his defence on this serious charge.

Counsel also argued that the defence witnesses were handicapped because of the language problem. Counsel enquired what was difficult for the court to record or indicate the language used in court and whether the same was interpreted. Counsel submitted that the conviction was thus unsafe and should be quashed. Counsel further submitted that ordering a retrial would be prejudicial to the appellant and would amount to an injustice.

Learned prosecuting Counsel Mr. Orwa opposed the appeal and supported both conviction and sentence. Counsel submitted that the record showed that the appellant participated fully in the trial. He used Somali language in his defence. Counsel further argued that though the specific language in taking plea was not indicated, the appellant understood the charge and thus pleaded not guilty. Counsel submitted that PW1 and PW2 infact gave their testimony in kisomali. The appellant elected not to cross examine PW 4 and 5 which was his right. Counsel submitted further that the appellant had a choice to defend himself in a way he chose to. Counsel maintained that the appellant understood the language used in court and the progress of the proceedings. Counsel emphasized that the ingredients of the offence of defilement had been proved by the prosecution beyond reasonable doubt. The identification of the appellant was without possibility of error or mistake. It was infact recognition rather than mere identification of a stranger.

In response Mr. Onono for the appellant stated that the law was clear that the court record must show the language used in court. In the present case three languages were indicated and it could not be presumed that the appellant was following the proceedings through one of those languages. Counsel also argued that the issue was not merely whether the appellant was prejudiced. According to counsel, the law required that it be clear from the record what language was used throughout. This was more important especially when the evidence of the doctor was tendered in the English language. Those were the submissions of the parties counsel.

The prosecution called 5 witnesses. PW1 ZMH was the complainant. She was a girl of 14 years. She was sworn before she gave her evidence. It was her evidence that on 6/07/2009 she was sleeping in a traditional Somali house. At around 3.00 am she noted somebody lying on her. She screamed and held on to this person. The person however beat her up and attempted to run away. She followed him together with an aunt PW2 A H D who was sleeping in the same house. There was moonlight outside and they screamed.

On hearing the screams, PW3, APC Mohamed Ali Bishow an Administration Police constable manning a nearby gate was attracted. He saw the appellant running away in the moonlight. He challenged him to stop and he stopped. He took him back to where the screams came from and met PW2 and PW1 who explained to him the story. A blanket in which the complainant was sleeping in, and a veil said to have been brought by the appellant were recovered by the police. The complainant was taken for medical examination the same morning. She was examined by PW4 Dr. Ben Jumbakocho. She was found to have fresh bleeding in her private parts and her hymen was broken. The appellant was thus arrested and charged.

When put on his defence, the appellant gave sworn testimony. He stated that he was arrested due to tribalism a day after the incident. He stated that the reason for implicating him was that his cousin was alleged to have pregnanted a woman whose husband was in prison. He called 2 defence witnesses. Both stated that the appellant was arrested on 26/06/2009. DW2 in particular stated that the appellant was arrested at 10.00 pm because of politics.

Faced with the above evidence, the learned magistrate came to the conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced him.

The advocate for the appellant filed a petition of appeal with 5 grounds. He however abandoned grounds 2,3 and 4. The grounds upon which he argued the appeal were grounds 1 and 5. Ground 1 is that the appellant was prejudiced in his defence in that he was unable to follow the language of the court proceedings. Ground 5 on the other hand, was that generally the conviction was against the weight of the available evidence.

I appreciate that in a first appeal, as a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusion and inference **see the case Njoroge vs. Republic 1987KLR 19.**

Since the appellant is represented by a counsel who has abandoned three grounds of appeal, I will go by the grounds of appeal he has argued. Ground 1 is on the language used in court. The law requires that the accused should understand and follow the proceedings in court. There is no way that an accused person will understand and follow the progress of the proceedings, if he does not understand the language used in court or by witnesses. The appellant herein used Somali language when he gave his defence testimony. In my view, it follows that he understood the Somali language.

During the proceeding on 7/07/2009 when plea was taken the language used was not recorded by the court. However, it was indicated that the charges were read in a language which he understood and he pleaded not guilty to both counts. In my view the fact that he pleaded not guilty to the charge cured the effect of the failure of the court to indicate the language used and translated to the appellant. Such a plea of not guilty would not prejudice the appellant, as the matter was now to go to full trial. Therefore in my view, plea was properly taken and plea of not guilty entered. The issue of language used became redundant.

Though counsel for the appellant has submitted that PW1 and PW2 testified in Kiswahili language, that is not what is on the record. The record clearly shows that the two witnesses testified in Kisomali language. The appellant also cross examined them though his cross examination was brief. The appellant know Kisomali language. It cannot therefore be said that the language used in court by witnesses was not stated and it cannot also be said that the appellant did not understand the proceedings. Otherwise in my view, he

would not have asked questions in cross-examination.

PW3 the arresting officer was recorded as having testified in Kiswahili. The appellant also cross examined him briefly. There was no record of translation to Kisomali language. In my view, it cannot be said that the appellant did not understand Kiswahili Language. Otherwise he would not have been able to cross examine this witness.

PW 4 and PW5 testified in English. When the appellant was asked to cross examine them, he stated that he did not have any question. In my view also, if the appellant did not understand the English language, he would not have answered that he did not have any question. The natural answer would be that he don't understand what this witness said. He did not say so.

In addition to this, the appellant gave sworn testimony. He did not at any point indicate in his defence statement that he did not understand the proceedings or any of the languages used. Though counsel argues that the appellant dwelt on irrelevances, in my view he did not. He was merely attempting to give the reason why he was arrested. According to him he was not arrested because of defilement but because of a tribal grudge existing in the surrounding community because of the conduct of his cousin who had impregnated another man's wife. This story was also supported by one of his defence witnesses. DW2, who said that the arrest of the appellant was due to politics.

Having revaluated all the record, the facts and circumstances of the case, I am convinced that the appellant understood the language used in court and by witnesses in the proceedings. I must add however, that the trial court should have indicated clearly the language which the appellant understood in order to determine whether there was need for interpretation.

I now turn to ground 5 of the appeal that the conviction was against the weight of the evidence. I appreciate that the visual identification of the appellant is that of a single identifying witness at night PW1 the complainant. Was this identification positive and free from the possibility of a mistake?

In the case of ***Wamunga vs. Republic (1989) KLR 424*** at page 430 the court of appeal stated as follows:-

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

The complainant PW1 followed the appellant as he ran outside the house. She saw him in fullness of the moonlight. She knew him before. She shouted his name severally. PW 2 also came out of the house and saw somebody running away in the moonlight. The appellant was seen running away nearby by PW3 an independent witness as the screams continued. He was restrained and arrested.

In my view, there was no possibility of mistaken identity. The appellant committed the offence, tried to run away. The complainant identified or recognized him in the moonlight and shouted his name. The complainant screamed and gave chase with PW2, and an independent witness PW 3 saw the appellant running away. PW 3 managed to arrest the appellant before he escaped. It cannot thus be said that the appellant was not positively identified, no that the wrong person was arrested. The medical report clearly established that there was fresh sexual penetration of the complainant. In my view the evidence of the prosecution established beyond reasonable doubt that defilement was committed on the complainant by the appellant. It cannot thus be said that the conviction was against the weight of the evidence. I concur with the findings of the Learned Magistrate that the prosecution proved its case against the appellant beyond reasonable doubt.

In the result, I find no merits in the appeal and dismiss the same.

Dated and delivered at Garissa this 5th Day of February, 2015.

GEORGE DULU

JUDGE.

In the presence of:-

1. **Appellant**
2. **Mr. Onono for appellant**
3. **Mr. Orwa for state**
4. **Martin/Abdikheir Court Clerk**