REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 38 OF 2014

DOUGLAS MWENDWA NZUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*From the judgment in Garissa P.M. Criminal Case No. 604 of 2010 D. W. Mburu R.M. delivered on 3/06/2010*)

JUDGMENT

The appellant was charged in the subordinate court with defilement of a girl under the age of 15 years contrary to Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 9th March, 2010 at [particulars withheld] village in [particulars withheld] Division of Tana River District within Coast Province intentionally and unlawfully did penetrate the genital organ namely vagina of M. K. M a girl under the age of 15 years. In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the same Act. Particulars of the offence were that on the same day and place did an indecent act to M. K. M. by touching her private parts without her consent. He pleaded not guilty to both counts. After a full trial, he was convicted on the main count and sentenced to serve 20 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant filed this appeal. His initial appeal was filed on 10th September, 2012. However on 30th October 2014 he filed amended grounds of appeal as well as written submissions. He relied on the later grounds of appeal as well as the written submissions.

At the hearing of the appeal, he submitted that he was arrested by civilians and not the police. Those civilians told him to admit the charges otherwise they would kill him. He stated that he did not tell the trial court about these threats because his eyes were paining. He submitted that though the complainant was said to be HIV positive, he was negative. He finally said that he was promised to be taken to hospital after three months which was not done.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that there were three elements for the prosecution to prove in a case of defilement. Firstly, that the complainant is below 18 years of age. Secondly, penetration had to be proved. Thirdly, the prosecution had to prove that the accused was the culprit.

On the age of the complainant, counsel submitted that the doctor PW5 confirmed the age of the complainant. The age was thus proved beyond reasonable doubt. With regard to penetration, counsel submitted that the doctor PW5 found blood stains on the underwear of the complainant and the hymen was broken. There was also a cut wound above the anal opening. The injury was classified as grievous harm. Penetration was therefore proved beyond reasonable doubt.

With regard to the appellant being the culprit, counsel submitted that PW2 the complainant knew the appellant well before the incident. The appellant infact lived in the same house with the complainant and was her uncle. The complainant knew the appellant by name. The offence was also committed during broad day light and visibility was clear. There was no evidence of an existing grudge. PW3 the wife of appellant also testified in court. Counsel submitted that the defence of the appellant was an afterthought.

With regard to the complaint by the appellant that the charge was defective, counsel maintained that the charge was proper and that the appellant fully participated in the trial. However, in case the charge had a defect then such defect was minor and did not prejudice the appellant. As such the defect if any, was curable under the provisions of Section 382 of the Criminal Procedure Code.

In response to the prosecuting counsel's submissions, the appellant stated he had nothing to add to his written submissions.

During the case in the trial court, the prosecution called 6 witnesses. PW1 was the complainant who tendered unsworn testimony. She stated that she knew the appellant as an uncle and that they lived in the same house at [particulars withheld]. On the day in question, the appellant asked her to go and fetch firewood in the bush. They went together. While in the bush, the appellant removed his clothes and lay down on the ground. He then removed the complainant's clothes and sodomised her using his finger and penis. She cried. On going back home she revealed what had happened in the bush to the appellant's wife. She was thus taken to hospital. This witness was cross examined though she did not give sworn testimony. In cross examination she stated that the incident occurred at around lunch time, and that the appellant had come from work by then.

PW2 was R M the mother of the complainant. She stated that the complainant was aged 13 and had mental problems since birth which was the reason and that is why she did not progress in school. She stated that on 11/03/2010, she was at Mwingi when she was called to go to [particulars withheld] urgently. It was her evidence that the appellant was married to the sister of the complainant. She arrived the next day at [particulars withheld] and found that her daughter the complainant had already been taken to the hospital.

Pw3 E M was the wife of the appellant. It was her evidence that on 9/03/2010 she left home and proceeded to Garissa Town to buy clothes. She left the complainant and the appellant in the house. When she came back in the evening, she found the complainant in bed. The complainant informed her that the appellant had raped her in the bush. When she asked the complainant about the allegation, he initially kept quiet but later admitted the incident and blamed it on the devil. She noted that the complainant had visible injuries in the anus area. They thus reported the incident to the police and took the complainant to the hospital. In cross examination, she stated that the appellant asked for forgiveness even in the presence of the doctor.

PW4 was J K. It was his evidence that on 9th March 2010, that the appellant did not report to his usual place of work. At around 11 am, he was informed that the appellant had committed defilement. This witness helped to take the complainant to the hospital at [particulars withheld] trading centre which was about 10 kilometers away. He stated that they had to carry the complainant because she was not able to walk. In cross examination, he stated that the appellant was actually at work on 9th March, 2010. He stated that it was on 10th March, 2010 the appellant came to work at 1.00pm. He denied having any interest in the appellant's wife.

PW5 was Dr. Kioko. He filled the P3 form for the complainant on 12/03/2010. The observation was a cut wound above the anal opening of the complainant. According to him there was evidence of penetration. He also examined the appellant medically. He produced the P3 forms for the complainant and appellant.

PW 6 was the Investigating Officer Corporal Ruto. It was his evidence that on 10th March, 2010 he received a defilement report at Madogo Police Station. He escorted the complainant to Garissa

Provincial General Hospital for treatment and completion of the P3 form. He recorded statements from witnesses and charged the appellant with the offence.

When put on his defence, the appellant gave sworn testimony. He stated that on 9th March, 2010, his wife went to [particulars withheld] Market while he went to work until 12.00noon. He went back home, prepared lunch for the children and went back to work. When he arrived back home at 5pm, his wife had not come back. He went to fetch water and on return he found his wife with the complainant. The complainant was crying and his wife refused to talk to him. According to him, the wife beat up the complainant and forced her to allege that he had raped her. They went to bed but his wife quarreled him until 2.00 am. In the morning, he suggested that they take the complainant to the hospital. Four men thereafter went to his place of work, took his axe and informed him that his wife had made a rape report to the police. It was his defence that his wife framed him due to the fact that he had poor eye sight.

Faced with the above evidence, the learned trial Magistrate delivered judgment. The court convicted the appellant on the main count of defilement and sentenced him to serve 20 years imprisonment.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to take into account the fact that I did not see the witnesses testify to determine their demeanor.

The appellant stated that the charge was defective. That the evidence on record is at variance with the charge. The charge is for defilement and the particulars are that the appellant penetrated the vagina of the complainant. The evidence from the doctor is that the injury or wound was found on the upper part of the anal opening. The complainant stated that the appellant used both his finger and his penis to sodomise her. My understanding is that the complainant was saying that the appellant penetrated her anus using his finger and his penis. As such, the only major variation is on whether the penetration was to the anus or to the vagina. The Sexual Offences Act does not make a distinction between the two, where defilement is alleged. In my view therefore, that variation between the allegation in the charge and the evidence tendered in court do not prejudice the appellant. Nor did it mean that an offence of defilement was not committed. I dismiss that complaint.

The appellant has complained on appeal that the Magistrate wrongly convicted him on unsworn evidence of the complainant contrary to Section 152 of the Criminal Procedure Code. Indeed, the complainant gave unsworn testimony. She was said to be below 14 years of age. She was said to be mentally handicapped to some extent. In my view, in view of the provisions of Section 124 of the Evidence Act provided her evidence was believable and was actually believed by the trial court a conviction can still be sustained.

In the present case, the complainant who gave unsworn evidence was cross examined. This was a mistake. It is common in this area for Magistrates to allow cross examination on the witnesses who have tendered evidence neither on oath nor affirmation. Witnesses who have not been sworn or affirmed cannot be cross examined. Their evidence is unsworn evidence and its value is taken at that level. It is therefore wrong to allow cross examination on such evidence. In the circumstances of this case, I find no reason to disbelieve the version of the complainant. She had nothing to lose or gain by implicating the appellant. In my view therefore, the evidence of the complainant was believable and the learned trial Magistrate was correct in believing and convicting on the same.

The appellant has also complained that the age of the complainant was not established. In defilement offences, proof of the age of the complainant is an important factor. It is an ingredient to be established beyond reasonable doubt by the prosecution. This is because the offence can only be committed on victims who are below 18 years of age. Secondly, there are three age brackets which determine the minimum sentence to be considered by the court and handed down. The complainant herein is said to be 13 years of age. The doctor did not carry out any assessment for age. The front page of the P3 form which was filled by the police gave the age of the complainant as 13 years. Under section C of the P3 form, the doctor merely entered an estimated age of more than twelve (12) years. The mother of the

complainant, who testified as PW2, gave the age of 13 years without stating when the complainant was born.

In my view, it was desirable for the prosecution to have established the actual age of the complainant. They seemed not to have been eager to do so. However, the learned Magistrate who had the advantage of seeing the complainant in court was convinced that she was around 13 years of age. The appellant who was a relative of the complainant has not suggested nor did he suggest at the trial that the complainant was above 18 years of age. In my view, the age of the complainant was sufficiently established in the present case. I dismiss that ground of appeal.

The appellant also complains that a crucial witness called Ali was not summoned by the prosecution to testify in court. In my view, that witness was not so crucial. The evidence of PW1, the complainant was quite clear. It was believable. The court was therefore not wrong in convicting on the evidence on record. There was no adverse inference that could be drawn from the failure of the prosecution to call A as a witness.

In my view, the prosecution proved his case against the appellant beyond reasonable doubt. I will uphold the conviction.

The appellant has not appealed on sentence. I have however considered the sentence and it is the minimum sentence. It is therefore lawful. I will also uphold the sentence.

To conclude, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court. The appellant is at liberty to appeal to a higher court.

Dated and delivered at Garissa this 4th day of March, 2015.

GEORGE DULU

JUDGE