REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 28 OF 2014

FARAH RASHID HUSSEIN...APPELLANT

VERSUS

REPUBLIC... RESPONDENT

(*From the decisionin Garissa of Chief Magistrate's Criminal Case No. 2525 of 2010 delivered on 28th November 2011 – J. N. Onyiego PM*)

JUDGMENT

The appellant was charged in the subordinate court with defilement of a girl under the age of 15 contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on the 22nd October 2010 at Garissa Township in Garissa District within Garissa County intentionally and unlawfully caused his penis to penetrate the vagina of S.M.A. a girl under the age of 15. In the alternative he was charged with indecent act contrary to section 11 (1) of the same Act. The particulars of offence were that on the same day and place committed an indecent act with S.M.A a child aged 14 years by rubbing his penis against SMA vagina. He pleaded not guilty to both counts.

After a full trial he was convicted on the main count of defilement. He was sentenced to serve 15 years imprisonment.

Aggrieved by the decision of the trial court, he has come to this court on appeal. He filed his initial petition of appeal on 5th May 2012. On 4th June 2014, however he filed an amended petition of appeal as well as written submissions. He relied on the later petition of appeal and the written submissions. He elected not to make oral submissions.

The Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that though the charge had a defect with regard to the section of the offence cited, that defect was minor and curable under section 382 of the Criminal Procedure Code. Counsel relied on the case of ***Fappyton Ngui Vs. Republic High Court Machakos***. In addition, counsel submitted that the appellant was not prejudiced by the reference to the wrong section of the Sexual Offences Act, since he cross examined the witnesses at length which meant that there was no miscarriage of justice.

Counsel submitted that the offence of defilement had three important ingredients. The prosecution was required to prove each of the three ingredients beyond any reasonable doubt. The first ingredient was age of the complainant. Counsel submitted that the age of the complainant was proved. She was to be 14 years old. That age was contained in the P3 form. Though there was a description in the charge of 15 years, that defect was curable under section 382 of the Criminal Procedure Code (Cap.75), as no prejudice was caused to the appellant.

The second element was penetration. Counsel submitted that PW4 had confirmed that the hymen of the complainant was broken. Counsel submitted that Pw4 found an injury suffered by the complainant thus confirming sexual activity. According to counsel, the evidence of the prosecution was overwhelming. Counsel urged the court to dismiss the appeal.

At the trial, the prosecution called four witnesses. Pw1 A A A was the mother of the complainant. It was her evidence that she was a businesswoman at Garissa. On the day in question before she closed business in the evening, she told her daughter who was epileptic to proceed home. She remained behind for about half an hour. She then left and went home. On reaching her kitchen she saw the complainant wearing her underwear very fast. She also saw the appellant in the same kitchen wearing his trousers. She screamed and neighbours came and arrested the appellant. She noticed blood stains on the biker of the complainant and trousers of the appellant. She later reported the incident to the police and took the complainant to the hospital.

Pw2 was the complainant. She testified not on oath. It was her evidence that when she was at home the appellant came and asked her for water. He suddenly pushed her down on the bed. He undressed her and had sexual intercourse. Shortly thereafter her mother PW1 arrived and started screaming. Members of the public then came and arrested the appellant. She was taken to hospital and a P3 form filled.

PW3 PC Rehema William was a police officer. It was her evidence that she took the complainant to hospital. She also took the appellant to hospital for blood examination but he refused. She took possession of the blood stained inner wear of the complainant and innerwear of the appellant. Both were blood stained. She produced the items in court as exhibits.

PW4 Dr. John Mwangi was the doctor who examined the complainant and filled the P3 form. He found that the hymen of the complainant was broken. There was also bacterial infection on the complainant. He assessed the injury as harm.

All these four witnesses did not testify with regard to the age of the complainant. However in the P3 form, the age of the complainant is indicated as 14 years.

When put on his defence the appellant stated that he was a barber. That on the material day while going home, four people confronted him and beat him unconscious. He was later charged with the offence. He denied refusing to have his blood medically examined.

Faced with the above evidence, the learned magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced him. Therefore arose the present appeal.

This is a first appeal. As a first appellate court I am duty bound to re-evaluate the evidence on record and come on my own conclusions and inferences. See the case of ***Okeno Vs. Republic [1972] EA 32.***

I have re-evaluated the evidence on record. With regard to the charge, though the wrong sub section was referred to, in my view that defect was minor and it did not prejudice the appellant in any way. The offence of defilement actually exist under the Sexual Offences Act. I dismiss that complaint.

With regard to the ingredients of the offence of defilement, it is very important for the prosecution to prove the age of the complainant. In the present case, neither the complainant nor the mother nor the doctor PW4 testified in court with regard to the age of the complainant or as to when she was born. The only indication of her age is found in the P3 form. Without any information as to the source of the age of the complainant as indicated in the P3 form, that age cannot be taken at face value to be the age of the complainant. No medical assessment of the age was done. In effect that age indicated in the P3 form was merely an estimate or guess work from the police. As such in my view, the age of the complainant was not proved. From the facts of the case however, that does not save the appellant. He appears to have forcefully had sexual intercourse with the complainant. That translates, if the complainant is an adult to the offence of rape. In effect therefore though the appellant can be said not to having committed the

offence of defilement, he could still be guilty of rape contrary to section 3 of the Sexual Offences Act.

As for the identity of the appellant as the culprit, that in my view was proved. He was seen by both the complainant and the mother of the complainant in the kitchen. His activities therein were fully described. He was arrested from the scene. Though ideally some of the members of the public who came to the scene should have testified in court, in the circumstances of this case, I find that the appellant was actually found in the house or kitchen with the complainant. That he had sexual intercourse with the complainant. He did not deny ownership of the blood stained underpants. He also refused to undergo blood examination in order to match the blood stains on the cloth. That shows that he had a guilty conscience.

In my view the magistrate was right in finding that there was penetration by the appellant. The magistrate was also right in finding that the appellant was the culprit. It is only the age of the complainant that was not established by evidence. However with the circumstances of the case where the appellant forced the complainant to have sexual intercourse with him, the offence of rape was committed assuming that the complainant was an adult. From the evidence, I find that the complainant was an adult. I also find that the appellant did not commit the offence of defilement but committed the offence of rape.

I thus quash the conviction of the offence of defilement, and substitute it with a conviction of rape.

On sentence the sentence for rape is imprisonment for a period of not less than 10 years. I set aside the sentence for defilement and substitute therefore a sentence of 10 years imprisonment.

Consequently I quash the conviction for the offence of defilement and set aside the sentence imposed thereon. I however substitute a conviction for the offence of rape contrary to section 3 of the Sexual Offences Act, and sentence the appellant to 10 years imprisonment from the date on which he was sentenced by the trial court. Right of appeal explained.

Dated and delivered at Garissa this 5th day of March, 2015

GEORGE DULU

JUDGE

In the presence of:-