REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 11 OF 2014

ABDUB GOLICHA QANCHORA .....….APPELLANT

VERSUS

REPUBLIC……...…….....RESPONDENT

(*From the conviction and sentence in Wajir PM Criminal Case No. 460 of 2013 – Linus Kassan PM*)

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 11th October 2013 at [particulars withheld] Location in Wajir East District within Wajir County intentionally caused his penis to penetrate the vagina of FAA a child aged 10 years. In the alternative he was charged with committing an indecent act with a child contrary to section 11 (1) of the same Act. The particulars of the offence were that on the same day and place intentionally touched the vagina of FAA a child aged 10 years with his penis.

He denied both charges. After a full trial, he was convicted of the main count and sentenced to serve life imprisonment. Aggrieved by the decision oft the trial court, he filed an appeal and later an amended petition of appeal through his advocate.

His advocate relied on the amended petition of appeal which has 14 grounds as follows:-

1. The learned magistrate erred in law and in fact in failing to recognize the fact there had been a grudge previously due to a dispute between the complainant's mother and the accused.
2. The learned magistrate erred in law and fact by relying on the prosecution witnesses all of whom were relatives of the complainant.
3. The learned magistrate erred in law and in fact in passing a sever and excessive sentence upon the accused person notwithstanding that the accused was a first offender and he had no previous past record.
4. The learned magistrate erred in law and in fact in failing to address his mind to the fact that the complainant was a minor as such was not capable of making an oath.
5. The learned magistrate erred in law and infact in relying on uncorroborated evidence of alleged photos which are said to have been seen by PW6 in the appellant's mobile phone which was never produced in court even for identification.
6. The learned magistrate erred in failing to take judicial notice of the fact that the appellants phone which is alleged to have been used to take photographs of the complainant private parts on 11th October 2013 was with PW6 on 10th of October 2013 from who it was collected by PW5 on 11th

October 2013 and who confirmed that to the court and therefore it was not in the appellants possession at the time the offence is alleged to have been committed.

7. The learned magistrate erred in law and in fact in failing to put into consideration that the alleged offence is presumed to have been committed on the 11th of October 2013 but it was reported to police on 31st October subsequently to the hospital same day.
8. The learned magistrate erred in law and infact in failing to put into consideration the evidence of PW3 the aunt who was the first person to get into contact with the complainant infact a few hours after the alleged defilement and who confirmed to the court that she never noticed any change in the manner of walking style of the complainant.
9. The learned magistrate erred in law and in fact in failing to address his mind to the real cause of the complainant walking difficulties noting the time the offence alleged to have been committed and disclosure by the medical report that the complainant was suffering from genital infection.
10. The learned magistrate erred in law and fact as he did not putting into considerations the complainants medical report which indicated that she had some genital infection which is presumed to have been infected by the appellant while the accused medical report showed that he was not infected at all.
11. The learned magistrate erred in law and in fact by not considering that the investigating officer failed to carry on any investigation of the alleged presence of photographs in the appelants mobile phone implying that the alleged allegation of the said photographs were just unfounded rumours which evidence was highly relied in convincing the appellant.
12. The learned magistrate erred in law and fact in failing to take judicial notice that though the complainant disclosed to the court that there were other people in the farm when the alleged offence is said to have been committed none of those people were ever summoned to give evidence and especially that they were independent and since the offence was alleged to have been committed during day time they would have confirmed if they saw the complainant on the vicinity on the material day.
13. The learned magistrate erred in law and infact in failing to take judicial notice of the fact the complainant disclosed to PW5 that she was ailing on her abdomen on or about 19th October 2013 and according to the complainant she proceeded to administer treatment on her the undisclosed ailment but PW5 contradicted this evidence by stating that she requested PW4 to take the complainant to hospital.
14. The learned magistrate erred in law and in fact in failing to take judicial notice that PW5 informed the court that upon the complainant informing her about her ailment she immediately informed PW4 to take her to hospital yet it took PW4 10 more days to find out where the complainant was ailing, interrogate her on what happened and report the case to the police and subsequently refer her to hospital even though at this time she affirmed to have known that photographs of PW2 private parts had been seen in the appellants phone memory.

Counsel for the appellant M/s. Stephen Gakonyo Wanyoike and Company filed written submissions of the appeal. Mr. Wanyoike who appeared in court on the hearing date, relied on the written submissions filed.

Mr. Orwa the learned Prosecuting Counsel made oral submissions. With regard to contradictions counsel argued that there were no contradictions on dates. There were also no contradictions regarding the issue of venereal disease. Counsel argued that drugs were administered to the complainant for a good reason. On the photographs counsel submitted that paragraph 3 of the written submissions was irrelevant as the detail of the photographs were erased and the phone, even if produced, would not serve any useful purpose. Counsel argued that there was no requirement for corroboration in sexual offences and relied on section 124 of the Evidence Act. In counsel's view the prosecution had called adequate witnesses to prove their case beyond reasonable doubts.

With regard to delay in reporting the offence counsel maintained that the complainant was aged 10 years and that she was also threatened by the appellant. According to counsel, the complainant thus only reported the incident because she felt pain in the belly, otherwise she could not have reported the incident. Counsel relied on a case of ***Faustine Mghanga Vs. Republic [2012] eKLR*** on delay in reporting the incident.

Counsel also submitted that in the Wajir region, it was unusual for children to have birth certificates. Therefore the evidence of age given by the complainant's mother should be adequate to prove or establish such age. Counsel further emphasized that there was no need to carry a DNA test in sexual offences. Such DNA test could only be conducted in cases of need, otherwise it was not a mandatory requirement. Counsel concluded by stating that the prosecution witness evidence corroborated each other. Counsel urged this court to dismiss the appeal.

In response Mr. Wanyoike learned for the appellant, submitted that they relied on the written submissions and urged this court to peruse Section 36 of the Sexual Offences Act.

At the trial the prosecution called 7 witnesses. PW1 was a Clinical Officer. He testified that on the 31st of October 2013 he conducted medical examination of the complainant who had been brought to Wajir hospital for treatment with a complaint of defilement. He noted the existence of pus cells and the hymen was broken with signs of deep penetration. He produced the P3 form in evidence. It is of note in the P3 form there is no assessment of the degree of harm suffered by the complainant. He also produced a treatment card relating to the complainant from the same hospital. He further produced a P3 form filled on the appellant. He noted the existence of pus cells in the P3 form for the complainant is dated 31st of October 2013. The appellants P3 form is dated 1st of November 2013.

PW2 was the complainant. It was her evidence that on 11th October 2013 she was sent to the farm by her aunt F to collect vegetables from the appellant who worked in that farm. At the farm she met the appellant who told her to go into the small traditional house for him to bring her pawpaw. While therein the appellant came, tied her hands, blocked her mouth and tied her left leg with a rope to a pole and went on to defile her. After the incident event the appellant harvested the vegetables for her, warned her not to disclose the incident to anyone and she went back home. She did not inform anybody about the incident until 8 days when she informed her grandmother because she was feeling pain in her lower abdomen. She later disclosed the story to her mother after having been beaten. She was cross examined at length.

PW3 was M A the mother of the complainant. It was her evidence that on the 31st of October 2013 the PW2 complained of sickness. When she inspected her private parts she found them abnormal, but the complaint refused to disclose the cause of the problem. After beating her, the complaint disclosed that the appellant had defiled her. It was the evidence of this witnesses that the complainant was 10 years old. She took the complainant to the police and also to hospital.

PW4 F A A was the aunt of the complainant who had sent her for the vegetables. It was her evidence that on 11th October 2013, she sent the complainant to the farm for vegetables at 9am. The complainant delayed and came back home at around 12 noon. PW4 was annoyed by the long delay and chased her out. Later she learnt that the complainant had been defiled.

PW5 H A A was the grandmother of the complainant who was also the employer of the appellant. It was her evidence that on 21st of October 2013 she sent the appellant's phone to somebody to charge same overnight. She was later informed that the mobile phone contained "bad things" which were not disclosed to her. It was her evidence that the complainant informed to her that she was feeling lower abdominal pain.

PW6 M A A was the person who charged the mobile phone for PW5. It was his evidence that the mobile phone contained two photos of private parts of a female child. He thus told PW5 not to bring the phone again for charging but did not tell her what he had seen.

PW7 PC Omondi was a police officer who conducted investigations, visited the scene, arrested and charged the appellant.

When put on his defence, the appellant gave sworn testimony. He stated that he had a difference with the mother of the complainant for five months before the incident as she had confiscated his identity card. He reported the incident to the police and, as he was pursuing the matter, these charges were framed against him. He denied that the complainant came to the farm for vegetables on the day in question. She

maintained that M used to come for vegetable at the farm in person. He stated that when the police ultimately visited the farm, he had reported that he left there Kshs. 20,000/= but only 6,000/= was said to have been found. He denied committing the offence. He was cross examined at length.

This being a first appeal I am duty bound to reexamine all the evidence on record and come to my own conclusions and inferences. See ***Okeno Vs. Republic [1972] EA 32***. I have re-evaluated the evidence on record. I have also perused the judgment.

It is quite clear to me that the appellant and the complainant knew each other before. The appellant worked for the grandmother of the complainant. The appellant claims that this incident was a frame up because he had a disagreement with the mother of the complainant.

The burden is always on the prosecution to prove a case against an accused person beyond any reasonable doubt. The accused does not have a burden to prove his own innocence. In cases of defilement the prosecution is required to prove three elements. First, the age of the complainant who should be below 18 years. Secondly, penetration, even if it is partial. The third element to be proved is that the accused is the culprit or the person who committed the act.

With regard to the age of the complainant, though no birth certificate was produced, in my view, the evidence on record established that the complainant was about 10 years old. The appellant does not appear to challenge the apparent age of the complainant. The mother of the complainant clearly stated that the complainant was aged 10. I have no reason to doubt the age given by the mother. I find and hold that the prosecution proved beyond reasonable doubt that the complainant was 10 years of age.

The second element the prosecution was required to prove was penetration. The evidence on record is that the hymen of the complainant was broken. That in my view establishes that penetration did occur. Therefore in my view the second element of defilement was proved.

The third element is whether the prove that the appellant was the culprit. The incident was alleged to have occurred on the 11th of October 2013. The complainant did not report the incident until much later. It was her evidence and that of her mother, that she mentioned the name of the appellant after the mother beat her. The medical treatment card and P3 form were filed on 31st of October 2013, about 20 days after the incident. The appellant has stated in his evidence that there was an existing grudge between him and the mother of the complainant. According to him, that is why he was framed.

I observe that the complainant gave graphic details of the events constituting the defilement. She narrated event after event in her evidence. In my view those details could not come as a matter of being framed up.

It also cannot be a matter of conversing. She also stated that she did not report the incident for some time because she had been threatened by the appellant. I find that the circumstances of this case are such that would be the natural behavour of a young girl aged about 10 years not to report due to fear of threats. Though the medical examination was done 20 days later, the evidence of defilement was still present and was detected. I have no reason to doubt the medical evidence tendered in court. In my view the delay in reporting the incident in the circumstances of this particular case was justified and the explanation given was believable by the complainant was believable and was believed by the magistrate correctly under section 124 of the Evidence Act (Cap. 80).

Though the appellant considers that his conviction was based on the photos allegedly found in his mobile phone, I do not think so. In my view the conviction was based on the evidence of PW2 the complainant and the accompanying medical evidence.

The appellant has also complained on appeal that important witnesses were not called by the prosecution to testify. I find no basis for this arguments. There is no suggestion of any eye witness to the incident or that anybody saw the appellant together with the complainant during the time in question. The prosecution in my view called all the witnesses necessary to assist in tendering evidence and clarifying

relevant issues in this matter.

The sentence imposed is the sentence provided by law. It is lawful.

Having re-evaluated all the evidence in record, I find that this appeal has no merits. Both the conviction and sentence are proper. I thus dismiss the appeal and uphold both the conviction and sentence.

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

GEORGE DULU

JUDGE