REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 48 OF 2014

ADEN DAHIR NUNO.....….APPELLANT

VERSUS

REPUBLIC…….…….....RESPONDENT

(From the conviction and sentence in Garissa CM Criminal Case No. 552 of 2012 – B. J. Ndeda SPM)

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 4th April 2012 at [particulars withheld] area within Garissa County intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of KDY a child aged 12 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 offence were that on the same day and place he intentionally touched the vagina, breasts and buttocks of KDY with his penis against her will.

He denied the charges. After a full trial he was convicted on the main count of defilement and sentenced to serve 20 years imprisonment. Dissatisfied with the decision of the trial court, the appellant filed a memorandum of appeal on 2nd July 2014. Before the hearing of the appeal, he filed an amended petition of appeal as well as written submissions. He relied on the amended petition of appeal, whose grounds are as follows:-

1. The Learned trial magistrate erred in law and in fact to convict him without considering that PW1's evidence was incredible when put to the test.
2. The learned trial magistrate erred in law and fact to convict him without considering that the complainant’s evidence was uncorroborated and full of inconsistencies.
3. The learned trial magistrate erred in law and fact to convict him without putting into consideration that the investigating officer was not produced in court to adduce his evidence.
4. The doctor's evidence was incredible since the doctor who performed the examination was not summoned to support the P3 form report.
5. The alleged two witnesses that are said to be at the scene of crime were not called to court as witnesses yet they are alleged to have very crucial evidence.
6. That he was not examined for ascertain the truth of the complainant’s allegations.
7. That the trial magistrate failed to note that there was a grudge between him and Pw1 and that it was the debt which gave rise to the alleged charge.
8. That the prosecution case was not proved beyond reasonable doubt as required in the law.

At the hearing of the appeal the appellant relied on his written submissions, which I have perused. He also

stated orally that he was convicted on an offence he did not commit. He stated that he was sick and had not been taken to hospital.

The Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that it was proved beyond reasonable doubt that the complainant was aged 12 years. This proof was from the evidence of witnesses as well as the contents of the P3 form. Counsel relied on a case of ***Faustin Mganga Vs. Republic Eklr Mombasa***where the court held that the evidence of a mother on the age of a child was the best and reliable evidence. Counsel also submitted that in Wajir area many women gave birth outside the hospitals and therefore in accordance of the provision of Article 159 of the Constitution this court should not unduly rely on technicalities of production of birth certificates but should instead administer substantive justice.

Counsel submitted that the second ingredient of an offence of defilement was penetration. In counsels view the doctor or medical evidence confirmed sexual activity as well as penetration. There was evidence of injuries as well as breaking of the hymen of the complainant.

As to whether the appellant was the culprit, counsel submitted that the evidence on record was clear that the incident occurred during the day. In addition, PW1 was an eye witness to the incident. There was thus no need for an identification parade as the evidence of identification was positive and free from the possibility of mistake.

Counsel also submitted that there were no contradictions in the prosecution evidence. However in case the court will find any such contradictions, the same were minor and curable. Counsel submitted lastly that the sentence was lawful and that the mitigation of the appellant was taken into account before sentencing.

In response to the above submissions, the appellant stated that the court should not dismiss his appeal.

During the trial the prosecution called 5 witnesses. PW1 A A M testified that on the 4th of April 2011 at around 10.30am as he walked in [particulars withheld] area of Garissa County, he heard screams of a girl crying in pain. He approached the scene and found the appellant and the complainant. The complainant was lying down on the ground partly naked and the appellant was lying on her while holding her legs. When the witness approached, the appellant stood up but he restrained him from escaping with the help of other members of the public. The witness observed that the complainant was injured and bleeding. She could not walk. They thus carried her and put her under a tree and later took her to the hospital.

PW2 was the complainant. It was her evidence that she was aged 12 years and attending school in standard 2. On the 4th of April 2012 at around 10a.m, she was sent to fetch water. She was with other girls. On the way back home, she stopped to answer a short call while the other girls proceeded home. The appellant then emerged and grabbed her. He fell her down, undressed her and also undressed himself and had forceful sexual intercourse with her. She screamed in pain and members of the public including PW1 came to her rescue. She was later taken to hospital. Though she did not give evidence on oath she was cross examined which was a mistake.

PW3 was the Assistant Chief Mubarak Ali Hussein. He was called on the phone and informed about the incident. Together with the police he proceeded to the scene and found the complainant lying under a tree bleeding as she could not walk. He noticed that the clothes of the complainant were stained.

PW4 was Dr. Julius Regena. He produced a P3 form for the complainant and a P3 form for the appellant. According to the entries in the P3 form of the complainant she reached hospital with high temperature and was bleeding. Her lower abdomen was swollen and thighs tender. The labia minora had lacerations and the hymen was broken. She was admitted to hospital for a number of days. As regards the appellant, he was aged about 25 years. His clothes were blood stained. Both the complainant and the appellant were found with pus cells which matched.

PW5 was a police officer Hecky Apollo. It was his evidence that on 4th April 2012 at 3pm, both the

complainant and the appellant were brought to Garissa Police Station. The complainant was bleeding and admitted to hospital for seven days. He arrested and charged the appellant.

When put on his defence, the appellant gave an unsworn statement. He denied committing the offence. He said that the eye witness PW1 was his business partner with whom they had disagreed over money. He contended that there thus existed a grudge and that was the reason why he was framed with the present offence.

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

I have reevaluated the evidence on record. The appellant has talked about contradictions. My perusal of the record does not disclose any contradictions in the prosecution case. I thus dismiss that ground.

The appellant has complained that the investigating officer was not called to testify in court. Even if this was true, in my view the failure of an investigating officer to testify in court is not fatal to a conviction. Provided the evidence on record is sufficient to sustain a conviction, the failure of an investigating officer to testify cannot vitiate a conviction.

The appellant has also complained that the doctor who examined the appellant and himself and filled the P3 forms did not testify in court. Indeed, another doctor testified and produced the medical reports. This is allowed under the Evidence Act under certain conditions. The doctor who tendered the medical evidence PW4 Julius Regena explained that he knew the hand writing of the predecessor who had been transferred. The documents were in the hand writing of the other doctor. The appellant also did not object to the production of the medical evidence by another doctor. As such he cannot now to complain on appeal. I dismiss that ground.

The appellant has stated that the eye witness to the incident PW1 had a grudge against him due to business disagreements. In my view that this argument was an afterthought. The appellant did not cross examine PW1 on any existing grudge. In addition this is not an incident that occurred in private between the two of them. There was evidence that the appellant was restrained at the scene. The public came immediately and found him there. He had blood stained clothes. The complainant was also present and was injured and could not even walk. It cannot thus be said that the eye witness fabricated a story against the appellant. Even the medical evidence connects the appellant to the offence. In my view, this is one of the rare cases of a sexual offence in which the evidence is so clear and direct that there can be no possibility of mistaken identity. All the evidence points to the appellant as the culprit. It was direct evidence.

The ingredients of the offence of defilement are firstly proof of age. In my view the age of the complainant was established as 12 years. She tendered evidence but not on oath. She was wrongly cross examined. Evidence that is tendered without swearing or affirmation cannot be subject to cross examination. Otherwise I find that the age of the complainant was established as 12 years.

The second element in a crime of defilement is proof of penetration. Proof of penetration was in my view established by the prosecution beyond reasonable doubt. It is quite clear to me that the complainant was so seriously injured in the defilement incident that she had to be admitted in hospital for a number of days due to the sexual assault by the appellant. The third element is proof of the culprit. The appellant was also proved beyond any shade of doubt to have been the culprit. I will thus dismiss the appeal on conviction.

With regard to sentence, the sentence imposed was lawful. The appellant committed an act that seriously injured the complainant. The sentence of 20 years imprisonment was actually deserved. It is also the minimum sentence under the law.

To conclude I find that this appeal has no merits. I dismiss the appeal and uphold both conviction and sentence of the trial court.

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

GEORGE DULU

JUDGE