REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 106 OF 2014

BARE MOHAMED .....APPLICANT

V E R S U S

REPUBLIC .....RESPONDENT

(from original conviction and sentence in criminal case No. 378 of 2013 of the Chief Magistrate's court at Garissa.)

J U D G M E N T

The appellant was charged in subordinate court with defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence that at unknown date during the month of February 2012 in [particulars withheld] Location of Lagdela District within Garissa County intentionally caused his penis to penetrate the vagina of LB a girl aged 7 years. In the alternative he was charged with committing indecent act with a child Contrary to Section 11(1) of Sexual Offences Act. The particulars of the offence were that at unknown date during the month of February 2012 in [particulars withheld] Location in Lagdera District within Garissa County intentionally touched the vagina of LB a child aged 7 years. He denied both charges.

After a full trial, he was acquitted of the main count and convicted on the alternative count of indecent act with a child. He was sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has now come to this court on appeal. He filed his initial grounds of appeal on 4th July 2014. When his appeal was brought to this court on 23rd April 2014, the appellant filed amended grounds of appeal. He also filed written submissions. He relied on the amended grounds of appeal which are as follows:-

1. That the learned trial magistrate failed to note that the mode of identification of the assailant by the complainant was doubtful and unconvincing.
2. The learned trial magistrate erred in law and fact to interprete the demeanor of the complainant hence misdirecting the course of justice in execution of his judgment.
3. That without the doctors report the charge of indecent act was not proved as nothing would have proved that his penis touched the genital organ of the complainant except a medical report.
4. The evidence of PW1, PW2, and PW3 respectively was contradictory.
5. The date on which the offence was committed was unknown and the evidence adduced was concocted and could not make sense.
6. The learned trial magistrate erred in law and fact by casually dismissing his defence without showing any reason.

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

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the appellant was an uncle of the complainant and that they were neighbours. As the incident occurred in broad day light, there was no possibility of mistaken identity. Counsel further relied on Section 124 of the Evidence Act and submitted that there was no requirement for corroboration of the evidence of minor victims or of women and girls. As the appellant was convicted of mere indecent act there was no necessity for production of a P3 form. Counsel emphasized that there were no contradiction in the evidence of the prosecution witnesses. Counsel also submitted that the appellant had not given or tendered any evidence showing that the charge was based on concocted evidence. Counsel submitted further that the defence of the appellant which was a mere denial was considered by the trial court. In counsel's view, the ingredients of the offence had been proved as the complainant was below 18 years of age.

In responses to the prosecuting counsel's submissions, the appellant stated that the complainant was not his nephew. He insisted that he was an employee of the father of the complainant and that the ingredients of the offence of indecent act could not be proved except through medical evidence.

During the trial, the prosecution called 3 witnesses. The complainant was

PW1. After examination of her intelligence and understanding of the seriousness of an oath, the trial court decided that she should tender her evidence without swearing. She was however cross- examined, which was a mistake.

She stated in examination in chief that she did not know where her home was nor did she know the date of the offence. She however knew the appellant as an uncle with whom they lived. It was her evidence that the appellant came to live with her family because his family camels were mixed with his. On the date in question, her father PW2 had gone to look for a lost camel and the mother went to fetch water. The complainant went to herd young camels when the appellant, who was also herding the animals, ordered her to lie down on her back, removed his clothes and defiled her. He warned her not to tell anybody. In the evening she felt pain while going for a short call and on the next day she reported the incident to her mother who took her to hospital at Modogashe for treatment. She was cross examined and denied being couched by her parents to implicate the appellant.

PW2 was B I the father of the complainant. It was his evidence that he lived with the appellant with whom they were not related. That on the day in question, he left home to look for a lost camel while his wife went to fetch water. On return, he noted that the complainant was sick. Next day he took the complainant to hospital and on the way she disclosed to him that she had been defiled by the appellant.

In cross examination he denied employing the appellant.

PW3 was Police Constable Nekono Shikulu the Investigating Officer from Mondogashe Police Station. It was his evidence that on 9th March 2012 at 10.00 am a girl was brought to the police station by the father with a report of defilement. He interrogated the girl who claimed to have been defiled by the appellant. The appellant was thus arrested and charged. In cross examination he denied that he was bribed to prefer charges against the appellant.

When put on his defence, the appellant tendered unsworn testimony. He stated

that he was employed to herd cattle for a person who owned his Kshs 15,000/=. When he demanded for payment the person refused and chased him away. They ended up fighting and he reported the incident to the elders. He was however arrested and charged with the present offence.

Based on the above evidence, the trial court found that the offence of defilement had not been proved because the doctor was not called to testify. However the court found that the offence of indecent act was proved beyond reasonable doubt. The court was particularly impressed by the fact that the complainant

(PWI) appeared agitated while tendering her evidence against the appellant.

This is a first appeal. As a first appellate court, I am required to re-examine all the evidence on record and come to my own conclusions and inferences. In doing so I am required to be mindful of the fact that I did not see witnesses testify to determine their demeanor. See the case of ***Okeno -vs- Republic (1972) EA 32.***

The appellant has raised a number of issues on appeal. I note firstly that though the complainant tendered unsworn evidence, the trial court allowed her to be cross examined. That was a mistake. Evidence that is tendered by a witness who is neither sworn nor affirmed is not subject to cross examination.

There are a number of issues that are disturbing about the conviction. The evidence of prosecution witnesses leaves gaps and is not consistent.

The doctor was not called to testify. The complainant stated that the appellant was an uncle. Her father PW2 stated that he was just a friend who was staying with him, but they were not related. That was a contradiction. The date of the incident was said to be in February. The report to the police however, was made on the 8th of March. That was a long delay. In the meantime there is no evidence whatsoever from an independent witness that a report was made either to a headman or to Assistant Chief or a Chief before the report was made to the police at least 8 days later. The complainant stated also that she informed her mother about the incident the next day. The mothers evidence is not on record. The evidence on record is that the father PW2 took the complainant to hospital and that on the way the complainant disclosed to him about the incident. There is thus a contradiction between the evidence of the complainant and that of her father about the report.

In my view with these contradictions and delay in reporting the incidents, it is quite possible that the allegation of an existing grudge between the appellant and the complainant's father due to none payment of a debt of 15,000/= could be true. Since the burden is on the prosecution to prove a criminal case against an accused person beyond reasonable doubt, I have an obligation to give the benefit of the doubt to the appellant.

I agree that a doctor's report need not be produced in court to prove an indecent act, if there is adequate evidence to establish the act. In the present case however there is no such independent evidence. The evidence of the complainant and PW2 her father is unconvincing and contradictory.

The fact that the complainant appeared agitated in the witness box is not proof that the offence was committed. Such agitation could still be as a result of couching from the parents as alleged by the appellant.

The mother of the complainant to whom she first made the report was a crucial witness. It would be natural in the circumstances of this case to call the mother of the complainant to testify. As a mother the complainant would more willingly disclose her problems to her than to the father. The complainant infact stated that she reported the incident first to her mother. It would also be natural for the mother to inform her husband PW2 of the incident. PW2 did not say that he was informed about the incident by the mother of the complainant. He stated that as he was taking the complainant to the hospital the next morning, the complainant revealed to him what had happened.

It would thus necessary for the prosecution to have called the mother of the complainant to clarify the position. That crucial witness was not called to testify, nor was any explanation given for the failure to call her. As was stated in the case of ***Bukenya -vs- Uganda (1972) EA 549***, where a crucial witness is not called to testify and the evidence of the prosecution is not sufficiently strong, the court can infer that the evidence of that witness would not be in favour of the prosecution side. I make that adverse inference in the present case.

In the result, I find that this appeal has merits. The conviction cannot be sustained. The sentence has also been set aside. I thus allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set a liberty forthwith unless otherwise lawful held.

Dated and signed at Garissa this 13th day of July 2015.

GEORGE DULU

JUDGE