REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.106 OF 2012

Appeal from the original conviction and sentence by the Senior Resident Magistrate (Linus Kassan, SRM) in Wajir Criminal Case No. 126 of 2012.

ABDI KIVULEY……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

Abdi Kivuley, the appellant, was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. It was alleged that on 5th day of April 2012 in Mandera West District within Mandera County intentionally and unlawfully caused the penetration of his genital organs (penis) into the genital organ (vagina) of H M S, a girl aged 3 ½ years old.

The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars in respect to the place, date and complainant of the alternative charge are similar to those in the main count.

The appellant pleaded not guilty subjecting the case to a full trial. The trial court found the main charge proved and sentenced the appellant to life imprisonment.

Petition of Appeal

The appellant is aggrieved by the conviction and sentence. He has preferred this appeal in which he has raised the following grounds:

i. The charges were not read and explained to the appellant.
ii. The evidence is inconsistent and contradictory.
iii. There is no medical evidence in support of the charges.
iv. The admission of the P3 Form is unlawful because the doctor who completed it did not testify.
v. The complainant's evidence did not incriminate the appellant.
vi. The mode of arrest was poorly administered.
vii. The prosecution case was maliciously fabricated.

Appellant's submissions

The appellant has submitted that the record of the trial court does not show that the charges were read out

and explained to him before he pleaded to the charges; that the language of the court is not indicated and where it is indicated, it shows different languages either Somali, Borana, Kiswahili and English and therefore it is not clear what language the appellant understood; that the complainant's mother told the court that she took the complainant to the police the same day when her father said it was the following day and that PW2 said the appellant was arrested in his boma while PW3 said the appellant was arrested from the market place.

The appellant further submitted that the parents of the complainant testified that they lived at [particulars withheld] while the charge sheet reads that the offence was committed at [particulars withheld]; that these are two different places; that the age of the complainant was not ascertained; that two doctors testified and that penetration was not proved because the evidence shows that the hymen was intact. He asked the court to allow the appeal and set him free.

Respondent's submissions

The respondent through the learned state counsel opposed the appeal. It was submitted that the appellant understood the charges he was facing and for him to plead, the same must have been read over to him and explained and that the appellant cross examined the witnesses and fully participated in the trial.

Counsel further submitted that there are no inconsistencies and contradictions in the prosecution case and that the evidence proves beyond reasonable doubt that the appellant committed the offence; that evidence shows that the appellant was at the home of the complainant, a fact he has admitted in his defence; that if there are any contradictions in description of the place the offence was committed, these are minor and do not go to the root of the matter; that section 143 of the Evidence Act provides that no particular number of witnesses is required to proof any fact; that section 77 Evidence Act allows production of medical evidence by someone else other than the one who prepared the report and that the appellant did not object to the production of the report; that the record of the trial court is clear as to why Ahmed Abdullahi, the first PW5, was stood down and in any event the trial court did not consider his evidence in the judgement and also why the author of the P3 form could not testify.

It was further submitted that there was proof of penetration as defined in section 2 of the Sexual Offences Act; that the trial court cautioned itself on relying on the complainant's evidence and found it consistent and that the appellant's arrest was proper. Counsel asked the court to dismiss the appeal for lack of merit and uphold the conviction and sentence.

Determination

As required of this court when sitting on appeal and this being first appeal, I do remind myself of the duty to examine all the evidence adduced in the lower court and evaluate the same afresh to inform my decision to agree or disagree with the findings of the trial magistrate. I am aware that I did not observe the witnesses giving evidence so I am not able to comment on their demeanour.

The case for the prosecution was supported by the evidence of five witnesses: H A, PW1 and the mother of the complainant; H M S PW2, the complainant who is a minor aged 3 ½ years at the time of the offence; M S, PW3 and father to the complainant, Police Constable Joseph Oramat, PW4; Ahmed Abdullahi, PW5, a Nursing Officer and George Thiongo, PW5, a Clinical Officer. The anomaly of having two witnesses testifying as PW5 will be explained in this judgement.

From the evidence, PW1 left PW2 the complainant with her younger brother inside a house with the appellant and went to take a bath. This was on 5th April 2012 at 4.00pm. The appellant was their domestic worker who had been with them for three days. He was left resting on his bed and the children playing in the same room. Mother heard her daughter scream and when the screams persisted she finished bathing quickly and dashed out to check what was happening. She testified that on entering the house she found the complainant whom she had left playing on the ground was on the appellant's bed and she saw the appellant zipping his trousers. He left the house through the door. The complainant was crying and turning about in bed. The complainant's clothes, dress and panty, were placed on top of the bed and PW1

noticed semen on her daughter's genitalia. She cleaned her immediately. She informed her husband PW3 when he got home at 7.00pm that evening.

The matter was reported to the police who issued a P3 form. The complainant was treated at [particulars withheld] and the P3 form completed. The appellant was later arrested and charged with this offence.

In his defence given under oath, the appellant told the court that he was resting in bed after his work when PW1 called him *kafir* because he never used to pray; that she told him to leave the compound but when he insisted on waiting for PW3, PW1 threatened her. He left but was arrested four days later on allegations of defilement. On cross examination he stated that he had worked for complainant's parents for twenty days and had not been paid salary. He denied committing the offence and said that he differed with PW1 leading to the fabrication of this case.

I have considered the grounds of appeal and rival submissions. The record of the lower court shows that on 10th April 2012 the appellant was arraigned in court before a Resident Magistrate (Martin Kinyua, RM). The court clerk was one Abdullahi. The language used is indicated as Kiswahili/Borana. The appellant pleaded not guilty to both the main and alternative counts. Some communication must have taken place to enable the appellant to state that it is not true. The hearing of the case was conducted by another magistrate Mr. Linus Kassan, SRM. After taking the evidence of PW1, the trial magistrate started administering *voire dire* examination on the minor complainant. The child gave her name and stated that she attends religious lessons known as *duxi* when the trial magistrate stated that the child was too young to testify under oath. He had not attempted to find out if she understood the nature of oath and the meaning of telling the truth. He did not record that she testified without swearing and what language she used.

The court record further shows that on 21st September 2012 one Ahmed Abdullahi, a Nursing Officer, was sworn in as PW5. He gave his evidence but before he was cross examined, the trial court ordered that the person who filled the P3 form should be called to testify. The magistrate made no directions on whether Ahmed Abdullahi was stepped down or what was to become of his evidence.

On 1st October 2012 one George Thiongo was sworn in as PW5 to testify. This witness produced the P3 form.

After the court ruled that the appellant had a case to answer and explained section 211 Criminal Procedure Code to him, the record indicates as follows:

Prosecutor: 'Ready'

Accused: 'Ready – sworn'

After the appellant testified, record indicates:

Accused: 'No witnesses'

It is not indicated whether the appellant closed his case or not.

I am aware that some of these issues, save for the claim that the charges were not explained to the appellant, have not been raised by the appellant. However, even on that one issue that the record is silent as to whether the charges were read out and explained to the appellant this court is perturbed that the trial was not properly conducted. I have highlighted these errors to build up the case that this matter ought to be returned to the lower court for retrial. I will therefore not consider the other grounds of appeal for fear of prejudice.

I will discuss one singular issue, that is, when ought a case to be returned for retrial. It is settled by decided cases when a case ought to go for retrial. In **Fatehali Manji v. Republic [1966] E.A. 343** the court stated as follows:

"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

In **Mwangi v. Republic [1983] KLR 522** the Court of Appeal stated:

"… that a retrial should not be ordered unless the appellant court is of the opinion that, that on a proper consideration of the admissible evidence, or potentially admissible, evidence a conviction might result: Braganza -Vs- Republic [1957] E.A. 152 (CA) 469 Pyarwa Bussam -Vs- Republic [1960] E.A. 854."

After careful consideration of the record of the lower court, I find there are defects in the manner the trial was conducted as highlighted in this judgement. The prosecution evidence in my view is sufficient and therefore a retrial will not give the prosecution a chance to fill in the gaps in their case.

It is also my view that by ordering this retrial the appellant will not be prejudiced. The case is not old and it will be easy for the prosecution to trace the witnesses.

It is my view that on proper consideration of the admissible and potentially admissible evidence in this case, a conviction might result. In the interest of justice therefore, I hereby order a retrial in this case.

This appeal succeeds in that the conviction is hereby quashed and the sentence set aside. However, the appellant shall be produced before the Senior Resident Magistrate at Wajir as soon as practicable for mention of this matter with a view to taking a date for fresh hearing. It is preferable that a different magistrate handles the retrial. I make orders accordingly.

Dated, signed and delivered this 11th March 2014.

S.N.MUTUKU

JUDGE