



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 37 OF 2013

FORMERLY HIGH COURT OF KENYA AT NAIROBI CRIMINAL APPEAL NO 350 OF 2010

**Appeal from the original conviction and sentence by the Resident Magistrate (D. M. Mburu, RM)
in Principal Magistrate's Court at Garissa Criminal Case No. 1126 of 2010.**

MOHAMED ABDI EFTIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Mohamed Abdi Eftin, the appellant in this judgement, was charged with attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act. It was alleged that on 11th May 2010 at [particulars withheld] in Fafi District within North Eastern Province he intentionally attempted to cause his penis to penetrate the vagina of M A M J, a child aged thirteen years.

He faced an alternative charge of indecent act with a child contrary to section 11(a) of the Sexual Offences Act. The particulars are that on the same date and place as in the main charge, he intentionally touched the vagina of M.A.M.J a child aged 13 years.

Facts

On 11th May 2010, the complainant M A M J, PW2, was asleep at around 1.00am. She was sharing a room with her grandmother when she felt someone on top of her and her mouth covered. The intruder removed her clothes and attempted to defile her. She started screaming which attracted her uncle I Y A, PW3. PW3 flashed a torch on the intruder who ran out of the house. PW2 and PW3 recognized the intruder as the appellant who is their relative. He was arrested and handed over to the police. He was charged with this offence.

The prosecution called five witnesses in support of its case. The appellant testified for the defence and denied committing the offence. The trial court considered the evidence before it and found the main charge proved beyond reasonable doubt. The trial magistrate convicted the appellant and sentenced him to

serve ten years imprisonment.

Petition of Appeal

The appellant is aggrieved by the conviction and sentence and has moved this court on appeal. The appellant has advanced seven grounds of appeal. These are contained in his amended petition filed on 2nd December 2013. The grounds of appeal can be summarized as follows:

- i. That the charge is defective.
- ii. The evidence on identification of the appellant is contradictory and inconsistent.
- iii. The charge was not proved beyond reasonable doubt.
- iv. The case is fabricated against the appellant.
- v. The mode of arrest was not established (sic).
- vi. The trial magistrate dismissed the appellant's defence.

Appellant's submissions

The appellant has submitted that the charge sheet is defective because it states that the offence was committed on 11th May 2010; that all the evidence shows 11th May 2010 as the date the offence was allegedly committed while the offence was booked on 11th November 2010. He says he was prejudiced for booking the offence on a date when his trial was going on.

He further submitted that the charge is wrongly drafted because it quotes section 9(1) (2) of the Sexual Offences Act instead of Section 9(1) as read with 9(2) of the Sexual Offences Act and that it omits to state "unlawfully"; that the language of the court is not indicated and this has infringed on his rights; that the complainant did not identify him as the person who attempted to defile her since it was dark and the assailant ran away after she screamed; that the complainant did not recognize him as alleged; that the evidence is inconsistent because the complainant did not see any light yet PW3 said he used a torch to see the appellant; that PW3 could not have had a torch since he told the court that he had told the appellant that the torch was with his mother; that there was no medical evidence supporting defilement and the alleged presence of semen on the complainant is not supported by the doctor's evidence; that the investigating officer did not record statements or conduct any investigation; that the appellant told the trial court the truth that he accidentally fell on the complainant but the trial magistrate dismissed his defence.

Respondent's submissions

The respondent opposed the appeal. The learned state counsel submitted that the offence under trial in the lower court was attempted defilement and not defilement as claimed by the appellant; that the appellant understood what he was charged with and if there existed any defects these are curable under section 382 of the Criminal Procedure Code; that the appellant was recognized by PW3 using a torch and that the appellant was arrested by PW5. The respondent urged the court to dismiss the appeal for lack of merit.

Determination

I have examined all the evidence adduced in the lower court. The appellant was known to the complainant, PW3 and PW4. He was their relative. According to PW3, the appellant had come to visit them and had stayed with them for four days. PW3 testified that the appellant had asked for a torch from him (PW3) and he had told him that the torch was with his mother. The 'mother' referred to by PW3 is the grandmother to the complainant who was sharing a room with the complainant. Evidence shows the appellant went into the room where the complainant and her grandmother were sleeping. According to PW3, the appellant took some time coming back and PW3 decided to go and find out the reason. This is when he found PW2 naked and the appellant half naked on top of her. He said he flashed a torch and saw the appellant. The appellant was arrested at the scene. PW3 did not elaborate on how the appellant was arrested, whether he attempted to run as alleged by PW2 or whether he was arrested inside the house. Whatever the sequence of events was, PW3 said he found the appellant on top of PW2 and when he

flashed a torch at him he jumped and attempted to run away.

The complainant's mother B Y A, PW4, corroborates the evidence that PW2 was found naked. PW4 also testified that she checked her daughter and found semen on her genitalia, which corroborates PW2's evidence that the appellant ejaculated on her.

The appellant simply said he was looking for bed sheets inside the house where PW2 and her grandmother were sleeping when he tripped and fell on PW2. She woke up screaming but he reassured her it was him. She went back to sleep. He said that PW3 asked him why PW2 was screaming and he explained that he had accidentally fallen on her. But according to the appellant, PW3 claimed the appellant had attempted to rape PW2. On cross examination the appellant admitted that he was found by PW3 somewhere between PW2 and her grandmother.

I have critically considered all the evidence and the grounds of appeal as well as the submissions. There is no contradiction between the charge sheet and the evidence. The charge is clear that the offence was committed on 11th May 2010. What the appellant refers to as the booking of the offence on 11th November 2010 is the record in reference to the Occurrence Book. All the evidence by witnesses confirms the offence took place on 11th May 2010.

I have noted that the charge sheet quotes section 9(1)(2) of the Sexual Offences Act. I agree it ought to have been section 9(1) as read with (2). However, I find that the appellant has not been prejudiced by this error. He understood the charges and actively participated in the trial, cross examined witnesses and gave his defence in a manner suggesting that he was fully aware of the charges facing him. Further, this type of error is curable under section 382 of the Criminal Procedure Code. This ground of appeal therefore has not merit and must fail.

On contradictory and inconsistent evidence, I do not agree with the appellant. It is true that PW3 told the court that when the appellant asked him for a torch, PW3 told him that the torch was with his mother. The court was not told which torch was being referred to or whether that was the only torch available. Whichever the case, it seems that PW3 had another torch which he used. I find that this anomaly in evidence does not go to the root of the case.

The offence facing the appellant was attempted defilement and not defilement. The evidence is consistent that the appellant attempted to defile PW2. There is evidence that she screamed, she was found naked and the appellant was found on top of her. PW4 found semen on PW2's genitalia. It is true the doctor did not find the semen on examining PW2. It is possible that PW2 took a bath before going to hospital but this court will not speculate on this. I however find adequate evidence of attempted defilement. The appellant admits to going into the room where PW2 was sleeping further corroborating evidence that he went there.

PW3 said the appellant was arrested at the scene. It is not quite clear whether it is PW3 who arrested him or it was some other person(s). Corporal Ndeche Chilumo, PW5, testified that he received a call from LWF security officer that a suspect had been arrested for allegedly attempting to defile a girl and he went to the scene where he found a suspect, the appellant, having been apprehended by members of the public. He took him to the police station. I have no doubt in my mind that the appellant did not get far that night.

I find no basis that the case is fabricated against the appellant and the claim that the trial court dismissed his defence is not true. The trial court considered it and rejected it as untrue. I too consider it and find it to be untrue. PW2 was found naked and the appellant half naked; PW2 was found with semen on her genitalia and this court has no basis of rejecting the evidence of PW2, PW3 and PW4 on this issue. The appellant has admitted to having been inside the room where PW2 slept. All this evidence proves beyond reasonable doubt that the appellant did not accidentally fall on PW2 as he alleges but attempted to defile her.

The language of the court is indicated as English translated into Kisomali at the time of taking the plea. Given that the appellant cross examined the witnesses and fully participated in the trial and gave his defence, it is my view that he understood the proceedings and although it is not indicated on the other

days when the case was proceeding what language was used, it is my view that the proceedings must have been translated to him. The right thing for the trial magistrate to have done was to ensure the record clearly shows the language used in court and the translation. However this error is not fatal to the prosecution case and my view is that the appellant was not prejudiced.

Independently and upon critical analysis of all the evidence and the defence, I find the charge of attempted defilement proved beyond reasonable doubt. This appeal has no merit and I have no reason to interfere with the conviction or the sentence. The appeal is hereby dismissed. It is so ordered.

Dated, signed and delivered this 11th March 2014.

S.N.MUTUKU

JUDGE