REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 85 OF 2012

MUSTAFA HUSSEIN……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal from the conviction and sentence of the Senior Principal Magistrate (J.N.Onyiego) in the Chief Magistrate's Court Criminal Case No. 644 of 2012)

JUDGEMENT

Mustafa Hussein, the appellant, was arraigned before the Senior Principal Magistrate to face the charge of attempted defilement contrary to Section 9(1) as read with 9(2) of the Sexual Offences Act No. 3 of 2006. It is alleged that on 20th April 2012 at [particulars withheld] in Garissa District within Garissa County committed an act that would cause penetration with K M, a girl aged 16 years without her consent.

The facts of this case are simple. K M, PW1, aged 16 years was sleeping in the same house with her younger sisters F M, PW2 and S.M, PW3 on 20th April 2012 when around 2.00am she felt someone undressing her. At the same time someone flashed a torch at her. She screamed for help and the screams woke up her sisters PW2 and PW3. The screams also woke up their father M.B.K, PW4 and other neighbours. They responded to the rescue. The appellant was arrested and handed over to the police at Garissa Police Station. He was charged with this offence.

The appellant has stated in his defence that he had lent Kshs 6,000 to PW4 the complainant's father after his wife got a baby; that on 20th April 2012 he asked for his money back; that PW4 went to spent that night in PW4's house and while sleeping PW4 woke up and threatened to kill him; that he screamed and PW1, PW2 and PW3 also started screaming; that he ran away and people responded and they arrested him. He denied committing the offence and said that the case was fabricated.

By an amended petition of appeal filed on 16th October 2013 and the original petition of appeal the appellant has advanced a total of eight grounds of appeal claiming that:

i. The identification was not free from error.
ii. The case was not proved beyond reasonable doubt.
iii. The magistrate relied on contradictory and inconsistent evidence.
iv. The burden of proof was shifted to the appellant.
v. The trial magistrate erred in law and fact in not summoning crucial witnesses.
vi. The trial magistrate failed to consider that investigations were not done to ascertain the credibility of the evidence of prosecution witnesses.
vii. The trial magistrate failed to note that there was a grudge between the appellant and the

complainant's family.

viii. The trial magistrate failed to consider the appellants defence.

In support of his grounds of appeal the appellant submitted that PW1, PW2 and PW3 did not identify him as the person who entered the house where they were sleeping; that the conditions were not favourable for positive identification because it was 2.00am and the three were sleeping; that PW1 stated that the attacker flashed a torch at her and that she could not have seen the attacker with the torch directed at her; that the three witnesses said they knew the attacker physically and not by name.

He submitted further that the witnesses contradicted themselves; that PW1 said the appellant was dressed in a black trouser and a pullover while PW2 said he was dressed in a black trouser and a blue shirt; that PW3 said the attacker was using a mobile phone torch while PW1 and PW2 did not mention mobile phone torch. He submitted that the trial magistrate made an inference from that the appellant's remorsefulness was an admission of guilt and that this amounts to shifting the burden of proof.

The learned state counsel submitted that the prosecution evidence was well corroborated and that in any case under Section 124 of the Evidence Act corroboration is not required in a Sexual Offences Act; that although the court has powers to summon witnesses it would not have served any purpose because they would have repeated what was stated by the witnesses who testified; that no certain number of witnesses are required to prove a case; that the alleged grudge is a creation of the appellant; that he did not cross examine PW4 on the matter; that the appellant's defence is an afterthought and it is contradictory. The learned state counsel urged the court to dismiss the appeal and uphold the conviction and sentence.

The trial magistrate analyzed the evidence and came to a conclusion that there was proof beyond reasonable doubt. He held that the appellant was positively identified by the complainant and her two sisters. He also stated that there was circumstantial evidence connecting the appellant with this offence. The trial magistrate was also alive to the dangers of relying on the evidence of a single witness on identification and cautioned himself.

On my part, I have re-examined this evidence and re-evaluated the same. I did not have the advantage of observing the witnesses testify and I take the trial magistrate's word for it that PW1 is a truthful witness.

I take the view that the conditions were not favourable for positive identification. It was about 2.00am and the three girls were asleep. PW1 was awoken by someone undressing her. She thought it was her sisters but when she realized it was a man she screamed. She said the attacker flashed a torch at her which means that the light was directed away from the attacker. PW1's screams woke her sisters, PW2 and PW3. I doubt that the attacker waited long enough to allow the girls to come fully awake and focus their attention on him. He must have bolted immediately PW1 started screaming. This is the natural thing to do under such circumstances. I harbor doubts that the three girls would have had adequate time to clearly see and identify the appellant. This case therefore relies on circumstantial evidence.

The Court of Appeal in cited with approval the case of ***Abanga Alia Onyango v. Rep CR. A NO.32 OF 1990(UR)*** at page 5 where it was held as follows:

> "**It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

It is my singular duty to determine if the evidence in this case passes the three tests. The time when this offence was committed was about 2.00am. At that hour of the night, everyone is expected to be asleep. PW1 was asleep with her sisters PW2 and PW3. The house in which they were sleeping did not have a lockable door. All it needed was for someone to push the door open. This was done by the attacker

without alerting the sleeping girls of his presence. He started undressing PW1. This woke her up and she noticed it was a man. She screamed for help. Her sisters woke up. The man dashes outside in a bid to escape. Unfortunately, the screams woke up the girls' father PW4 and other neighbours. The attacker is pursued and according to PW4 he was arrested. PW4 identified him as the appellant.

On that night, 20th April 2004, PW4 the girls' father was spending the night at the home of one Ismail Kiayai because his wife had given birth and tradition did not allow him to spend the night in the same house as his wife. His three daughters, PW1, PW2 and PW3 were sleeping at a neighbour's home. The appellant was an employee, just like PW4, at the Dairy Farm belonging to an organization known as Young Muslims. The appellant was spending the night in the same house as PW4.

The appellant was restless that night. At 1.00am PW4 saw the appellant open the door and go out. He kept on going out and in. PW4 asked him what the matter was and the appellant replied that he wanted to go and buy cigarettes in the canteen nearby. The appellant left. At 2.00am PW4 heard screams from his daughters and he went to find out what the problem was. He called the appellant to assist him but the appellant was not available. Neighbours chased the person they thought was the thief and PW4 followed. He found the appellant arrested. The appellant was taken to the police.

None of the people who arrested the appellant testified. PW4 found the appellant already arrested and sought to know from the appellant why he had attacked his daughters. According to PW4 the appellant told him that it was the work of the devil.

The appellant stated in his defence that he ran away after PW4 threatened to kill him after the appellant asked him to pay back the Kshs 6,000 he had loaned him. He said that he screamed and PW4's children also screamed and that he was arrested and taken to the police. What I find rather strange is the appellant's statement in the course of his defence. He stated as follows:

"I was charged with an offence I did not do. I am innocent. I will not repeat the offence. The case is fabricated."

Further, going by the answers given by PW4 when he was cross examined by PW4, the appellant must have asked PW4 to forgive him.

The behaviour of the appellant that night of restlessness, going in and out, and saying he was going to buy cigarettes that late at night and the screams from PW4's daughters shortly thereafter followed by the chase and his arrest in my view are circumstances cogently and firmly established and from these circumstances an inference of guilt can be drawn. These circumstances definitely point towards the guilt of the appellant. Further, these **circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the appellant committed the crime.**

Going back to the grounds of appeal, I agree with the appellant that his identification as the person who attacked PW1 is not free from error. I also agree with him that there are contradictions in the manner the attacker was dressed that night and that the investigations were not done. Police Constable Wilson Chelimo, PW5, came across this case when he was perusing the Occurrence Book on 20th April 2012. At the time the appellant was already in custody. Other than visiting the scene and recording statements he did not do anything else. However, I wish to correct the notion held by the appellant that investigations would have ascertained the credibility of witnesses. This is not the case. I however hold the view that had PW5 summoned the witnesses who arrested the appellant, evidence would have been adduced as to the circumstances leading to his arrest.

I find no merit in the other grounds of appeal. There is no basis that the trial court shifted the burden of proof to the appellant. I find no basis of a grudge between PW4 and the appellant and hold the view that it is not the number of witnesses that matters in trial but the truthfulness and quality of the evidence. I come to the same conclusion with the trial magistrate that this case was proved beyond reasonable doubt. Consequently, this appeal is hereby dismissed and the conviction

upheld and the sentence confirmed. It is so ordered.

Dated, signed and delivered this 27th day November of 2013.

S.N.MUTUKU

JDUGE