REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 145 OF 2013

Appeal from original conviction and sentence by the Acting Senior Resident Magistrate (M. D. Kiprono) in Hola Criminal Case No. 12 of 2013

WAYU OMAR DOLOLO……..……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGEMENT

Background

Wayu Omar Dololo, referred to in this judgement as the appellant, was charged in the lower court at Hola with defilement contrary to section 8(1) (3) of the Sexual Offences Act. It was alleged that he defiled **H.K.S** a girl aged 14 years on diverse dates between August and September 2012 at (particulars withheld) in Tana River County. He faced an alternative count of committing an indecent act with **H.K.S** contrary to section 11(1) of the said Act.

The trial court took evidence from four prosecution witnesses and four defence witnesses after which it found defilement had been proved. The court convicted the appellant and sentenced him to twenty (20) years imprisonment. The appellant is aggrieved by the conviction and sentence and has come to this court on appeal.

Petition of appeal

By self-made petition of appeal filed on 10th September 2013, the appellant has raised five grounds of appeal as follows:

i. The trial magistrate was not considerate and ruled in favour of the complainant.
ii. No DNA was carried out to ascertain the biological father of the child.
iii. His grievances were overlooked.
iv. His defence was not given consideration during judgement.
v. The charge against me was defective from the start.

The appellant is represented by Mr. Gekanana, advocate, who decided not to file amended petition but instead rely on the appellant's self-made petition. The respondent is represented by Mr. Collins Orwa, learned state counsel. Both counsels agreed to dispose of the appeal by way of written submissions.

Appellant's submissions

Counsel for the appellant prepared written submissions in which he advanced three grounds of appeal that substantially alters the grounds of appeal prepared by the appellant but which in summary faults the trial magistrate for failing to consider all the evidence from prosecution and defence sides and for not finding that the case had not been proved beyond reasonable doubts.

Counsel submitted that although the trial magistrate properly directed himself that the prosecution bears the onus of proving the case beyond reasonable doubt he relied on the pregnancy of the complainant and failed to find that there was no evidence to prove beyond reasonable doubt that the appellant was the person responsible for the pregnancy.

Counsel submitted that the complainant must have been 11 years old and there is no evidence that her parents looked for her if it is true that she spent the night with the appellant; that the complainant claims to have missed her periods in 2012 two years after her encounter with the appellant and that there is no evidence to show that the sexual encounter continued beyond 2010; that the medical evidence shows that by the time the doctor examined the complainant she was five months pregnant which means she got pregnant in 2012 clearly putting the appellant outside the bracket of being responsible for the pregnancy.

Counsel further submitted that the complainant testified under oath without a *voir dire* examination being conducted on her and therefore her evidence cannot stand; that it was unsafe for the trial magistrate to convict on a single witness without corroboration of her evidence.

Counsel for the appellant asked the court to allow the appeal, quash the conviction and set the sentence aside. Counsel filed three authorities in support of the appellant's case, namely:

i. **DNN vs. Republic [2013] eKLR**
ii. **Brian Kipkemoi Koech vs. Republic [2013] eKLR**
iii. **Donimic Kibet Mwareng vs. Republic [2013] eKLR**

Respondent's submission

The respondent through learned state counsel opposed the appeal. Learned state counsel identified the ingredients of the defilement and submitted on them. On the issue of age of the complainant he submitted that the prosecution proved beyond reasonable doubts that the complainant was aged 14 years.

On the issue of penetration learned state counsel submitted that penetration is defined by section 2 of the Sexual Offences Act as partial or complete insertion of the genital organ of a person into the genital organ of another person; that in order for pregnancy to occur there must be sexual activity which would involve penetration as defined; that the trial magistrate correctly directed himself that it is a matter in the ordinary course of nature that the pregnancy occurred as a result of penetration and therefore correctly applied section 59 and 60 (1) Evidence Act that no prove is required on facts of which the court can take judicial notice.

Learned state counsel submitted that the sexual activity between the complainant and the appellant was a continuous one and did not just happen once in 2010; that the DNA test could not be carried out on the child because at the time the complainant testified in court the baby had not been born; that under section 124 Evidence Act evidence of a single witness, a victim of sexual offence, can be relied on to convict without corroboration; that there were no contradictions in the prosecution evidence; that failure to conduct *voir dire* examination may not lead to quashing of a conviction where there is in existence of other evidence.

Learned state counsel submitted that generally the authorities relied on by the appellant are irrelevant to the matter before the court. He asked this court to dismiss the appeal for lack of merit and uphold the conviction and sentence imposed by the lower court.

Brief facts

The appellant approached the complainant to be his girlfriend during the third term of the school calendar in 2010 promising to marry her when she completed her education. During the course of their friendship the appellant taught the complainant to ride a motorcycle. During the pendency of their friendship, they engaged in sexual activity over a period of time spanning from 2010 to June 2012 when the complainant missed her monthly periods. She informed the appellant who denied responsibility. The complainant decided to take action and told her parents. The matter was reported to police who arrested the appellant and charged him with defilement. In the meantime, the complainant was examined by a doctor and the pregnancy confirmed.

Determination

In determining this appeal, I will consider whether the ingredients of defilement have been proved beyond reasonable doubt. The charge is brought under section 8(1) as read with sub-section (3) of the Sexual Offences Act. The age bracket of the victim in sub-section 3 is between twelve and fifteen years. The prosecution produced a birth certificate as proof that the complainant was aged fourteen years at the time of offence.

The time of the offence is in controversy. Learned counsel for the appellant claims that there is no evidence to show that the sexual activity was continuous. I have read the evidence carefully and I have come across the following evidence in the complainant's cross-examination:

> **"We started dating in 2010. It was third term. …….. I missed my periods in June 2012. I am nine (9) months pregnant today."**

The complainant was testifying on 17th April 2013 and during this time she was nine (9) months pregnant.

I have compared this evidence with that of Dr. Patrick Cheboi, PW4, who examined the complainant on 25th January 2013. PW4 testified that at the time of examination the complainant was five (5) months pregnant. In my view it adds up that a pregnancy that was five months old in January 2013 during the time of examination would be approximately nine (9) months in April 2013 four months later.

The trial magistrate took judicial notice that a pregnancy results from a sexual activity and as such found penetration proved. On my part, I have examined the evidence carefully. At the time of examination by a doctor, the complainant was heavy with child and the pregnancy was visible as observed by the trial court. Indeed at the time of hearing the complainant said she was nine months pregnant. A pregnancy is a biological condition that results from a sexual activity unless there is evidence that there was artificial implanting of fertilized ova into the uterus of a female human being. The trial magistrate had the opportunity to observe the demeanour of the complainant as she testified. He was impressed by her demeanour and observed so in his judgement.

I have considered that under the proviso to section 124 of the Evidence Act, evidence of a single sexual offence victim does not require corroboration and a court can convict on such evidence upon recording reasons for believing such evidence. The trial court recorded the reasons why it believed the evidence of the complainant.

I am satisfied that evidence of pregnancy of the complainant is sufficient proof beyond reasonable doubt that penetration, whether partial or complete, took place. I am also satisfied that the appellant is the person who made the complainant pregnant therefore proving beyond reasonable doubt that defilement took place. In arriving at this conclusion I have considered that the relationship between the complainant and the appellant is not a one-off chance meeting but a continued relationship of boyfriend and girlfriend in which they engaged in sexual activity. The appellant even taught the complainant how to ride his motor cycle. I am satisfied that it was a continuous relationship from late 2010 to June 2012 when she discovered she had become pregnant and the appellant refused to take responsibility. Evidence shows that the complainant was hoping to be married by the appellant after completing school.

I have considered the defence of the appellant. He generally denied knowing the complainant or defiling her. His witnesses introduced evidence that the appellant did not even mention or cross examine the complainant or her father on. The appellant had no duty to prove anything but I wonder why he would fail to cross examine on issues that would show that it was not him but another person, either Bwinete or Odhiambo, people named by his witnesses, who defiled the complainant. All that was required of the appellant was to raise doubts in the court's mind that he was not the one responsible but I find this was not done leaving prosecution evidence uncontroverted.

I want to distinguish this case with **DNN case,** above which counsel for the appellant has relied on. The circumstances of that case are such that the evidence required corroboration because the evidence of the complainant was not sufficient to base a conviction on. The complainant in that case had named two suspects as having defiled her but during her testimony she had exonerated one suspect living the appellant in that case.

The second case, **Brian Chepkemoi Koech**, above, dealt with defective charge. The medical evidence in that case did not support defilement. The appellate court allowed the appeal due to inconsistencies in evidence. The case before me is distinguishable from that case in that I have not found inconsistencies in this case. Likewise the third authority, **Dominic Kibet Mwareng,** above is distinguishable with this case in that in that case medical evidence did not support defilement.

Counsel for the appellant did not submit on the issue of defective charge sheet. All the same I have noted that the charge as drawn contains a statement of the offence and particulars giving all the information necessary for the appellant to know what offence he was charged with. In my view the charge complies with the law (see sections 134 and 137 of the Criminal Procedure Code). The only error is citation of section 8(1)(3) of the Sexual Offences Act instead of section 8(1) as read with 8(3) of the Sexual Offences Act. This is an error that is curable under section 382 of the Criminal Procedure Code and I proceed to cure it under that section. It is my view that the appellant was not prejudiced nor did he suffer any miscarriage of justice.

I also want to distinguish this case with **Garissa High Court Criminal Appeal No. 2 of 2012 Ismail Ibrahim Kofa vs. Republic** (unreported) which had similar circumstances. In that case there was no evidence that the complainant was attending tuition in the house of the appellant and the complainant kept the pregnancy and the alleged defilement secret. This court harboured doubts in that case due to insufficient evidence on the identity of the appellant due to those doubts. In this case evidence shows that the complainant told her father about the defilement. She also told the court that their relationship was girlfriend and boyfriend.

On the issue of the DNA, the record of the lower court shows that the hearing of the case concluded before the baby was born. It is true that no DNA tests were carried out but this in my view did not prejudice the appellant given that there is sufficient evidence to support the charge and to prove this case.

On the issue that the trial magistrate did not consider the all the evidence and the defence of the appellant, I have read the entire record of the lower court and I am satisfied that the trial magistrate subjected all the evidence and the defence to scrutiny. This assertion has no merit.

Conclusion

I have subjected all evidence to careful scrutiny. I have carefully considered the issues raised by the appellant in this appeal and find that the trial magistrate properly directed himself in reaching the conviction. He did not rely on the pregnancy as proof of defilement. He relied on pregnancy in addition to other evidence to find penetration had occurred. I also find that the sexual relationship between the complainant and the appellant continued over two years from 2010 to June 2012 when the complainant became pregnant and the appellant denied responsibility. I did not find contradictions in evidence. I have noted the evidence of the complainant that at one time they had sex from 4.00pm to 2.00pm. Learned Counsel for the appellant has raised issue with this evidence that this means they must have spent the night together and that the appellant took her home in the morning. It is actually true according to the

evidence that the complainant said they spent the night together. While I find the timing is not correctly cited, I do not think this affects the prosecution case given that their sexual relationship continued over time.

On the issue of *voir dire* examination, it is true that the trial magistrate failed to conduct *voir dire* examination on the complainant who is a child of tender years for purposes of defilement. However, failure to conduct a *voir dire* examination is not fatal to prosecution case when there is in existence other evidence other than that of the complainant alone to show that defilement took place. In **Nyasani s/o Bichana vs. Republic [1958] EA 190** it was held that failure to comply with the requirements of section 19 of the Oaths and Statutory Declarations Act may result in the quashing of a conviction when the other evidence is insufficient by itself to sustain the conviction.

In view of the reasoning above, I find that the prosecution proved its case beyond reasonable doubt. The appellant's appeal has no merit and must fail. The appeal is hereby dismissed. This court upholds the conviction and the sentence of the lower court. It is so ordered.

Dated, signed and delivered this 17th September 2014.

S. N. MUTUKU

JUDGE