



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. 2 OF 2012

Appeal from original conviction and sentence by the Resident Magistrate

at Hola in Criminal Case No. 185 of 2011 (M.O. Obiero)

ISMAIL IBRAHIM KOFA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Ismail Ibrahim Kofa who is 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. The particulars of the offence are that on the month of November 2010 at (particulars withheld) in Tana River District with Tana River County intentionally caused his penis to penetrate the vagina of **L.F.S** a child aged 14 years. Alternatively, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The prosecution case was supported by evidence of five witnesses. The appellant was the only defence witness. The trial magistrate found the charge of defilement proved, convicted the appellant and sentenced him to serve 15 years imprisonment.

Petition of appeal

The appellant filed an amended appeal on 9th April 2014 with leave of this court. He also filed written submissions which he relied on to support his petition of appeal. He has advanced the following grounds of appeal:

- i. The learned trial magistrate erred in law and fact to convict him without considering that the prosecution case was not proved beyond reasonable doubt.
- ii. The pundit trial magistrate erred in law and fact to convict him without considering that the DNA test was not done to confirm the truth.
- iii. The learned trial magistrate erred in law and fact to convict him without considering that there was no investigation done.
- iv. The pundit trial magistrate erred in law and fact to convict him without considering that the prosecution case relied on sole witness who was the victim.

Appellant's submissions

The appellant has submitted that defilement was not proved beyond reasonable doubts and the benefit of any existing doubts should be given to him; that the complainant did not state the date when the alleged defilement took place; that the doctor said that the complainant was defiled in May and June and this contradicts the evidence of the complainant; that there was no DNA tests done to confirm that the appellant was the father of the child born of the complainant; that the complainant lied to court and that there is no evidence from the complainant's father or brother that the complainant attended tuition at night at the appellant's house. The appellant asked the court to allow the appeal, quash the conviction, set the sentence aside and set him free.

Respondent's submissions

The respondent through learned state counsel opposed the appeal. Learned counsel made oral submission in response to those made by the appellant. He submitted that the age of the complainant was proved to be 14 years; that penetration was conclusively proved by medical evidence; that identification of the appellant as the assailant was proved and that though the evidence was that of a single witness the trial court was alive to the need for caution in relying on such evidence; that it was penetration and not pregnancy of the complainant that the prosecution was required to prove and this was proved.

Learned counsel further submitted that the investigations were carried out as testified by PW5; that no particular number of witnesses is required to prove a case; that the prosecution evidence was consistent and corroborated and the case was proved beyond reasonable doubt. Counsel submitted that the trial court gave an illegal sentence and urged the court to correct this error under section 354 (a) (ii) and (b) of the Criminal Procedure Code. Learned counsel asked the court to dismiss the appeal for lack of merit.

Brief facts

L.F.S, PW1 and the complainant in this case, claimed that in November 2010 while she was a standard 8 pupil at (name withheld) Primary School, she used to attend evening tuition at the appellant's house. The appellant was a teacher at the same school and used to live in the same plot as the family of the complainant. PW1 said tuition had started in June 2010. During one such tuition on unspecified date in November 2010 the appellant put off the candle light they had been using, pushed the PW1 onto his bed, undressed her, removed his clothes and defiled her as a result of which she experienced pain. PW1 went home that evening and slept without telling anyone. She stopped attending tuition at the appellant's house but continued with tuition conducted in school.

After some time PW1 missed her monthly periods and realized that she had conceived. She kept it a secret. Time went by and on 3rd February 2011 she joined Form 1 at (name withheld) Secondary School. All this time she kept her pregnancy secret and did not inform anyone. On 29th June 2011 PW1 was tested for pregnancy but the results were not revealed to her. On 30th June 2011 PW1 went home for half-term. She was told to report back to school with a parent. She returned to school on 6th July 2011 with her brother **H.S**, PW2.

PW2 was informed by the school principal that PW1 was pregnant. PW2 asked PW1 the person responsible and PW1 told him it was the appellant. PW2 was told to tell their father to go to school. **S.D.T**, PW3, the complainant's father went to school where he was informed that his daughter was pregnant. PW1 told her father that the appellant was responsible for the pregnancy.

PW3 reported the matter at Hola Police Station and recorded a statement with the police. The appellant was thereafter arrested and charged with this offence. PW1 was taken to Hola District Hospital where Dr. Sultan Sherman, PW4, examined her on 10th July 2011 and confirmed that she was 34 weeks pregnant.

Determination

In determining this appeal, this court will be concerned with whether there is evidence to prove beyond reasonable doubt the age of the complainant; whether defilement took place and the identity of the appellant as the person who defiled the complainant. Pregnancy of the complainant is only relevant in as far as it is proved that it was caused by the appellant as a result of the alleged defilement. I state this because the appellant has spent a lot of energy challenging the pregnancy as an ingredient of defilement when the issue is not pregnancy *per se* but defilement resulting in pregnancy.

The gestation period for a human is 40 weeks and by 34th week, the pregnancy of a human being is almost mature and birth is normally expected anytime from the 40th week. These are biological facts which this court takes judicial notice of. Therefore, by 34th week, PW1 must have been big enough to attract attention. The pregnancy must have been visible. It is no wonder that according to her evidence by the time the matter was reported to the police she was about 8½ months pregnant and that she delivered two weeks after. It is unbelievable that she could keep this pregnancy her little secret and not even the parents could notice it!

The age of the complainant has been proved beyond reasonable doubt. The production of a copy of her birth certificate as prove of her date of birth is conclusive evidence of her age. In November 2010 when defilement is alleged to have taken place, she was 13 years old and by the time judgement in the lower court was delivered in December 2011, she was 14 years.

The medical evidence confirmed that the complainant was pregnant. The complainant, her brother and father confirmed that she gave birth to a baby who died. This court has no reason to doubt the evidence of pregnancy. This court takes judicial notice that a pregnancy occurs as a result of sexual activity. This court can therefore conclude that sexual activity with penetration had taken place thereby proving penetration beyond reasonable doubt.

This leaves this court with one major issue: whether the appellant is the person who engaged in the sexual activity with the complainant as a result of which she became pregnant. If this is the case, then the appellant would be found to have defiled the complainant. She was a minor and could not have given consent for the sexual intercourse.

There is on record evidence of the complainant as the sole witness that the appellant is the person who defiled her. The trial court handled this issue and found the evidence of the complainant credible after recording that her demeanour left no doubts in the court's mind. On my part, I have considered that the complainant did not tell anyone including her mother that she had been defiled by the appellant; she did not tell anyone that she had conceived as a result of the alleged defilement; she was admitted in Form 1 and joined in February 2011 about three months after the alleged defilement and did not tell anyone that she was pregnant. Had the school not conducted tests perhaps she would have delivered while in school! It is rather strange that a young girl who has no experience with motherhood could carry pregnancy almost to term without anyone noticing!

Further, PW2 and PW3 brother and father of the complainant admitted that the appellant was their neighbour but none of them said anything about him giving tuition classes to the complainant especially since tuition was going on in the evenings.

Further, evidence shows that the child born by the complainant died soon after birth. There is no evidence to show that any DNA test was undertaken to confirm paternity of the baby. This becomes necessary due to the circumstances surrounding this case.

When all the above evidence is taken together, it leaves this court unsure of the allegations of defilement by the appellant. This court is alive to the requirement of the law that evidence of a single witness can be relied on to base a conviction on after the court takes all necessary precautions to avoid miscarriage of justice. I am also alive to the fact that the proviso to section 124 of the Evidence Act does not require corroboration of evidence of a single witness if that witness is the child victim of the defilement so long as the trial court records reasons why it believes the single witness is telling the truth. However, this court is perturbed by the behaviour of the complainant after the alleged defilement. She kept the matter to

herself raising doubts as to the identity of the person who defiled her. I harbour uneasiness in that her evidence could be wrong about the identity of the appellant. I cannot help asking, suppose someone else had done it?

I have given this matter due consideration, especially taking into account that the complainant carried the pregnancy almost to term before it was discovered and this is when she named the appellant. The appellant was her neighbour and according to her his house was five metres from her home. How can it be that she took almost nine months to name him? How come the parents of the complainant did not know that she was attending tuition at the appellant's house? Obviously, these questions beg for answers. Since there are no answers this court finds that there are doubts about the identity of the appellant.

Evidence in support of criminal case must not leave any doubt in the mind of the court. Such a case must be proved beyond all reasonable doubt. It is unfortunate that I still harbour doubts in my mind due to the manner the complainant behaved in this matter. I find that it may not be safe to convict the appellant when there are doubts in existence. I agree with the appellant in his appeal that this case was not proved beyond reasonable doubt. The appellant will benefit from these doubts to the effect that this appeal is allowed. Consequently, the conviction is hereby quashed, the sentence is set aside and the appellant is set free unless for any other reason he is held in custody. It is so ordered.

Dated, signed and delivered this 28th July 2014.

S.N.MUTUKU

JUDGE