REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 58 OF 2012

FORMERLY HIGH COURT OF KENYA AT MALINDI CRIMINAL APPEAL NO. 65 OF 2011

Appeal From The Original Conviction And Sentence In Criminal Case No. 121 Of 2011 Of The SRM's Court At Hola (M.O.Obriero, RM)

ABDI YEROW SHEPEL……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

JUDGEMENT

Background

Abdi Yerow Shepel, the appellant, was convicted and sentenced to 15 years and 2 years respectively in two counts of defilement contrary to section 8(1)(3) of the Sexual Offences Act and assault causing actual bodily harm contrary to section 251 of the Penal Code. Both offences are alleged to have been committed on 7th May 2011 at (withheld) village in Bura Tana within Tana River County and the victim is a girl known as **E.I** aged 16 years. The sentences were to run concurrently. He is aggrieved by the conviction and sentence and has appealed to this court.

Initially the appellant had filed Criminal Appeal No. 65 of 2011 at Malindi High Court after leave was granted by that court to file the appeal out of time. The file was transferred to Garissa High Court for hearing and determination. The appellant sought leave to amend his petition of appeal and this was granted on 26th June 2012.

Facts

E.I (PW1) was tending to the family goats in the grazing fields when someone identified as the appellant approached and greeted her. He left but returned shortly thereafter holding a stick. He caught PW1 by the left hand and started beating her all over the body with the stick without talking to her. He drew a knife and cut PW1's clothes, pushed her to the ground, removed his shorts and defiled her while holding her neck to stop her from screaming. He then left.

PW1 raised alarm attracting the attention of one Noor (not a witness). Noor went to report the incident to I.F (PW2) complainant's father. PW2 went to the scene where he found his daughter lying on the ground in pain and unable to talk. PW2 noticed that the complainant's dress was torn and she had a swollen body with injuries all over. The complainant narrated to her father that she had been defiled by someone who had escaped. They followed the assailant but did not find him.

The matter was reported at Bura Police Station the following morning. The appellant was also arrested the following morning and handed over to the police.

Examination by Doctor Sultan Sherman (PW3) confirmed that the complainant had been defiled and assaulted. Injuries on the head, shoulders, both arms and right calf were confirmed. The doctor found the hymen broken confirming sexual assault.

Petition of appeal

By a petition of appeal filed on 11th March 2013 the appellant has raised the following grounds of appeal:

i. That the case was not proved beyond reasonable doubt.
ii. That the prosecution evidence is contradictory and inconsistence.
iii. That police did not conduct investigations.
iv. That the appellant was not identified as the assailant.
v. That penetration was not proved.
vi. That the trial court shifted the burden of proof to the appellant.
vii. The sentence is harsh and excessive.

Appellant's submissions

In support of the petition and grounds of appeal, the appellant submitted that he was not identified as the assailant; that the complainant did not give description of the assailant to those who arrested him and she did not join those who arrested the appellant to point him out to them; that the knife he alleged used to cut the complainant's clothes and the torn clothes were not produced as evidence; that there were contradictions in the evidence of PW1 and PW4; contradictions in complainant's evidence that there were no other people around and that someone saw the appellant running away; contradiction in the evidence of the investigating officer that the complainant was hit with a *rungu* and fell down and that the complainant did not mention any *rungu*.

The appellant further submitted that the medical evidence did not support penetration took place and that the doctor only testified of female genital mutilation and not penetration. The appellant contents that the sentence is harsh and excessive. He urged the court to allow his appeal, quash the conviction and set aside the sentence.

Respondent's submissions

The learned State Counsel for the respondent opted to submit orally. He opposed the appeal and submitted that the offence was committed in broad daylight at 1.00pm and the appellant was clearly seen by the complainant; that the trial magistrate cautioned himself on the dangers of relying on a single identifying witness; that dock identification can be relied on to base a conviction if the court is satisfied that on the facts and circumstances of the case the evidence must be true and if the court cautions itself of the possible danger of mistaken identification (see **Patrick Ngunjiri Karriuki v. Republic [2013] eKLR**).

Learned State Counsel further submitted that there were no contradictions and inconsistencies in evidence and that there was proof that the complainant had been sexually assaulted and also that she suffered injuries on other parts of her body confirming assault causing actual bodily harm. It was submitted that the sentence is not harsh and excessive since the appellant was sentenced on two counts and the sentences are to run concurrently.

Determination

I have subjected all the evidence tendered before the trial court to scrutiny. Starting with ground six of the

appeal, there is nothing wrong in the conviction on the two counts. The appellant was charged with defilement under section 8(1) and (3) of the Sexual Offences Act and common assault under section 251 of the Penal Code. These are two distinct offences. The latter is a misdemeanor and carries a sentence of five years imprisonment while the former carries a sentence of not less than twenty years imprisonment. The trial magistrate was in order in his discretion to convict on both offences and to sentence the appellant. I have noted that the trial court made a mistake in sentencing under section 8(3) of the Sexual Offences Act by giving 15 years imprisonment instead of 20 years imprisonment or more. I will address this issue in the course of this judgement.

On ground five, there is evidence that the complainant was assaulted both sexually and physically on her other parts of the body. The doctor testified thus:

> **"On the head, there was swelling on the left side of the head. On the thorax, there was tenderness and bruises on the shoulder at the back.**
>
> **There was mild bruising on both arms. There was bruising on the right calf. The injuries were days old. The same was caused by blunt object. She had been treated prior to the incident. The injuries were classified as harm. I signed the P3 form.**
>
> **I also examined her on the issue of defilement. The girl had undergone female genital mutilation. The hymen was not intact. There was no infection. I concluded that there was penetration because the hymen was not intact."**

This court has no doubt that assault both on the complainant's body and sexually had taken place. The doctor's evidence conclusively lays this issue to rest. The appellant seems to have misunderstood the doctor's evidence. The doctor found penetration had been proved not because of the female genital mutilation but because evidence showed that the complainant's hymen had been broken.

The appellant is contesting that there were no investigations carried out. Police Constable Joab Ouma (PW4) told the court that he received the report on 7th May 2011. He issued the complainant with P3 form and escorted her to Bura Health Centre for treatment. He said he received and rearrested the appellant after he was arrested by members of public on 10th May 2011 and charged him with the offence.

The record shows that the appellant did not cross examine this witness after telling the court that he did not have questions to the witness. In my view the witness ought to have explained whether he followed up with the members of public including complainant's father who brought the appellant to the station on 10th May 2011 two days after his arrest on 8th May 2011 to find out where the appellant had been held up to the time he was brought to the station. The trial court too ought to have found out what had happened to the appellant after he was allegedly arrested on 8th May 2011.

This court however finds that there was no prejudice occasioned on the appellant by failure by PW4 to pursue further investigations.

On the issue of contradictory evidence, I have noted that the complainant and her father said the appellant was arrested the following day after the assault. This would make the day of arrest to be 8th May 2011. However, PW4 said the matter was reported to him on 7th May 2011. Indeed this is the date quoted on the Occurrence Book as O.B No. 5/7/5/2011. On this issue, it is my view that this is a minor contradiction that does not go to the root of the case and does not prejudice the appellant.

Further, the appellant claims that the complainant contradicted herself by stating that there was no other person at the time she was attacked and later to state that the appellant was seen by someone running away. Since the complainant did not claim that there was someone who saw her being defiled, it is my finding that this does not contradict her evidence that there was no one around when she was attacked.

I find that it is true that the clothes she wore when she was attacked were handed over to the police but

were not produced in evidence. There is no evidence to show that the allegedly knife carried by the appellant was recovered.

Finally, I wish to handle the issue of identification of the appellant as the assailant. The evidence shows that the time was 1.00pm. The complainant does not say whether she knew the appellant before or not. However, her evidence is that the appellant approached her at first and greeted her. He left and returned after a short while carrying a stick with which he assaulted the complainant.

Although evidence does show that someone saw the appellant running, that person is not disclosed nor did any one testify to that fact. The boy named as Noor who went to tell PW2 about his daughter's assault did not testify nor did the uncle of the complainant who accompanied PW2 to rescue the complainant.

This leaves this court with evidence of a single witness on the issue of identification of the appellant. Recognition has been held to be better than identification of a stranger, but even in recognition, courts are cautioned to treat such evidence with care. In **R v. Eria Subwato (1960) EA 174** the court stated as follows:

> ***"…When evidence alleging to implicate an accused is entirely on identification, that evidence must be absolutely watertight to justify a conviction..."***

Similar views were expressed in **Wamunga v. Republic (1989) KLR 424, 426 and an appellate court is required to treat such evidence with caution:**

> ***"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

Abdalla bin Wendo *& Another v. R* (1953) 20 EACA 166 still remains in our jurisprudence as good law on this issue. The former Court of Appeal for Eastern Africa expressed itself as follows:

> ***"Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence or identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

The trial magistrate addressed this issue in the judgement. He was alive to the need for caution when handling evidence of a single witness on identification and after considering the evidence surrounding identification of the appellant found that the evidence had no possibility of mistake.

On my part, I have considered the evidence in line with the decided cases. I note that it was daytime and the appellant at first greeted the complainant before going away and returning after a while with a stick which he used to hit the complainant. Indeed the complainant did not give the description of the appellant to her father or to the police. If she did give the description it did not come out in evidence. I have cautioned myself as required and I am alive to the possibility of error in identification of the appellant.

I have considered the defence of the appellant. He narrates that he was arrested and taken to Bura Police Station and someone claimed that he defiled his daughter. The appellant said he was a herdsman. There is one sentence in his defence that calls for attention. It reads:

> **"One of the people alleged that I had defiled his daughter. Later, my family members negotiated with them and paid four cows as compensation."**

Given that this defence was given without taking oath, the appellant was not cross-examined. It is for this court to either believe this or not. Now in the normal way of life people do not negotiate to compensate others without reason. Although I have no evidence to back up this inference, it is not out of ordinary for people to agree to negotiate compensation. To me this is the closest this court can get to enable it make a conclusion that this is other evidence which this court can reasonably rely on to conclude that the evidence of identification though based on testimony of a single witness can safely be accepted as free from possibility of error and that the appellant was the assailant.

With this conclusion, the issue of identification of the complainant as the assailant is laid to rest. This court makes a finding that the appellant was properly identified as the assailant. In arriving at this conclusion, this court has also taken into account the proviso to section 124 of the Evidence Act which enables a court to convict on the evidence of a single witness who happens to be a child victim of a sexual offence, of course after duly recording reasons for so relying on such evidence as I have done above.

On sentence, it is my view that there is nothing harsh or excessive about it. Count one attracts a sentence of not less that fifteen years and count two attracts a sentence of five years.

I have noted that the charge was brought under section 8(1) (4) of the Sexual Offences Act. Someone made changes on the Section and it shows subsection (3) instead of the original (4). It is obvious that the original number was (4). The evidence of PW2, the girl's father said his daughter was aged 16 years and this is the age reflected on the P3 Form. I will go by section 8 (1) as read with subsection (4) of the Sexual Offences Act.

I note that the drafting of the charge is quoted wrongly by stating section 8(1) (4) instead of section 8(1) as read with subsection (4). The charge was not amended to reflect this. However, this did not prejudice the appellant and it is an error that is curable under section 382 of the Criminal Procedure Code. I proceed to cure it under that section.

This appeal has no merit as reasoned in this judgment and consequently, I proceed to dismiss it, which I hereby do, for lack of merit. It is so ordered.

Dated, signed and delivered this 15th July 2014.

S.N.MUTUKU

JUDGE