REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 7 OF 2013

HUSSEIN HASSAN KALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant was charged in the subordinate court with defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of charge were that on 23/01/2011 at [particulars withheld] town in Mandera County unlawfully and intentionally caused his penis to penetrate the vagina of B A M a girl of 16 years. In the alternative he was charged with indecent act with a child contrary to section 11(1) of the same Act. The particulars of charge were that on the same day and place he intentionally caused his penis to rub the vagina of F A.

When the appellant appeared in court the charge was read to him and he stated that it was not true. It is not clear from the record whether he pleaded to the main or the alternative charge. It is also noted that the alternative charge was in respect of a different complainant F A.

Be that as it may, since he pleaded not guilty, he had to be tried. After a full trial, he was convicted on the main count of defilement and sentenced to serve 30 years imprisonment. Being dissatisfied with the decision of the trial court, he appealed to this court initially through grounds filed on 8/07/2012, which were later replaced when he filed amended grounds of appeal on 5/06/2014. His grounds of appeal are as follows:-

1. **The Magistrate erred in both law and fact while convicting him on the purported visual identification of PW2 a single witness in light of no prompt first report to suit her allegations.**

2. **The Magistrate erred in both law and fact by being impressed with his mode of arrest**

that remained totally doubtful when the evidence is put into consideration.

3. **The Magistrate erred both in law and fact by convicting him on reliance on evidence of PW2 whose credibility remained doubtful in accordance with section 19 of the Oath and Statutory Declarations Act for minor children.**

3. **The Magistrate erred in both law and fact while convicting him on charges that were not proved when PW4 evidence was put into consideration**

4. **The Magistrate erred both in law and fact when convicting him on a charge which is not proved when PW4's evidence was put into consideration**

5. **The Magistrate erred both in law and fact in rejecting his sworn defence that was not challenged by the prosecution side as per Section 212 of the Criminal Procedure Code.**

The appellant also filed written submissions of appeal. At the hearing of the appeal, he relied on the written submissions filed. I have perused the same.

Learned Prosecution Counsel Mr. Okemwa, opposed the appeal. Counsel submitted that the identification of the appellant by PW 2 was positive. PW2 saw the appellant during the day sitting with an old man and they even talked. In counsel's view, it was apparent that the complainant knew him before. There was therefore no need for an identification parade.

With regard to the mode of arrest, counsel submitted that during the trial, the appellant did not raise any issue of malice relating to his arrest. It was therefore late in the day for the appellant to allege malice on appeal.

On credibility of witnesses, counsel submitted that the evidence of PW 2 the complainant satisfied the provisions of section 19 of the Oaths and Statutory Declarations Act. The court verified the intelligence of the witness before testifying. In councils view, the complainant's evidence was consistent and credible and was corroborated by that of PW 3. Counsel urged that the appeal be dismissed.

In response to the Prosecuting Counsel's submissions, the appellant stated that he did not have anything to add to his written submissions.

In summary, the facts of the prosecution case were that on 23/01/2011, the complainant PW 2 B A a 16 year old girl, was in the bush herding goats. The appellant, whom she had earlier met at a nearby homestead sitting with an old man, came and hit her on the rib and She fell down and he raped her twice. The complainant then went home crying but there was nobody at the homestead. She met a woman but did not inform her about

the incident.

When her uncle PW1 F A came back, the woman informed him that the complainant was in pain. PW 1 then enquired from the complainant, and the complainant informed him about the rape. Pw1 and PW2 then proceeded to the scene, looked for the goats left behind by PW2, and found them near a home. They then went to a nearby homestead where they found the appellant with the old man. The complainant pointed at the appellant as the culprit. The appellant was then arrested the next day.

On the next day, which was 24/01/2011, the complainant was taken to PW 3 Isaac Korir a Clinical Officer at [particulars withheld] for treatment and obtaining a P3 form. The P3 form was filled and signed on 25/01/2011.

On medical examination, it was noticed that the complainant had blood stains in lower parts of the hijab. There was tenderness on her left and right side of the stomach. There was also tenderness on both thighs. Externally, there were visible blood stains on the thighs. External genitalia was normal, though there was discharge fresh blood which stained the thighs. There were Cervical lacerations, blood cells and mobile spermatozoa were also seen. The hymen was broken. This witness filled and produced the P3 form.

The appellant was thus arrested by PW 7 CPL Joseph Getanda and charged with the offence.

When put on his defence, the appellant gave sworn testimony. He denied seeing the complainant. He however said that the complainant borrowed water from him and that an old man Nurrow gave her the water. It was his testimony that, at the material time of the alleged incident, the Degodia and Garre clans were fighting. Since he came from Garre clan, he was wrongly implicated by the complainant who was from the Degodia clan.

On the above evidence, the learned Magistrate came to the conclusion that the prosecution had proved its case against the appellant beyond reasonable doubt. The court thus convicted and sentenced him. Therefrom arose the present appeal.

This being first appeal, I am duty bound to re-evaluate the evidence on record and come to my own conclusion and inferences – see ***Okeno vs. Republic(1972) EA32.***

The conviction of the appellant was predicated on the evidence of identification by a single witness the complainant PW2. Being a sexual offence of defilement. It was also predicted on evidence of age of the complainant, and medical evidence of sexual penetration.

The evidence of age of the complainant is that she was 16 years old. She did not produce any documentary evidence. Her parents did not testify in court. No age assessment was done. I note however that the age of complainant was not challenged either at the trial or on appeal. Though I appreciate that, in the

sexual offence of defilement, age is an important element of the offence and has to be proved beyond reasonable doubt, I am of the view that the age of the complainant herein was established by the oral evidence of the complainant.

I now turn to penetration. The medical evidence tendered by PW 3 establishes with abundant certainty that sexual intercourse occurred. There was penetration. PW3 testified that the hymen was broken and that there were lacerations of the cervix. There was also evidence of fresh bleeding, and the existence of live spermatozoa. In my view penetration was proved. That ingredient of the offence was established beyond reasonable doubt.

The issue is whether the appellant was the culprit. He denied being involved.

The issue is whether the appellant was the person who had sexual intercourse with the complainant. The incident occurred during the day. The complainant and the appellant all agree that they met before the time of the alleged incident. The complainant asked for drinking water from the appellant and was so provided.

They all agree that the request for water was made in the presence of an old man, who was not called by either side as a witness. The appellant says however that he was implicated in the crime due to Degodea and Gare clan conflicts. He however did not raise such line of defence in the trial.

I find that the evidence of PW 2 the complainant was credible and believable. The evidence is that of a single identifying witness. However in my view the time and sequence of events clearly established that the identity of the appellant by the single witness the complainant was free from the possibility of error. Though the appellant raised the issue of clan animosity, I am sure that it was true it would be a matter of common knowledge he did not raise that issue in cross examination to enable the prosecution address the same. I observe that the prosecution did not ask a single question in cross examination to challenge the sworn evidence of the appellant. They should have done so. However, I do not see any reason to doubt the prosecution evidence. I will uphold the conviction.

On sentence, the appellant was sentenced to serve 30 years imprisonment. Under section 8(4) of the Sexual Offences Act, the sentence for such an offence is a term of not less than 15 years. The said section provides that a person who commits an offence of defilement with a child between the age of 16 and 18 years is liable upon conviction to imprisonment for a term of not less than 15 years.

The appellant was sentenced to serve a sentence of 30 years imprisonment. He was a first offender but the prosecution called for a deterrent sentence. After conviction, the prosecutor stated as follows:

“No records. He is a first offender. Offence was done in a beastly manner. Child is traumatised. This offence is rampant in Wajir. I call for a deterrent sentence”.

When the accused was asked to mitigate, he said nothing. Obviously this was an indication that he did not express any remorsefulness for the offence. The learned Magistrate observed that there were increased incidents of defilement cases in Wajir town, and that there was need to pass a deterrent sentence to send a message to society.

Though, in my view, the offence was serious and the appellant did not express any remorsefulness, the sentence of 30 years imprisonment for a first offender was excessive. The law imposes a severe minimum sentence of 15 years imprisonment. In my view, there were no aggravating factors to that could warrant the imposition for twice the minimum sentence for a first offender. I appreciate that sentencing is the discretion of a trial court. However, in the circumstances for the present case, my view is that the sentence imposed was harsh and excessive. In my view, the minimum sentence of 15 years imprisonment is sufficient. I will therefore set aside the sentence imposed and substitute thereon a sentence of imprisonment for 15 years.

In the result, I dismiss the appeal on conviction. I uphold the conviction of the subordinate court. On sentence, I set aside the sentence imposed by the trial court and order that the appellant will serve a sentence of imprisonment for 15 years from the date on which he was sentenced by the trial court.

Date, signed and delivered at Garissa this 5th day of November, 2014

GEORGE DULU

JUDGE