REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.80 OF 2012

From the original conviction and sentence by Senior Principal Magistrate (J.N.Onyiego, SPM) in the Garissa SPM's Criminal Case No. 1806 of 2011

MOHAMED DECK YUSSUF……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

Mohamed Deck Yussuf, whom I will refer to as the appellant in this judgement, was charged with defilement contrary to section 8(3) of the Sexual Offences Act and in the alternative committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. It was alleged that on 11th October 2011 at Borehole 5 in Lagdera District within Garissa County intentionally and unlawfully caused his penis to penetrate the vagina on one B.H.A, a child of 12 years. In the alterative it is alleged that he unlawfully and intentionally committed an unlawful act by touching her vagina with his penis.

After full trial, the trial magistrate found the main charge of defilement not proved but the alternative charge proved. He convicted the appellant on the alternative charge and sentenced him to ten years imprisonment. Being dissatisfied with the conviction and sentence, the appellant has come to this court on appeal.

Petition of appeal

By his amended petition of appeal filed in court on 25th March 2014, the appellant has listed nine grounds of appeal summarized as follows:

i. The prosecution case was not proved beyond reasonable doubt.
ii. That the evidence of the complainant was contradictory, inconsistent and incredible.
iii. That the prosecution was at fault in guiding and directing the complainant on her evidence.
iv. That none of the prosecution witnesses testified that they knew the appellant.
v. That investigations were not carried on this this case.
vi. That the crucial witnesses did not testify.
vii. That the appellant tendered credible evidence.
viii. The trial magistrate relied on extraneous matters in his judgment.

Appellant's submissions

The appellant submitted in support of his grounds of appeal. He stated that the case was not proved beyond reasonable doubt; that there are contradictions in the complainant's evidence and that of her father; that the complainant told the court that the appellant knocked her down and inserted her penis into her vagina causing her a lot of pain as a result of which she lost consciousness; that the appellant ran away; that when she came to she saw her father and that her father found the appellant wearing his pants. He submitted that the complainant could not have seen the appellant running away if indeed she had become unconscious; that her father contradicted her evidence when he said he met the complainant running; that the father did not state that he found the complainant lying on the ground or the appellant wearing his pants; that the father said he found the appellant with other young men yet the complaint said the appellant had been alone. Her father did not mention that the complainant had lost consciousness.

He further submitted that the complainant's mother said she found the complainant injured and on examining her vagina she found blood; that the complainant's clothes were stained with blood and that the sutures used to stitch her genitalia had been broken and that this evidence is not corroborated by the doctor.

The appellant submitted that the evidence is fabricated against him and that the complainant's father assaulted him and that the complainant was couched by the prosecutor what to state in court after she failed to implicate the appellant the first time.

The appellant asked the court to allow the appeal, quash the conviction, set the sentence aside and set him free.

Respondent's submissions

The appeal was opposed. Learned state counsel submitted that the evidence of the prosecution witnesses does not contradict in material facts; that corroboration is no longer a requirement under the law by virtue of section 124 of the Evidence Act; that even if corroboration was a requirement, it would be unconstitutional by virtue of **Criminal Appeal No. 277 of 2002 Mukungu v. Republic** and further the trial court was satisfied that the child was truthful after conducting a *voire dire* examination on her.

It was further submitted that the contradictions do not go into the root of the case, that there is no evidence that the prosecution couched the complainant; that the appellant was apprehended immediately and taken to the police station; that the appellant has not demonstrated what further investigations he sought since PW6 took over the case and took both the complainant and the appellant to hospital; that no particular number of witnesses is required to prove any fact by dint of section 143 of the Evidence Act and that the defence of the appellant is a mere denial. Counsel urged the court to dismiss the appeal for lack of merit and to uphold the conviction and sentence.

Evidence

Briefly, the complainant told the court that she was herding family goats alone on 11th October 2011 when the appellant went to her and asked her for water to drink to which the complainant told him that she did not have water. She said the appellant held her by the neck and mouth, knocked her down, removed her clothes and defiled her. She said that her father found her and arrested the appellant whom he took to the police station where he was charged with this offence. She said she was treated and a P3 Form completed.

The complainant's father, H.A.A, PW2, told the court that he went to check on the complainant as she was herding goats at around 11.00am. He said he found her running away and she reported to him that a man had undressed her and had had sex with her. He said that the complainant pointed the appellant as the man who had attacked her. He said he arrested the appellant and took him to Dadaab Police Station.

S.A.S, PW3, the complainant' mother testified that she found her daughter at Dadaab Police Station and examined her and noticed her virginity and the sutures used to seal the girl's genitalia after what is commonly referred to as female genital mutilation (FGM) had been broken. She said she saw blood

oozing from the girl's genitalia and her clothes were blood stained.

The appellant testified under oath and told the court that on 11th October 2011 he went to the forest to harvest tooth brush sticks for sale; that he saw the complainant looking after goats; that her goats strayed to the sticks he had cut and gathered; that he told her to remove the goats from the place; that the complainant ran away; that he was arrested and beaten; that he was taken to Dadaab Police Station where he was charged.

Determination

This case was heard initially by Mr. D.W. Mburu Senior Resident Magistrate but upon his transfer, the case was inherited by Mr. J.N. Onyiego, Senior Principal Magistrate who finally wrote and delivered the judgement. I have read, examined and evaluated all the evidence afresh. I have also read carefully the judgement of the lower court. The trial magistrate believed the evidence of the prosecution witnesses and found the alternative count of committing an indecent act proved.

Firstly, I wish to state that after careful analysis of the evidence it is my considered view that the ground of appeal that there were crucial witnesses who were left out and that the appellant was not identified by the witnesses do not hold any water. The prosecution called the witnesses it thought were crucial to its case and the evidence shows that the identity of the appellant is not an issue since he himself admits to having met the complainant and her father. The only contention is that he did not commit this offence.

On the issue of investigations, it is true that not much was done in respect of this case other than re-arresting the appellant, taking down statements of witnesses, preferring these charges and issuing P3 Form to the complainant. There is medical evidence to show that the appellant had sustained injuries and this did not come out in prosecution evidence.

The appellant has submitted that the prosecutor guided the complainant in her evidence. The record of the lower court proceedings show that the complainant was stood down on 26th October 2011 at the instance of the prosecutor. This was after she had told the court that the appellant knocked her down, lay on top of her and that she did not know what he did to her. When hearing resumed on 27th October 2011, the complainant told the court that after lying on her the appellant inserted his penis into her vagina and repeated this causing her pain and that she lost consciousness.

This additional evidence is the reason why the appellant claims that the complainant was directed on what to say. This court can only speculate as to what happened after the prosecutor asked for an adjournment to have the complainant counseled as she seemed scared. Be that as it may, it is the view of this court that though there is no proof that the complainant was directed what to say in evidence, after addressing the other issues touching on her evidence the finding of this court is that the appellant is not prejudiced.

On the issue that the trial magistrate relied on extraneous matters, I find this to be true to some extent. The magistrate in his judgment had this to say in reference to the complainant and her evidence:

> **"She explained how accused confronted her, grabbed her while in the bush and defiled her. She screamed and the father responded. The father was shown the person who defiled his daughter and arrested him from among a group of young men."** (Emphasis mine)

The evidence does not show that the complainant screamed at any time nor does it show that her father answered to those screams. It does not show that the complainant showed the appellant to the father.

The evidence shows the following analysis too:

> **"PW2 her father confirmed that, when he arrived, he saw her daughter running away as she pointed accused as a person who had sexually assaulted her. She pointed at him immediately (sic)."**

There is no such evidence that the complainant ever pointed out the appellant to her father.

The magistrate further stated that:

> **"Accused does not deny chasing away the complainant after their goats ate his twigs/tree branches he had gathered……"**

The evidence does not show that the appellant ever admitted chasing the complainant. His evidence is that he asked her to remove the goats from where he had gathered his sticks but she ran away.

I also note that the trial magistrate, while finding that the alternative charge had been proved, stated thus:

> **"By undressing her, he definitely touched her genitalia indecently."**

With respect to the magistrate, I found no evidence supporting this finding and I am unable to understand what led the trial magistrate to make this conclusion. This is a criminal trial and any evidence tending to point to guilt of an accused person must be watertight so as to prove a case beyond reasonable doubt. There has to be evidence proving to this degree that the appellant touched the private parts of the complainant.

It is true, with these examples, that the trial magistrate introduced extraneous matters in his judgment.

The issues that the case was not proved beyond reasonable doubt; that the evidence is contradictory and inconsistent and that the appellant gave credible evidence are handled together.

Firstly, there is no medical evidence supporting that the complainant was sexually assaulted. She told the court that the appellant penetrated her twice and that she felt pain and lost consciousness. Her father told the court that his daughter reported to him that someone had undressed her and had had sex with her. PW3 her mother said her daughter's virginity and the sutures sealing her genitalia had been broken and that her vagina had some discharge and was oozing blood and that her clothes were stained with blood.

The alleged clothes were not produced in court as exhibits and no mention of them was made by Police Constable Nehemiah Wasanga, PW4 who re-arrested the appellant and recorded statements.

Doctor Wilson Muriuki, PW6, examined the complainant on 11th October 2011, six hours after the alleged assault. His evidence is as follows:

> **"Her hymen was broken. There was no bruises, tear, nor bleeding suggesting that the hymen was not broken recently leave alone the six hours within which it was alleged that she had been defiled."**

On being cross examined, the doctor said:

> **"There was no sperms found in her vagina (sic). There was no sign of forced penetration. I am not sure if there was penetration or not."**

With no evidence to support defilement, the issue is whether there is evidence to support the alternative charge?

There are contradictions and inconsistencies in the evidence of complainant, her father and her mother. Since the father and mother relied on what the complainant told them it is to her evidence that this court must turn. She had told the court initially that she does not know what happened to her. She later said that the appellant had inserted his penis into her vagina. This girl does not strike me as a truthful witness. She says she lost consciousness and that when she woke up she saw her father. She does not say anywhere in evidence that she ran away. Although the complainant says that the appellant penetrated her, the doctor found no evidence of such penetration.

I have read the P3 form. It indicates in the additional remarks by doctor that examination showed no obvious signs of struggle or forced penetration except the tender neck.

Obviously, the mother, PW3 lied in court when she said her daughter was oozing blood in her genitalia, her hymen and sutures had been broken and she had discharge. This evidence is not confirmed by the doctor and the complainant herself did not say so. Her father found the complainant running and had injuries on her neck. He said she pointed out the appellant to him as the person who had had sex with her. PW2 continues to state in reference to the appellant:

> **"He was also in the forest. I saw him with my own eyes. I found the accused person with some other young men……"(emphasis added)**

I find this evidence incredible. If it is true that the complainant pointed out the appellant to her father leading to his arrest, it is incredible to state that the appellant was also in the forest with other young men! Mind you, the complainant did not mention these other young men.

The appellant claims that he was beaten and injured. The medical examination in the P3 form in respect of the appellant shows he had soiled clothes; bruises and swelling on the left side of the head. The probable type of weapon used to cause those injuries was classified as blunt probably blows. It is therefore not in dispute that the appellant sustained injuries. He stated that these were caused by the complainant's father and other people.

After careful consideration of the evidence by the prosecution witnesses it is my finding, as shown in this judgment, that the same is inconsistent and contradictory on material facts. The appellant has given a credible defence which the trial court did not consider at all. Instead, the trial court found the evidence of the father corroborative of that of the complainant. The trial court failed to appreciate the contradictions in the evidence. The trial magistrate seemed to base the conviction for the alternative charge on the injury found on the neck of the complainant. Although she said the appellant held her by the neck, she never stated that this caused her any injury. The trial magistrate seems to have fabricated evidence to support his conviction of the appellant.

My view is that there must be proof beyond reasonable doubt that the appellant committed an indecent act with the complainant. Section 2 (1) of the Sexual Offences Act defines **"indecent act"** as follows:

> (a) **Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.**

With doubtful evidence that any sexual activity took place due to the contradictions in the evidence, and without the proof that the appellant injured the complainant on the neck, it is my finding that the evidence does not prove beyond reasonable doubt that the alternative count as defined above was proved. This court will give the benefit of doubt to the appellant. Consequently, the conviction on the alternative charge of committing an indecent act is hereby quashed and the sentence of ten years set aside. The appellant is set free unless for any other reason he is held in custody. He shall be released to the UNCHR at Hagdera Refugee Camp through the Officer Commanding Garissa Police Station (OCS). It is so ordered.

Dated, signed and delivered this 25th day of June 2014.

S.N.MUTUKU

JUDGE