REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 32 of 2012

SILVANO GALANA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Formerly High Court at Malindi Criminal Appeal No. 123 of 2011 being an appeal from the conviction by Hola Resident Magistrate's Court in Criminal Case No. 58 of 2011)

JUDGEMENT

1. Silvano Galana (the appellant) was tried, convicted and sentenced to a fifteen year jail term on 6th July 2011 by the Resident Magistrate at Hola for the offence of defilement. He is dissatisfied with the conviction and has preferred this appeal. The appellant had been charged with the main charge of defilement contrary to section 8 (1) and (4) of the Sexual Offences Act and an alternative charge of indecent act with a child contrary to section 11 (1) of the same Act. The offence is alleged to have been committed on the 1st day of March 2011 at (withheld) in Tana River County and the victim is **M.J.K** a girl aged 16 years.

2. The petition of appeal, originally filed at Malindi High Court but later transferred to High Court of Kenya at Garissa, lists five grounds of appeal to the effect that the learned magistrate erred in both law and fact in (a) failing to properly consider the evidence of the prosecution witnesses and the appellant's defence; (b) in shifting the burden of proof to the appellant; (c) in relying on circumstantial evidence which was not strong to prove the appellant's guilt; (d) in failing to consider that the age of the complainant was not proved or ascertained and (e) in convicting the appellant on insufficient grounds that did not meet the threshold of proof beyond any reasonable doubt.

3. In addition to the grounds of appeal, learned counsel for the appellant made oral submissions on grounds four and five and asked the court to consider grounds one, two and three and make a determination on the same. In his submissions, counsel stated that the age of the victim was not ascertained or proved; that although the age assessment report was identified in court during

proceedings it was not produced as an exhibit; that age of the victim is very crucial in sexual offences because the penalty is based on the age. On the issue of proof beyond reasonable doubt, counsel submitted that there was no proof that there was penetration; that although the doctor stated that the hymen had been torn there was no evidence to show penetration took place. He asked the court to allow the appeal, quash the conviction and order release of the appellant.

4. The appeal was opposed by the prosecution with learned state counsel submitting that the exhibits were produced in court by PW5 on behalf of Dr. Mwangi; that the age of the complainant had been assessed; that the evidence as narrated by complainant and the other witnesses proved that the offence took place; that the lower court disregarded the defence of the appellant. The learned state counsel asked the court to dismiss the appeal.

5. The trial court received evidence from five prosecution witnesses and three defence witnesses. The five prosecution witnesses included the complainant **M.J.K** (PW1), her father **V.K** (PW2), assistant chief of the area (PW3), the investigating officer (PW4) and the doctor (PW5). The defence witnesses were the appellant (DW1) and his two friends (DW2) and (DW3). After examining and analyzing the evidence in support of the prosecution case the trial magistrate was satisfied that it meets the threshold of proof beyond reasonable doubt. He rejected the defence evidence and convicted the appellant. This court will examine and evaluate this evidence afresh as required of a court sitting on first appeal taking into account that this court did not have the benefit of observing the witnesses as they testified and therefore I am not able to comment regarding their demeanour.

6. The case makes interesting reading. PW1 then in form three at (withheld) boarded a motor cycle, commonly known as boda boda, on 1st March 2011 at 3.00pm and left home. She was returning to school after half term holiday. On reaching (withheld) while still aboard the boda boda, she sported the appellant whom it would later emerge was her boyfriend. The appellant was at the time seated near a road with his friends later identified in evidence as DW2 and DW3. PW1 told the cyclist to stop to enable her talk to the appellant. She asked the appellant for money. The appellant did not have money on him and he told her that he would give her the money the following day. She dismissed the cyclist who left. The appellant told her to go to school and that he would organize to send her the money but PW1 refused to go. They spent the night together and had sexual intercourse. In the morning on 2nd March 2011 the appellant asked her to go back to school but she refused. She washed her clothes and put them up to dry but before the clothes dried up her father PW2, the area assistant chief PW3, the appellant's father and PW1's uncle arrived. They wanted to know why PW1 had not gone to school. PW1 told them what had happened after which both PW1 and the appellant were taken to the police station and locked up in cells. PW1 was referred to hospital on 3rd March 2011 and the appellant was charged.

7. The above evidence as narrated by PW1 was confirmed by the evidence of her father PW2 and PW3 the assistant chief. PW2 told the trial court that he learned of PW1's absence from school from PW1's uncle one Godana who works at the school where PW1 attended. PW2 called the matron of the school who confirmed that PW1 had not returned to school after half term. PW2 went to the school after he was summoned by the matron and at the gate of the school he confirmed from the gate record that his daughter had not gone to school. PW2 went to report the matter to the police and in the company of PW3 they searched for PW1 until she was found at the appellant's home.

8. On his part the appellant confirmed that PW1 went to his home and asked for money to buy school items claiming that her father had not given her the money. The appellant claims to have told PW1 to go to school and that he would take the items and money the following day. Upon her refusal to go to school without the items, he told her to go home and she did. She returned to his home the

following day 2nd March 2011. He left her at his brother's house and went to look for the money. He then went to his cousin's place from where someone informed him that he was needed at home. On arriving home he found PW1's father, his father and two other men who enquired the whereabouts of PW1. He led them to his brother's house, used his key to open the door and found PW1 in the sitting room. He admitted to having been friends with PW1. He also admitted to having sexual intercourse with her believing she was an adult aged 19 years. He said they had planned to marry after PW1 completed school. He told the court that PW1 had told him that she had been born in 1992. On cross examination he said that PW1 had demonstrated to him that she was above 18 years of age. She did this by giving him documents to show she was 19 years old. He also said he went to (withheld) Primary School and confirmed that PW1 was a pupil at the school in January 2011.

9. The evidence by the appellant was confirmed by that of DW2 and DW3. Both witnesses testified that PW1 was told to go home after the appellant told her to go since he did not have money and that she went back to the appellant's home on 2nd March 2011.

10. I have carefully perusal the record of proceedings from the trial court and have re-examined and re-evaluated all the evidence adduced by both the prosecution and defence witnesses. On the first ground of appeal I do not agree with the appellant that the trial magistrate failed to properly consider the evidence of both sides. I am satisfied by looking at the record that the trial magistrate gave all the evidence due consideration. Ground one of the appeal therefore has no merit.

11. On the second ground of appeal the appellant asserts that the trial magistrate shifted the burden of proof to the appellant. I have carefully read the judgement of the trial court. I have noted that the trial magistrate dwelt at length on the defence by the appellant that he had sexual intercourse with the complainant because he believed she was an adult. The trial magistrate was explaining the requirements of section 8 (5) of the Sexual Offences Act which affords an accused person defence in cases where he engages in sex with a girl believing her to be an adult. In my view I do not think the trial magistrate shifted the burden of proof. I will deal with the requirements of section 8 (5) later in this judgement.

12. On the trial magistrate reliance on circumstantial evidence to convict, I do not think this is the case. I have read the evidence adduced and the trial magistrate's analysis of the same. What is on record is not circumstantial. It is direct evidence from PW1, confirmed by that of PW2 and PW3 that PW1 was found in the house of the appellant (although the appellant says it was his brother's house). Both PW2 and PW3 told the trial court that after the appellant opened the door where PW1 was, she came out from the bedroom. The appellant opened the door of the house using his key. There is also admission from him that he engaged in sexual intercourse with PW1, not once but on several occasions, only he believed her to be an adult. This cannot be termed circumstantial evidence!

13. On the issue of age of PW1, it has been submitted that the age assessment report was marked but was never produced as an exhibit to confirm the age of PW1. The record of the lower court shows the P3 form and age assessment report were identified in court as MFI-1 and MFI-2 respectively. However PW5 Dr. Sultana Sherman who testified on behalf of Dr. Mwangi produced the P3 form only and nothing was said about the age assessment report that had been marked for identification. I need not over-emphasize that the prosecution bears the burden of proving all the particulars of an offence in a criminal case and age of the victim of a sexual offence is one such particular to prove. Our courts have pronounced themselves on the importance of ascertaining the age of the victim in various cases. This is because the penalties in sexual offences under section 8 of the Sexual Offences Act are pegged on the age of the victim. In one such case, **Ben Wambua Makau v. Republic (2010) eKLR** the judge discussed this issue as follows, ***'……in such circumstances it is mandatory to establish the age of the child through documentary or factual evidence. There was no P3 form produced by the***

doctor or any other document showing the age of the complainant. That was fundamental error on the part of the prosecution which goes to the root of the conviction entered by the court.' Although this is a High Court decision, its persuasive value cannot be ignored.

14. Available evidence on the issue of age of PW1 was adduced by PW1 herself when she told the court that she was aged 16 years. She further told the court in reference to MFI-2 the assessment report that the report shows her age to be 16 years. The investigating officer who testified as PW4 and the doctor PW5 did not say anything about the age assessment report. They however mentioned the P3 form and PW5 produced the same as exhibit 1. The P3 form indicates PW1's age as 16 years in both pages 1 and 3. In addition to this PW2, the father of PW1 in cross-examination told the trial court that PW1 was born in 1995 and was named after the first born daughter who had been born in 1992 and died in early 1995 before PW1 was born. He further said that they named PW1 after the deceased first born as custom requires. After carefully considering this evidence, I am persuaded to believe that PW1 was born in 1995 even without the benefit age assessment report which although identified was not produced. I have noted that the age indicated in the age assessment report though not produced is 16 years as per the evidence of the witnesses who referred to it. This is the same age given in evidence by PW2 the father and indicated in the P3 form. My considered view is that this is factual evidence and I have no reason to doubt it. In view of that conclusion, it is my finding that the age of PW1 has been ascertained to be 16 years.

15. On the final ground of appeal as to whether the evidence proves the case beyond all reasonable doubt, I have considered the evidence carefully. It is not denied that the appellant and PW1 had on several occasions engaged in sexual intercourse. This is admitted by the appellant his only defence being that he believed PW1 to be an adult aged 19 years. He seems to however deny that he had sex with her on 1st March 2011. He says he told her to go home and she did so and returned to his home the following day 2nd March 2011. This is the evidence of DW2 and DW3 as well. PW1 herself told the trial court in her evidence in chief that she refused to go to school or to go home as advised by the appellant. She changed the story in cross-examination to state that she went home until the following day. I highly doubt this evidence that PW1 went home and returned to the appellant's home on 2nd March 2011. PW2 told the court that he learned that PW1 did not go to school and on responding to the summons of the Matron of the school where she attends on the same issue of PW1's absence from school he confirmed from the gate records that PW1 had not reported to school. Definitely PW1 did not go to school on 1st March 2011 and neither did she go home for PW2 would have noticed. In any event she could not have gone home since she had left earlier that day to return to school and her father PW2 had given her money to shop for school items. In my view her stopping at the appellant's home was not planned but an impromptu decision on her part. The evidence of PW2 and PW3 confirms that PW1 was found in the home of the appellant. I have no reason to doubt that is where she spent the night of 1st March 2011. I have no reason to doubt that she and the appellant engaged in sexual intercourse on 1st March 2011. There was nothing to stop them since they were boyfriend/girlfriend and they had been having sex before. They also believed that they were in love and were waiting to marry after PW1 completed school. The medical evidence showed that PW1 was not a virgin as there was an old tear of the hymen. She was examined on 16th March 2011. She was found with an infection. According to Dr. Sultana penetration was proved by the medical report. This is not specifically stated in the P3 form but after considering all the circumstances of this case, the admission by both PW1 and the appellant that they were friends and had had sex on several occasions and my own finding that I am convinced that the two engaged in sexual intercourse on 1st March 2011 it is my considered view that penetration took place.

16. The appellant raised the issue that he believed that PW1 was an adult. Section 8 (5) (a) and (b) affords an accused person defence in the following terms:

It is a defence to a charge under this section if - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

Subsection (6) of Section 8 provides that ***the belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***

The appellant admits having sex with PW1 but states that he believed she was 19 years old. I understand subsection 6 to mean that it is an accused person has to show what steps he took to ascertain the age of PW1 following her presenting documents to him to show that she was aged 19 years. These documents were not produced in evidence nor were their nature identified in court. By producing them the appellant would have demonstrated the steps he took to ascertain the age of PW1 following her claim that she was 19 years old. In my view I do not think this would be shifting the burden of proof but abiding by the requirements of subsection 6 of section 8 of the Sexual Offences Act for I do not see any other meaning of '….***including any steps the accused person took to ascertain the age of the complainant.'*** It is specifically stated that it is the accused to take steps to ascertain the age and not the prosecutor or the court since it is only an accused who would posses information in respect of what steps he took to ascertain the age of the child.

17. The appellant told the trial court in cross examination that in January 2011 he went to (name withheld) Primary School and he confirmed that PW1 was a pupil at the school in that school. He further admits in cross examination that PW1 was in form III at (name withheld) Secondary School. I do not think this helps his defence that he took steps to ascertain the age. In any case a primary school girl, and in most cases a form III girl, would definitely be a child under the Children's Act and such a child cannot give consent to sexual act **(see section 42 of the Sexual Offences Act).**

18. I have taken all the circumstances into account in determining the belief by the appellant that PW1 was aged 19 years oldincluding the steps the appellant says he took to ascertain the age and find that this defence is not available to the appellant. In so determining I am alive to the fact that the burden of proof in a criminal case never shifts from the prosecution. However, the requirements of the provisions of section 8 (5) and (6) of the Sexual Offences Act place this duty on the court to determine if the appellant's belief that PW1 was 19 years old has been established.

19. In conclusion, I find no merit in the grounds of appeal raised by the appellant. The trial magistrate discharged his mandate in determining the issues before him properly and arriving at sound findings based on the available evidence. I have no reason to disturb his findings. I therefore dismiss the appeal. The appellant will continue serving sentence imposed by the trial court. I order accordingly.

STELLA N. MUTUKU, JUDGE

Dated, Signed and Delivered this 26th November 2012.