Case Number:	Criminal Appeal 99 of 2013
Date Delivered:	01 Dec 2015
Case Class:	Criminal
Court:	High Court at Garissa
Case Action:	Judgment
Judge:	George Matatia Abaleka Dulu
Citation:	Abdi Osman Isaack v Republic [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	M. N. Gicheru
County:	Garissa
Docket Number:	-
History Docket Number:	Criminal Case 443 of 2008
Case Outcome:	Appeal Allowed in Part
History County:	Garissa
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 99 OF 2013

ABDI OSMAN ISAACK …….....…….. APPELLANT

V E R S U S

REPUBLIC ……. RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 443 of 2008 – M. N. Gicheru – CM)

JUDGMENT

The appellant was charged with defilement of a girl under the age of 15 years contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 8th July 2008 at 11.00 am, in Tana River District Coast Province caused penetration of his genital organ to K.I a girl under the age of 15 years. He pleaded not guilty. After a full trial, he was convicted of the offence and sentenced to serve twenty (20) years imprisonment, concurrently with a sentence he was already serving in another case.

Dissatisfied with the decision of the trial court, he has appealed to this court. He filed his initial grounds of appeal on 23rd September 2009 in Nairobi. The appeal file was later transferred to this court. On the 5th October 2015 however, he filed an amended petition of appeal which he relied upon, on the following grounds:-

1. The learned trial magistrate erred in law and fact to convict him without considering that he was not positively identified as the person who accosted the complainant.

2. The learned trial magistrate erred in law and fact to sentence him 20 years for an offence that was not proved beyond reasonable doubts.

3. The learned trial magistrate erred in law by convicting him without considering that the P3 form indicated that the hymen was intact.

4. The evidence of the doctor who gave oral evidence was contrary to the examination reflected on the P3 form.

5. The trial magistrate failed to consider that the mode of arrest was poorly instigated since there was (no) specific person who arrested him hence raising doubts of where he was arrested.

6. The trial magistrate erred in law by not considering the first report of the complaint which had no description of the assailant contrary to the evidence of PW3.

7. The learned trial magistrate erred in law and fact to convict him without considering that the age of

the complainant was not ascertained beyond reasonable doubt.

The appellant also filed written submissions to the appeal. He elected not to make oral submissions during hearing of the appeal. With regard to identification he stated in his written submissions that none of the witnesses including the complainant, identified him or knew him before. He also submitted that the evidence of the complainant was inconsistent and that he could not be connected to the offence, as those who arrested him saw him sleeping which was not consistent with the behavior of a person who had just committed such a crime in the vicinity. He maintained that he was innocent.

With regard to the P3 form, he submitted that the doctor who testified did not identify the handwriting of Dr. Victoria who filled the P3 form. He maintained that since the hymen of the complainant was intact, no defilement had occurred.

With regard to the age of the complainant, he submitted that no evidence was tendered to sufficiently prove the age of the complainant as the P3 form indicated the age of 15 years, while PWI said that she was 12 years.

The appellant urged this court to re-evaluate the evidence on record before delivering Judgment.

The learned Prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the incident occurred in broad daylight in the morning, and the appellant was arrested the same day. The victim saw and identified the appellant and as such there was no possibility of mistaken identity.

With regard to age of the complainant, counsel submitted that the father of the complainant stated that she was 12 years of age. The complainant also as well as PW4 stated that she was 12 years of age. Counsel emphasized that it had been decided in several cases that where one of the parents testified to the age of a child, such evidence should not be challenged. Counsel also submitted that the set up herein was rural, and that as such one could not expect the complainant to possess a birth certificate. In addition, counsel submitted, the trail court actually saw the complainant in court and was convinced about the age.

With regard to penetration, counsel argued that through the evidence of the doctor was that the hymen was intact, there was presence of spermatozoa in the vulva which confirmed ejaculation. In addition injuries were observed on the back and neck of the victim which was evidence of use of external force or violence. Counsel submitted that the carrying of a DNA test was not necessary.

With regard to the arrest of the appellant, counsel submitted that there was no irregularity.

Counsel also pointed out that as the age of the complainant was 12 years, the proper section for the offence was section 8(1)(3) of the Sexual Offences Act.

Counsel further submitted that as there was no penetration proved, this was a case of attempted defilement. Counsel; urged this court to invoke the provisions of Section 354 of the Criminal Procedure Code (cap.75) and substitute a conviction for attempted defilement.

In response to the Prosecuting Counsel's submissions, the appellant said that the lower court's record showed that the age of the complainant was said to be 15 years. He emphasized that he had

been in custody since 2009 and wanted justice to be done.

He objected to the proposal to substitute the conviction with one for attempted defilement, and said that key witnesses were member of one family.

During the trial, the prosecution called 6 witnesses. PWI was ISA the father of the complainant.

It was his evidence that he came from Tana River District and that the complainant was his daughter aged 12 years. It was his evidence that the complainant did not go to school and that on 8th July 2008 at 11.30 am while at home, his daughter the complainant and another girl U took the livestock out to graze. After a short while U a niece, came back crying saying that a person was beating the complainant.

He then ran to the place and saw the appellant running away while the complainant ran towards him. The complainant then told him that the appellant had threatened her with a knife, held her throat and defiled her. He observed that the throat was swollen and her head and clothes were dusty, and she was crying.

Then MB who was with him, chased the appellant into the bush and arrested him. They then took him on a vehicle used for carrying sand to the police station at Madogo. It was his evidence that the appellant threw away his 3 litres jerrican as he ran away, and that the appellant was found with a knife.

According to this witness, they took the complainant to the Madogo police station by them and also to the Garissa Provincial General Hospital. He stated that though his wife examined the complainant and confirmed the defilement, she did not come to court to testify because she had delivered recently.

In cross examination, he stated that he did not know the appellant before. He maintained that he saw the appellant at the scene of the incident. He said that four people including himself, took the appellant to the police station.

PW2 was he complainant. After being examined on her intelligence and understanding of the nature of an oath, the court decided that she would tender unsworn evidence.

It was her evidence that she was aged 12 and could not remember the exact date of the incident. However, she stated that on the day in question, he left home at 9.00 am with UA to graze 50 goats.

While grazing the goats, the appellant approached and asked her if she had seen cows which had strayed. She told him she had not seen the animals.

According to her, the appellant whom she had not seen before, had a 3 litre jerrican and stick in his hands. The appellant then left but came back again and asked the same question and she answered that she had not seen the livestock. He then held her hand and could not let go, undressed her and himself and lay on her. U then ran away to make a report at home. She felt the appellant ejaculate. According to her, the incident took about 2 hours.

When the appellant saw people coming to rescue her, he ran away while telling her not to reveal the incident to anybody.

When U and others arrived at the scene, she showed them the direction taken by the accused. A chase was made and he was arrested at Lagh Badera and a report made to the police. The complainant was also taken to the Garissa General Hospital and treated. She stated that she saw the appellant first

on the date of the incident. She identified him in court.

At this stage, the court ordered that the complainant be examined by a doctor to determine her exact age and a certificate produced before close of the prosecution case. From the record, however this court order was not complied with.

PW3 was MBJ, a peasant and member of the community policing. He testified that on 8/7/2008 while at home at Lagh Badera people came towards him and said a girl had been defiled. They proceeded together to the scene, and found the complainant who said she could identify the culprit, as he wore a kikoy, rubber shoes, had a stick, a knife and a 3 litre jerrican. They followed footprints and found the appellant somewhere sleeping. When they saw him, the appellant removed his knife and attempted to stab them. They disarmed him and called the OCS who advised that they take him to the police station.

According to this witness, on the way to the police station, the appellant pleaded not to be taken to the police station as he had committed on earlier offence. He wanted to be taken to the Assistant Chief who was his relative. They however took the appellant to the police station. It was his evidence that the appellant was Orma and the witness Munyoyaya and that he did not know him before.

In cross examination, he stated that he did not witness the incident. He stated that the appellant was not arrested far from the scene.

In re-examination, he stated that he was Chairman of Community Policing in Konora Madha area. PW4 was Dr. Julius Rogena of Garissa Provincial General Hospital. He testified on a P3 form filled by Dr. Victoria who had gone for further studies. The P3 form was dated 11/7/2008 in respect of the complainant aged 12 years. The report was that the girl had tenderness on the neck and bruises on her face. Investigations revealed spermatozoa on the vulva and vagina. Hymen was intact. He produced the P3 form.

In cross examination, he maintained that spermatozoa was found in the vagina, but he did not know the culprit.

PW5 was UA a girl aged 9 years. After examination to establish her intelligence and importance of an oath, the court decided to take unsworn evidence from her.

It was her evidence that on 8/7/2008 at 11.00 am while looking after goats with the complainant, the appellant approached and greeted them in Kisomali. He asked them whether they had seen his cows, and they said they had not. He went away, but came back, held the complainant's hand, kicked her and knocked her down and lay on her. According to this witness, the appellant threatened the complainant with a knife, removed her pants and trousers.

She then ran home and informed the complainant's father and another about the incident. They all ran back to the scene and when the appellant saw them approach, he ran away but was arrested and taken to the police. She stated that she did not know the appellant before.

PW6 was P C James Maina of Madogo Police Station. It was his evidence that on 8/7/2008 while at the station, members of the public and the community policing came with an arrested person, the appellant. A minor (complainant) also came to the station. He was given the story of the incident and arrested the appellant and issued the complainant with a P3 form. He took possession of a knife and charged the appellant in court.

In cross examination, he stated that the appellant was brought to him and that he was not medically examined. He did not witness the incident.

In his defence, the appellant tendered unsworn testimony. He stated that he came from Madogo. He stated that in an earlier criminal case against him, the father of the complainant herein was the brother of the complainant. That he was imprisoned for 5 years but escaped.

He stated that while at an eatery the father of the complainant saw him and four people followed him with knives and clubs and arrested him. It was his defence that this case was fabricated against him. He denied committing the offence.

Based on the above evidence, the trial court found that the prosecution had proved their case against the appellant beyond reasonable doubt, convicted and sentenced him.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence on record and came to my own conclusions and inferences – ***see the case of Okeno –vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record. The appellant has raised several grounds of appeal.

The appellant has complained that the main prosecution witnesses were members of one family. Indeed, PWI, the complainant, PW2, and the eye witness PW3 were relatives. PWI is the father of the complainant. PW3 was a niece of PWI and a cousin of the complainant. PW2 was a daughter of PWI. However, in my view in the circumstances of this case, there was no prejudice occasioned on the appellant due to all the three witnesses being relatives. There was no reason why the said witnesses would collude to fix him with this offence. His contention that he was implicated because of a previous conviction in a case involving a brother of the complainant's father in my view is not believable. If that was true he was arrested because of a previous conviction. I do not believe he would have been alleged to have defiled a girl.

The incident occurred in broad day light. The complainant PW2 saw the appellant well. PW3 also saw the complainant well. Both however saw him for the first time. None of them gave any description which could identify him. He was however arrested shortly after the incident by following footsteps in the direction he disappeared to. He was arrested by Barisa PW4 a community Police member who was an independent witness. The appellant was found lying down, which in my view, meant that he was hiding from distant visibility as he would certainly be seen easily from a far if he was standing. The fact that he was found lying down, did not help his defence. He also used a knife to threaten the person who tried to arrest him, which was a mechanism to prevent arrest. In my view, he was the culprit.

The medical evidence did not show penetration, and the hymen of the complainant was intact. There was however, evidence of spermatozoa found in the vulva of the complainant. There were also bruises on the face and neck of the complainant establishing violence on her from external forces. Those bruises and presence of spermatozoa in the vulva established forced sexual assault. The Learned Prosecuting Counsel has asked that this court substitutes a conviction for attempted defilement.

The spermatozoa was not subjected to DNA to establish that it was from the appellant. Though that was a test lapse on the side of the prosecution, in my view the circumstances of this case and the evidence on record, prove beyond reasonable doubt that the complainant was sexually assaulted, and so assaulted by the appellant.

Since penetration, even partial penetration, was not proved, it meant that the offence of defilement was not proved.

However, the offence of attempted defilement was proved. As requested by the Prosecuting Counsel therefore, and in accordance with the provisions of Section 354 of the Criminal Procedure Code (cap.75), I will substitute a conviction for the offence of attempted defilement and sentence the appellant accordingly.

With regard to age, though the age in the charge sheet was said to be 15 years, the evidence on record refers to 12 years. During the trial, the learned trial magistrate ordered that the age be medically assessed and a report submitted to the court. This was not done, which means the age of the complainant was not scientifically established, nor were any documents on the date of birth tendered in court.

In my view, however it was established that the complainant was a minor, and that was the reason she was not even sworn by the trial court before tendering evidence. Since the age of the minor was not scientifically established as ordered by the court and the appellant was charged with defiling a girl of 15 years, and the severity of the sentence in sexual offences goes according to age, I hold that the age of the minor was 15 years. The sentence for attempted defilement is imprisonment on a term of not less than ten years.

To conclude, I quash the conviction for defilement and substitute thereto a conviction for attempted defilement contrary to section 9(1) of the Sexual Offences Act. I order that the appellant do serve ten (10) years imprisonment from the date on which he was sentenced by the trial court. Right of appeal explained.

Dated and delivered at Garissa this 1st December 2015.

GEORGE DULU

JUDGE