



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 11 OF 2020

FARAH MOHAMED HARED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Hon. M. Wachira – Chief Magistrate

delivered on 16th November 2016 in Garissa CMCRC No. 1 of 2016)

JUDGEMENT

1. The Appellant **Farah Mohamed Hared** was faced with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on the 30th day of December 2015 at Block [Particulars Withheld] in Dadaab District within Garissa County he intentionally attempted to cause his penis to penetrate the vagina of UHK a child aged 10 years.

2. There was an alternative count, of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 based on particulars similar to the above.

3. Having pleaded not guilty to both the main and alternative counts the matter proceeded to full hearing where the Appellant was found guilty of the main count and sentenced to 10 years imprisonment.

4. The Appellant was dissatisfied with the entire Judgement and hence this appeal on the following grounds: -

- **There was no tangible evidence to warrant the conviction.**
- **The case was not proved beyond reasonable doubt.**
- **The prosecution evidence was contradictory.**
- **The court took into account extraneous and irrelevant matters that did not form part of the evidence on record and thus arrived at an erroneous conclusion and**
- **The sentence was excessive.**

5. In his written submissions the Appellant asserted that his constitutional rights under Article 49(h) (f) of the Constitution and Section 109 and 110 of the Evidence Act were not taken into account.

Further the evidence of PW1 established that there was no penetration neither detection of any spermatozoa on the alleged victim. There were contradictions in the evidence of **PW1, PW2, PW3** and **PW6** and therefore difficult to say who was stating the truth. Further the evidence of **PW4, PW5, PW6** and **PW3** was not corroborated. Additionally, the court failed to consider the Appellant's mitigation and equally failed to consider period of 5 years and 10 months he spent in custody.

6. The appeal was opposed by the State on grounds that there was overwhelming evidence on record to warrant the conviction as **PW3**, the complainant's mother found the Appellant as he attempted to commit an act that could have caused penetration. Further **PW1**, corroborated

the evidence as the medical examination indicated that the complainant had injuries in her genitalia.

Further the case was proved beyond all reasonable doubt; the identity of the Appellant was not in question as he was caught in the act at 10 am and was well known to **PW2** and **PW3**. **PW3** heard **PW1** scream, she went to her rescue and found the Appellant in the act. **PW5** a neighbour responding to **PW3**'s screams found the Appellant in the act of dressing. Further there was no iota of contradiction as the evidence of prosecution witnesses was cogent, credible and trustworthy.

The state submitted further that there was no demonstration that the burden of proof was shifted; the defence was a mere denial.

As for the sentence meted out, it was not excessive as the same is within the law. The State urged for dismissal of the appeal.

7. This being the first appeal, this court has to examine, evaluate and analyse the evidence afresh in order to form an independent opinion bearing in mind that the trial court heard first hand interaction with the witnesses. (See **Okeno vs R [1972] at 32**).

8. The prosecution case briefly is that the Appellant invited the complainant a 10 year old mentally retarded girl in a neighbour's house, made her lie down naked, removed his kikoi, attempted to penetrate the child's vagina and as the girl screamed her mother heard the screams and on entering the place she found the Appellant half naked downwards in an attempt to defile the girl. The mother screamed attracting another neighbour (**PW5**) who on getting into the house found the Appellant in the process of dressing. The matter was reported to the police and the child taken to hospital where she was found with some injuries on her genitalia.

9. The victim **UHK** said to be mentally retarded gave an unsworn testimony where she narrated the happenings of the material day stating that she had been sent by her mother, and on her way back she found the Appellant outside a house. He called her, took her through a kitchen, to a verandah, spread a sack on the ground and put her on it, removed her panty and removed his kikoi. He started putting his penis inside her vagina when she screamed for help and her mother found after the Appellant had spread her legs and had started penetrating her vagina, causing her to scream. Immediately her mother arrived the Appellant stopped.

10. **PW3 RMI** the victim's mother on her part stated that she had sent her daughter to a neighbor and after a short while she heard screams and rushed to where the screams were coming from. She got inside the house and the accused started dressing, she screamed and another neighbor arrived. When she entered the house, she found her daughter lying down naked and the Appellant naked from the waist downward.

11. **PW5 AIO**, corroborated the evidence of **PW3**. She said on her part, that she heard screams on the material day at around 10.00 am and went to the house where the screams were coming from. She found **PW2** holding her daughter and the Appellant in the process of wearing his kikoi. They thereafter took the child to the police who referred them to the hospital.

12. **PW1 Salma Mansud Nanji** a medical doctor based at Kenya Red Cross hospital at Ifo 2 examined the victim on the 30th of December, 2015 at about 10.30 pm and thereafter filled the P3 form. She made the following observations;

- Child is mentally retarded and was physically good.

- Head, neck, thorax, abdomen were normal.

- Upper and lower limbs were normal.

Genitalia-had injuries that were within hours caused by a blunt object.

- Degree of injuries-harm

- Girl age 9 years.

- There was FGM Grade 4 and a whitish discharge, no spermatozoa but few epithelial cells seen.

- No evidence of penetration.

13. At the close of the prosecution case, the court found the Appellant had a case to answer. He was placed on his defence and gave a sworn statement where he simply denied the charge.

14. Having considered the evidence on record, the Court finds that the complainant, **PW2** despite her alleged state of mind was able to clearly explain to the court what transpired. She was indeed saved in the nick of time when her mother **PW3** entered the house she was in as the Appellant had attempted to forcefully penetrate her vagina. This information is corroborated by the findings of **PW1**, a doctor. Further, the Appellant was found in the act by **PW3**, this comes out clearly too in her evidence. **PW5** found him putting on his kikoi. The Appellant cannot escape the evidence of **PW1, PW2, PW3 and PW5**.

15. The complainant was found to be credible and trustworthy by the trial court. Likewise, this court finds her evidence clear and convincing and it has no reason to doubt the same. The evidence is backed by the medical examination. And with the evidence of **PW3** and **PW5** the evidence is complete. Therefore, the court finds that the prosecution placed before court evidence proving their case beyond all reasonable doubt such that the defence of mere denial did not in any way dislodge the prosecution's case.

16. Getting back to the trial court's judgement the court fully concurs with the same and has not seen any extraneous matter or irrelevant matter that it considered as was alluded to by the Appellant.

17. The Appellant complained that the time he spent in custody being over 5 years was not taken into account at the time of sentencing. The record show that he was first arraigned in court on the 4th of January 2016, he was convicted and sentenced on the 16th of November 2016; about 10 months in custody.

18. As regards the sentence, the same is within the law. In any event the crime was heinous, the little child had undergone female genital mutilation as observed by **PW1** and as if this was not enough trauma, the Appellant attempted to penetrate her vagina making it double punishment for a child so young. The Appellant's action was inhuman and barbaric and certainly deserves a severe punishment. He does not deserve any mercy or leniency whatsoever. Even with the consideration of the 10 month in custody this court finds the sentence appropriate.

The appeal lacks merit and is dismissed.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2021.

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ALI-ARONI

JUDGE