



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT GARISSA**  
**CRIMINAL APPEAL NO. 52 OF 2019**

**FARHAN MOHAMED SIAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the Judgement of J. J. Masiga – Senior Resident Magistrate Mandera in a judgement that was delivered on the 2<sup>nd</sup> of October, 2019 in Mandera SRM Criminal Case No. 23 of 2019)**

**JUDGEMENT**

1. The Appellant **Farhan Mohamed Siat** was faced with two counts as follows:

**Count I:** Attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006.

Particulars of this offence are that on the 18<sup>th</sup> day of September 2019 at [Particulars Withheld] in Mandera East Sub-County he intentionally attempted to cause his penis to penetrate the vagina of **RMA** a child aged 7 years.

There was an alternative count of indecent assault contrary to Section 11(1) of the Sexual Offences Act.

**Count II:** Being unlawfully present in Kenya contrary to Section 53(1) (5) as read with Section 53(2) of the Kenyan Citizenship and Immigration Act No. 12 of 2011.

Particulars of the offence are that on the 18<sup>th</sup> day of September 2019 at [Particulars Withheld] in Mandera East Sub-County within Mandera County, while being a Somalian national were found unlawfully present in Kenya without a valid permit or document authorizing him to stay in Kenya.

2. The matter proceeded to trial and the Appellant found guilty, convicted and sentenced to 15 years imprisonment on the 1<sup>st</sup> count. The trial court convicted him equally for the 2<sup>nd</sup> count but did not indicate the period of sentence to be served save that it would run concurrently with the sentence on the 1<sup>st</sup> count and he would upon completion of the sentences be repatriated to Somalia.

3. The Appellant was aggrieved by the Judgement and preferred this appeal on grounds that;

- **The testimonies before court were contradictory.**
- **The complainant was a minor and PW2 the grandmother was not able to identify the Appellant &**
- **The sentence of 15 years was excessive.**

4. In his submissions the Appellant reiterated that the prosecution evidence was contradictory. As for PW1 he submitted that she at first said she did not know him, with the same breath further stated, she had seen him when he beat her.

Further he submitted that the trial court failed to consider violation of his rights. Lastly, the prosecution failed to prove its case.

5. In opposing the appeal, the State submitted that there were no contradictions in the testimonies of the prosecution witnesses.

The incident took place at 11 am and the complainant was able to see the appellant; she positively identified him as he was brought to the

hospital by members of the public, and in court. Further the Appellant was arrested as he went back to the scene of crime to collect his wares. The prosecution also submitted that none of the testimony by the witnesses were challenged at cross examination.

As regards the sentence; the same was justified and within the law.

6. The prosecution case briefly is that the Appellant accosted PW1 the complainant a child aged 7 years as she was on her way from Duksi at about 11 am, took her to a deserted home, removed her trousers, attempted to defile her when the child screamed attracting her grandmother's attention, who went to the scene found the girl lying down and saw a person fleeing from the scene. leaving his water jerricans behind. Further, the child was able to see the Appellant and was able to identify him when the public arrested him as he went back for his jerricans. She was equally able to point at him in court. It was also the prosecution case that the medical evidence placed before court corroborated the evidence of the complainant.

7. **PW1** a child, gave an unsworn statement where she informed the court that she did not know the accused before. On the material say as she went home from Duksi she met him and he took her behind the water tank to a kitchen through to a verandah, removed her panty and put his penis in her private parts (points the place though refers to the place as her stomach), she screamed and her grandmother came, when the Appellant ran away. There was no one around.

8. **PW2 HHM**, grandmother of the victim recalls that on 18/9/2019 while at home at 11 am she heard screams. She went outside as the screams were coming from the neighborhood. She then saw one running away. She went to where the complainant was and found the complainant in pain and naked. She checked the complainant's private parts, the place was red. She then called a relative who arrived with the Area Chief. She stated further that the person who attempted to defile the child ran leaving jerricans behind as he had gone to the place to fetch water. The person was arrested later when he went back for his jerricans.

9. **PW3 Ali Maalim Ahmed** is a clinical officer based at the Mandera Referral Hospital. He attended to PW1 on the same day of the alleged attempted defilement and filed the P3 form. He made the following observations on the victim; -

- **She was sick looking.**
- **Had no injuries on the neck or head.**
- **Had no injury on the thorax or abdomen.**
- **Had no injury to the lower limbs nor deformity.**
- **The genitalia was normal with no injuries. No spermatozoa noted however pus cells were detected.**
- **Hymen was intact.**

The witness further explained to the court that when there has been minimal harm, epithelial cells can be detected and that is how he arrived at a conclusion that there was an attempt to defile the minor.

10. **PW4 P.C Edward Mutwiri** was the investigating officer. He recalled that on 18<sup>th</sup> September 2019 while at the office a lady known as Saadia reported a case of defilement. He Saadia and the victim accompanied them to the County Hospital where the victim was examined.

While at the hospital two boys were brought by members of the public and the victim identified one of them as her assailant.

11. From the evidence on record there is no doubt in the mind of the court that the victim PW1 was accosted by a person who attempted to defile her.

The description of what happened as narrated by PW1 is so clear that one cannot doubt its veracity despite her tender age. She struck the court as a confident and truthful witness. Indeed, her grandmother found her without a pant and her vagina being red. The P3 form corroborates the statement of PW1 as minimal friction was detected.

I therefore find as a matter of fact that an attempt was made to defile the child.

12. The next issue is who the assailant was?

PW2 the grandmother of the victim did not see the face of the assailant. The evidence is that the victim saw the assailant at the time of the incident and on her own she positively identified him when she saw the man at the hospital, as the one who attempted to defile her.

The Appellant was arrested as he went back for his jerricans. PW2 stated that he ran away when she appeared leaving behind the jerricans. It cannot be a coincidence that the Appellant simply left the jerricans at the scene of crime, with no explanation and later went back for them. All fingers point at Appellant as being the one who ran away when PW2 appeared at the scene of crime as he had no time to pick his wares. His action of retreating back to collect jerricans places him at the scene of crime.

This circumstantial evidence corroborates the evidence of PW1 and PW2 and the court therefore finds that the Appellant was indeed the person who defiled PW1.

13. This court therefore concurs with the findings of the trial court. Does not see any serious contradictions with the prosecution evidence and is of the view that contradictions if any were so minor as to affect the substance of the evidence against the appellant.

14. The Appellant failed to demonstrate or explain bias meted out on him as he alleged and therefore the said ground is found to lack merit.

15. The trial court failed to ascertain the sentence on the 2<sup>nd</sup> count of being unlawful in Kenya. In a bid to correct the anomaly the court will sentence the Appellant for a period of 12 months for the said offence.

16. As for the sentence, the law prescribes for a sentence of a term not less than 10 years for attempted defilement of a child below the age of 10.

The trial court meted out 15 years. Which is within the law. For the heinous crime committed by the Appellant he certainly deserves severe punishment and since the 15 years jail term is within the law, this court does not see any reason to interfere with the same.

The Appeal is found lacking in merit and is therefore dismissed.

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021**

.....

**ALI-ARONI**

**JUDGE**