



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E006 OF 2021

HAMADI ABDALLA SALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. Christine Kemuma Auka, Resident Magistrate,

delivered on 19th January 2021 at Kwale Senior Principal Magistrate's Court

Sexual Offences Case No. 83 of 2019).

J U D G M E N T

1. The Appellant HAMADI ABDALLA SALIM was accused in Kwale Chief Magistrates Court Sexual Offence Case No. 83 of 2019 contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that Hamadi Abdallah Salim on the 23rd day of June 2019 at around 1500hrs at Mangawani Location Kubo Division Kwale County within Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of BS a child aged 13 years.
3. In the alternative the Appellant was charged with offence of committing an indescent Act with a child contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006.
4. The prosecution presented evidence of 5 witnesses and upon the Appellant giving his sworn defence statement the trial court found appellant guilty and convicted him and he was sentenced to serve 5 years imprisonment.
5. The Appellant was aggrieved by the conviction & sentence and he preferred this appeal on the following grounds:-
 - i. **That the learned Magistrate erred in law and fact in finding and conferencing that a valid charge had been laid out.**
 - ii. **That the learned Magistrate, erred in law and fact finding that the conviction was properly arrived at considering the evidence adduced.**
 - iii. **That the learned Magistrate erred in finding the sentence lawful and further in not finding it manifestly excessive.**
 - iv. **That the learned Magistrate erred in law & fact in not making a finding that 2 persons were involved in the offence.**
 - v. **That the learned Magistrate erred in law & fact by refusing to acknowledge the evidence of the clinical officer regarding an old scar in the Complainant's private parts.**
6. The Appellant sought that his conviction quashed and sentence set aside. This appeal was canvassed by way of written submissions.
7. The Appellants submissions were that the charges as drawn and particulars don't disclose an offence against him. He argued that insufficient evidence was used to convict him. He submitted that the sentence against him was manifestly excessive.
8. The Appellant argued that had the trial Magistrate considered that Complainant was probably defiled by 2 people he would not have been

convicted. He also said that had the trial Magistrate considered the Medical evidence that an old scar was observed in complainant's genitalia he would have been acquitted.

9. The Respondents submissions was that the ingredients of the offence of defilement as set out in the case of Josphat Mundai vs Republic (2016) eKLR – Machakits HCCA No. 1 of 2014 namely age of the Complainant – Thomas Mwambu Mwinyi vs Republic [2017], penetration and identity of the perpetrator had been proved by prosecution witnesses beyond all reasonable doubts.

10. It was argued that Appellant didn't disclose what was defective about the charge sheet. It was also submitted that the sentence of 5 years was passed after considering the Muruatetu case, a consideration which was erroneous and that the court ought to resubmit the file to trial court for resentencing in line with the current Supreme Court directions regarding the application of the Muruatetu case.

11. The Respondent submitted that the appeal should be dismissed for lack of merit.

12. This court has re-evaluated the straight forward and clear evidence on record for the Respondent and near admission defence by the Appellant as opposed to his grounds of appeal and submissions and find that his grounds of appeal raise nothing substantive that can be used to turn the verdict of guilt arrived at by the trial court.

13. The appellant was known to the Complainant and her parents as a neighbour. He lured the Complainant alleging that his sister who was a friend and classmate to Complainant was calling her. He then took her to a house at his uncle's farm where after he had defiled her, he also watched her being defiled by a servant.

14. The father of the complainant saw her return home and was walking with difficulties. He and the mother of the Complainant took action and established that the complainant had been defiled by the appellant. The matter was reported to police and complainant taken to Hospital where PW 5 Clinical Officer at Kwale County Hospital. He observed a broken hymen and lacerations as well as whitish foul smelling discharge from the genitalia of Complainant which made him conclude that Complainant had been defiled. PW 5 said that he saw a deep bruise which was inflicted when assailant was struggling to defile the Complainant.

15. PW 5 said that later on 12/07/2019 when Complainant was tested for pregnancy, she was found to be positive. The sentence passed against the appellant was too lenient as Section 8(3) provides for imprisonment for a term not less than 20 years imprisonment.

16. I do find that the Appellant's appeal is not merited and the same is dismissed.

17. Right of Appeal – 14 days. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

IN THE PRESENCE OF:-

OGWEL – COURT ASSISTANT

MR. MULAMULA FOR RESPONDENT

APPELLANT – PRESENT IN PERSON

MR. WERE ADVOCATE FOR THE APPELLANT

COURT

Copies of Judgment-certified to be supplied to Appellants Counsel.

Hon. Lady Justice A. Ong'injo

Judge