



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 16 OF 2020**

**ABDIKADIR MOHAMED OSMAN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the conviction and sentence in the Principal Magistrate's Court at Mandera**

**in Sexual Offences Case No. 29 of 2019 delivered by Hon. P.M. Areri (PM) on 7/1/2020)**

**JUDGEMENT**

1. The appellant was convicted and sentenced to 5 years' imprisonment for defilement of a child contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006.
2. Particulars being that on 8/11/2019 in Mandera East Sub-County, Mandera County intentionally caused his male genital organ to penetrate female genital organ of NAI a child aged 12 years old.
3. Being aggrieved by the aforesaid decision the appellant lodged instant appeal in which he complained of –
  - **The fact that there was no prove beyond reasonable doubt.**
  - **The court failed to consider defence.**
  - **The sentence was excessive and oppressive.**
4. It was worth noting that during the hearing the prosecution gave notice to the appellant that they were seeking to substitute conviction to main count of defilement in lieu of indecent count and enhance sentence accordingly.
5. The prosecution case was that, NAI a minor (victim) told the trial court that on the 8<sup>th</sup> day of November, 2019 she was at home at [Particulars withheld] where she stays with her father when at 9.00 am the 2<sup>nd</sup> accused went and convinced her that they go to the 2<sup>nd</sup> accused's house in the neighbourhood.
6. The minor (PW1) agreed and they proceeded to 2<sup>nd</sup> accused house and on arrival the 2<sup>nd</sup> accused told her to lie on the bed. She said she complied and the 2<sup>nd</sup> accused then tied her legs using a piece of cloth to the bed and told her to wait for a man to come and have sexual intercourse with her. PW1 said that she could not scream because the 2<sup>nd</sup> accused had tied a cloth over her mouth.
7. She said that shortly afterwards the appellant person who had previously been introduced to her by the 2<sup>nd</sup> accused person as Jehow came and defiled her (victim). She told the trial court that Jehow was appellant before trial court. She said as the appellant was defiling her in the house the 2<sup>nd</sup> accused was sitting outside the house.
8. She said he defiled her up to about noon when she returned home and later when she returned to 2<sup>nd</sup> accused's house the 2<sup>nd</sup> accused gave her Ksh.100 out of Ksh.500 she had received from appellant. PW1 said she was annoyed from being paid only Ksh.100 and she tore the note. She then returned home and slept.
9. Later their neighbours Amara and Shukri went and noted she was dragging her feet as she walked and acquired what was wrong with her

and she disclosed that she had been defiled. She was then taken to hospital and the matter was reported at Mandera Police Station. She said she was examined at Mandera County Referral Hospital and P3 form was filled.

10. PW1 said she was 12 years and was in Class Four at [Particulars withheld] Primary School. The accused persons did not have questions to ask the witness on her version of what transpired on the 8<sup>th</sup> of November, 2019.

11. PW2 RCO Ali Maalim Ahmed told the trial court that his colleague one Adan M. Noor examined PW1 on the 10<sup>th</sup> November, 2019 and found she had laceration on the labias, the hymen was broken and the vagina was penetratable by two fingers.

12. He concluded there was sexual assault or defilement. PW2 produced a P3 form filed by his colleague as exhibit P3 form was signed on 13<sup>th</sup> November, 2019.

13. In his defence the appellant denied committing the offence as alleged at all. He said he was being framed.

14. Appeal was argued by appellant via submissions filed and prosecutor orally.

#### APPELLANT'S SUBMISSIONS

15. The prosecution produced no exhibit in support of their case and the ingredients of all counts were therefore not established to sustain the conviction and sentencing which was very excessive.

16. It is his submissions that the trial magistrate failed to establish that the appellant committed the alleged offence. The trial magistrate failed to establish the ingredients of the offence as drafted for the evidence on the record is not in agreement with the charges and its respective particulars and ought to have been dismissed leading to the discharge of the appellant.

#### PROSECUTION'S SUBMISSIONS

17. The appellant submitted that the offence on charge was defilement though convicted of indecent. He ought to have been convicted of defilement. Exhibit 3 shows child was 12 years.

18. On identification the co-accused linked complainant and appellant vide page 4 of proceedings. See also Page 5 line 10. The co-accused was person who linked 2 of them (appellant and the PW1).

19. On penetration, PW2 Clinical Officer page 9 line 22 interpreted the injuries in her private parts i.e. the hymen – broken. Defilement was found to have taken place vide clinical officer.

20. On page 20 of judgement the trial court holds contrary to the clinical officer's findings. Court to invoke provisions of section 354 of the Criminal Procedure Code and substitute conviction of indecent assault with defilement and enhance sentence.

#### ISSUES, ANALYSIS AND DETERMINATION

21. In this case the issues for determination were-

*(1) Whether the victim (PW1) was a child?*

*(2) Whether the victim was defiled by the appellant person?*

*(3) Whether sentence was excessive?*

22. I have carefully evaluated and analyzed the evidence adduced by the prosecution and I find the victim's age was assessed at 12 years vide the age assessment report dated 15<sup>th</sup> November, 2019 and produced as prosecution exhibit 3. The assessment was not disputed or challenged. The victim being a child as defined under section 2 of the Children's Act No. 8 of 2001.

23. On whether the victim had been defiled the medical evidence tendered by PW2 wit exhibit 1 and 2 do not support the charge of defilement as there were no laceration noted on the labias and the minora had been used (defiled) more than once. Meaning the victim had been previously sexually abused previously.

24. What is strange is that the pw2 who testified on behalf of his colleague did not lay the basis for production of the document on behalf of the same person who had examined the victim.

25. Secondly, whereas he said there were laceration on the labias the p3 produced and filled by his colleague stated that no laceration noted on the labias and the minora. No explanation for that anomaly was proffered.

26. Secondly, there was no spermatozoa seen on examination though same is not mandatory however it would have gone along to establish the alleged long span sexual intercourse made appellant leave some deposit of same in the girl's vagina. She never indicated that the appellant used any condom.

27. However, from the testimony of the victim (PW1) which was not challenged or rebutted by the appellant, there was sufficient evidence to support charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act against the appellant person'

28. The appellant defence was a mere denial and thus this the conviction by the trial court on the less charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act under section 215 of the Criminal Procedure Code Cap 75 of the Laws of Kenya was justified.

29. On sentence the penalty for indecent act with a child under section 11(1) of the Sexual Offence Act is an imprisonment term for not less than 10 years as follows:

***“(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”***

30. Though the sentence is couched in mandatory terms, same has been rendered unconstitutional by supreme case of **Muruatetu Petition No. 15 of 2015** and subsequent superior court decisions on mandatory aspect of the sentence. Thus the trial court had discretion to impose the sentence impugned as circumstances dictate.

31. Thus this court finds no merit in appeal and makes the following orders;

***i) The appeal thus fails and conviction and sentence are upheld.***

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2020.**

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**C. KARIUKI**

**JUDGE**