



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 18 OF 2018

HUSSEIN ABDI NOOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From conviction and sentence in Garissa Chief Magistrate

Criminal Case No. 3 of 2016 by Hon. Cosmas Maundu (CM)

JUDGMENT

1. HUSSEIN ABDI NOOR is charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence being that on the 14th day of October, 2016 at Raya area in Garissa County unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ vagina of HA a child aged 12 years.
3. The appellant person faces an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.
4. The particulars being at on the 14th day of October 2016 at Raya area in Garissa County intentionally and unlawfully committed an indecent act by rubbing the vagina of HA a child aged 12 years old.
5. He pleaded not guilty and matter went into trial. He was convicted and sentenced to serve 20 years imprisonment.
6. Being aggrieved by the above decision he filed instant appeal and set out 4 grounds of appeal.
7. During hearing he sought to rely on handwritten amended grounds namely;
 - (1) **That the learned trial magistrate erred in law and fact to convict him without considering that the complainant had no able time to identify the assailant.**
 - (2) **That the pundit trial magistrate erred in law and fact to convict without considering that the arresters had no complainant and they had no descriptions of the person they intended to arrest.**
 - (3) **That the pundit trial magistrate failed in law and fact to convict him without notice that the mode of arrest was poorly instigated.**
 - (4) **That the learned trial magistrate erred in law and fact to convict him without considering that he was not scientifically examined by the doctor and no DNA test was done to ascertain whether he was the right culprit.**
 - (5) **That the age of the complainant was uncertain.**
8. The parties agreed to canvass appeal via submissions.

9. The appellant filed handwritten submissions. The State counsel submitted verbally.

SUBMISSIONS BY APPELLANT:

10. The appellant herein was convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were as set out in the charge sheet.

11. Thus the prosecution failed to support its case beyond reasonable doubt as per the stipulations of section 109, 110 and 111 of the Evidence Act.

12. The appellant contends that without the evidence of the complainant's sister who was alleged to have run away, the prosecution's case remained unproved.

13. The complainant had no able time to identify the assailant since she was vigorously chased and she became unconscious on the process and when she regained her consciousness the assailant had already fled.

14. The case was fabricated against him due to the existence or prevailed vendetta, between him and victims family.

15. The description or the physical appearance of the assailant, stature, and colour, were not given by the victim.

16. The age of the complainant was doubtful since the doctor failed to establish how the same was assessed.

17. In a criminal offence especially in a sexual offence where the evidence adduced is doubtful as to whether the appellant is the right culprit or not, it is important to conduct DNA test.

PROSECUTION'S SUBMISSIONS:

18. The Prosecution's Counsel opposed the appeal. He supported conviction and sentence. He submitted that, the offence charged was defilement and the appellant was sentenced to 20 years imprisonment which is legal.

19. The prosecution contended that, complainant was 15 years. Age was proved via exhibit No. 3 on penetration. Victim testified that on 14/10/2015 appellant did defile her. PW5 Health Officer testified and he produced.

20. Complainant was very clear as to what happened and by whom. She identified appellant as defiler. Appellant stated that he was framed up by her father. This was an afterthought.

DUTY OF FIRST APPELLATE COURT:

21. This being a first appeal, the role of this Court as an appellate Court of first instance is well settled, it should re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion. This was held in the case of *Okeno vs. Republic (1977) EALR 32* and in the Court of Appeal case of *Mark Oiruri Mose vs Republic (2013) eKLR* that the Court on first appeal is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter in while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify.

22. Consequently, this Court guided by the aforesaid legal requirement, therefore should delve into the review of the evidence adduced at the lower court with a view of arriving at its own conclusion.

PROSECUTION'S CASE:

23. To prove its case the prosecution called a total of six witnesses.

24. The complainant who is a girl aged 16 years testified that on 14/10/2016 at about 4.00 pm she was at K's farm cutting grass with her sister who is aged 5 years when the appellant person came and chased away her sister.

25. The appellant person after chasing away her sister got hold of her. He violently tore off her clothes, knocked her down and proceeded to defile her. She lost consciousness briefly and when she came to the appellant person had already left. When she arrived home she informed one BB who she used to live with what happened.

26. That BB gave her pain killers. She also telephoned her father who was away and informed him what happened. On the next day her father came with police officers from Raya police post. She narrated to her father what happened. She informed him that she was defiled by one Hussein.

27. Police officers and her father went to search for the culprit. She could not accompany them because of pain. After two hours her father, brother, aunt and police officers came back. They took him to Raya police post. The incharge of the post advised her father to take her to hospital. She was escorted to Garissa County Referral Hospital where she was examined and treated.

28. The complainant told court that she knew the appellant person before the material date and that he used to work in the shamba where they

were cutting grass.

29. PW2 AA is the father of the complainant. He testified that on 14/10/2016 at 7.30 pm he was at Modika area where he used to work when he received a call from one BB informing him that the complainant was defiled by one Hussein Elai. He knew Hussein Elai since he used to work in a farm belonging to one Khalif Elmi.

30. That he immediately hired “a boda boda” and went home. He arrived at around 10.00 pm. He found her daughter sleeping. Her neck was swollen. His daughter informed him that he was defiled by one Hussein.

31. On the next day he woke up at around 3.00 am. He went to Soko Ngombe in Garissa. He requested three male relatives to accompany him to Raya police post where they reported the matter.

32. That they were given 3 police officers. They went to K’s farm where they found the appellant person herein and 2 other men. The appellant was carrying a spraying pump. When the appellant person saw them coming he dropped the pump and ran away.

33. They went back to Raya police post. From there he went back to K’s farm where he laid an ambush. He camped in the farm from 2.00 pm upto 8.00 pm. He was hiding. At about 8.00 pm the appellant person came back to the farm. He told other workers in the farm that he was leaving for Mandera.

34. The appellant person then started packing his belongings. He (PW2) pounced and got hold of the appellant person as he was preparing to leave. He was assisted by Khalif Elmi’s son. They tied him up and escorted him to Raya police post where they handed him over to the police.

35. After handing over the appellant person to the police, he took his daughter to Garissa General Hospital where she was treated and her P3 form was filled. Later appellant person was charged with the present offence.

36. PW3 Corporal Adam Abdi is the Deputy Officer In-Charge Raya Police Post. He testified that on 15/10/2016 in the working hours he was at Raya police patrol base when AA (PW2) came accompanied by 2 people. PW2 reported that her daughter was defiled by a person he knew at Shabaa area. The report was booked in the O.B.

37. He also instructed APC Harriet Mohamed, driver P.C Munyao and P.C Musa to accompany the reportee to Shabaa area in order to arrest the culprit who was a farm worker at Taleh Farm. The police officers returned after one hour. They informed him that the suspect ran away when he saw them. Later on that same day at about 10.15 pm the suspect was brought to the police post by PW2 who was accompanied by other members of public.

38. PW4 P.C Musa Ikiyu is one of the officers who accompanied PW2 to Taleh Farm to arrest the culprit. He testified that when they arrived at the farm they found the appellant person herein and 2 other men. PW2 identified appellant person as the assailant.

39. When the appellant person saw them, he took off. They chased him but were unable to catch up with him due to mud in the shamba. Later appellant person was brought to Raya police patrol base by elders who had arrested him.

40. PW5 Jeremiah Musombe is a clinical officer based at Garissa County Referral Hospital. He is the one who examined the complainant on 15/10/2016 and filled her P3 form. He observed that the hymen was broken. Laboratory tests revealed presence of (dead) immotile spermatozoa. He concluded that there was penetration based on the broken hymen and presence of spermatozoa in her high vaginal swab. He produced the P3 form and treatment notes as exhibits in this case (see Pexh 1 &2) respectively.

41. PW6 P.C (W) Akatha Wanjohi is the investigating officer in this case. She testified that on 15/10/2016 she was on duty at Garissa police station when she received a telephone call from Corporal Abdi Koto (PW3) of Raya police post.

42. PW3 informed her that there was a juvenile called HA (PW1) who was defiled on the previous day and that he had directed her (PW1) to Garissa police station for assistance. On that same day the complainant came with her father. She had been treated. She issued her with a P3 form.

43. She accompanied her to Garissa County Referral Hospital. Unfortunately they did not find the doctor who treated her. They went back to the hospital on 17/10/2016. Her P3 form was filled. Her age was also assessed. She was found to be 15 years old. She produced the age assessment report which is dated 18/10/2016 as an exhibit in this case.

DEFENCE CASE:

44. When the appellant person was put on his defence, he elected to give unsworn evidence. He did not call any witness. The appellant person said that he hailed from Mandera County. He said that when the incident allegedly happened he used to reside at Shabaa area.

45. He alleged that on 3/6/2016 he was employed by one AA to work in his farm at a monthly salary of Kshs.7000/=. In that farm he used to work with one YO who is a brother in law to AA. He alleged that from month of June to the month of October 2016 AA paid him salary for only one month.

46. On 2/10/2016 AA travelled to Modika to visit his family. He came back on 5/10/2016. He alleged that AA threatened to cut him with a panga when he asked him to pay him his salary. On 7/10/2016 he left AA’s farm and went to a neighbouring farm belonging to one Khalif

Adam who employed him.

47. That on 9/10/2016 he met with AA at Shabaa trading centre. He claimed that AA told him that, "both of them cannot stay at Shabaa". On 14/10/2016 AA came with young men who arrested him. They beat him up, tied his hands and legs and took him to Raya police patrol base where he was locked up in cells.

48. He was told by police that he defiled one HA. He alleged that HA was married to one YO and that she lived at Modika area. Later he was charged with the present offence.

ISSUES, ANALYSIS AND DETERMINATION:

49. In the case of the **High Court at Machakos Criminal Appeal No. 296 of 2010, Fappyton Mutuku Ngui vs Republic** the court held that, ;

"the ingredients to look out for in a defilement case are; The first is whether there was penetration of the Complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant."

50. The ingredients of defilement are penetration and minority age of the victim. If these ingredients are proved the other issue is whether the appellant person was the perpetrator.

51. As regards the issue of the age of the victim, the prosecution produced an age assessment report which indicates that the complainant was 15 years old.

52. On the issue of penetration we have the evidence of the clinical officer who filled the P3 form. He told court that the complainant's hymen was torn and there was presence of spermatozoa. This clearly indicates that the complainant was defiled.

53. The complainant said that it is the appellant person who defiled her. She knew the appellant person since he used to work in the farm where she was cutting grass on the material date.

54. The father of the complainant also knew the appellant person and he led police to the farm where the appellant person used to work.

55. When police officers went to arrest the appellant person, the appellant person took off as soon as he saw police officers coming. Appellant person was with two (2) other persons who did not run away.

56. The father of the complainant said that he laid an ambush at the farm where the appellant person used to work from 2.00 pm to 8.00 pm when the appellant person came back. He heard the appellant person telling his colleagues that he was leaving for Mandera. Appellant person started packing his belongings ready to flee to Mandera but (PW2) he pounced on him and arrested him.

57. The aforesaid conduct by the appellant person clearly shows that he had done something wrong. The appellant person would not have run away from the police if he was innocent. Secondly, appellant person was arrested as he was preparing to flee to Mandera where he hails from. In my view the conduct of the appellant person strengthens the complainant's evidence that it is him who committed the alleged offence.

58. In addition I find that the complainant positively identified the appellant person by recognition. This offence took place in broad daylight and the complainant knew the appellant. She informed her father the name of the assailant on the same day the incident took place.

59. I do note that in his Grounds of Appeal and written submissions, the Appellant faulted the Trial Magistrate for convicting him yet he was not subjected to DNA profiling pursuant to Section 36 of the Sexual Offences Act. It is however instructive that whereas Section 36 of the Sexual Offences Act provides for DNA testing, that provision is not mandatory.

60. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

61. The appellant person's defence that he was implicated falsely by the complainant's father and that the complainant was married does not hold water. The appellant did not raise these issues during cross examination.

62. He was also not cross examined on them since he gave unsworn statement. The allegations raised by the appellant person in his defence appear to be an afterthought. He alleged that the complainant's father was his employer and that he failed to pay him his salary.

63. He also alleged that the complainant was married to one YO. Both the complainant and his father testified in this case. The appellant person did not raise those issues when he cross-examined them.

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

(i) appeal is dismissed, conviction is affirmed and sentence confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 6TH DAY OF AUGUST, 2019.

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C. KARIUKI

JUDGE