



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 65 OF 2016**

**ABDI HUSSEIN SAHAL.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(FROM THE CONVICTION AND SENTENCE IN GARISSA CM CRIMINAL CASE NO. 889 OF 2015 BY T. L. OLE TANCHU – SRM)**

**JUDGMENT**

1. The Appellant was charged in the Chief Magistrate’s Court at Garissa, with defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. No. 3 of 2006. The particulars of the offence were that on 27<sup>th</sup> August, 2015 at [particulars withheld] in Dadaab District within Garissa County, intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of I.A.R (name withheld) a girl aged 4 years.

2. In the alternative he was charged with committing an indecent act with a child contrary to Section 11 (1) of The Sexual Offences Act No. 3 of 2006. The particulars of the offence, were that on the same day and place, he intentionally, touched the vagina of the I.A.R a child aged four (4) years with his penis.

3. He denied both the charges. After full trial, he was convicted of the main count of defilement and sentenced to life imprisonment.

4. He has now come to this Court on Appeal through an appeal filed by his advocate Paul Mugwe Nyagah, on the following grounds:

**1. THAT the trial court erred by finding, that PW1 was capable of testifying without conducting Voire Dire examination in the manner required in law.**

**2. THAT the trial court erred in law by failing to give a chance to the appellant to cross –examine Pw1.**

**3. THAT the trial court misdirected itself by making findings based on extraneous matters not in the record.**

**4. THAT the trial court, erred in fact and in law, by failing to consider the material contradictions in the prosecution’s case.**

**5. THAT the trial court erred in law by dismissing the appellant’s defence which was cogent and plausible.**

5. On the hearing date, Mr. Nyagah counsel for the appellant argued the grounds of appeal, and emphasized that the evidence of the complainant PW1, was wrongly relied upon as the appellant was not allowed to cross-examine her. According to counsel, such failure by the trial court to allow the appellant cross-examine PW1 was a denial his rights to fair trial enshrined under Article 50 (2), (k) of the Constitution of Kenya 2010.

6. Counsel for the appellant also sub-mitted that the voire dire examination of the complainant (Pw1) was not properly done, and as such the evidence of the complainant was not of probative value in the case, and should not have been relied upon by the trial court.

7. Counsel further argued that the magistrate disregarded the cogent defence of the appellant, which was a mistake.

8. Counsel finally submitted that there were material contradictions in the prosecution evidence which should have led the trial court to that the prosecution evidence was not truthful.

9. In response, the Principal Prosecuting Counsel Mr. Okemwa for the state submitted that age of the complainant was proved and was not

challenged. Identification of the perpetrator was also proved, as he was a neighbor of the complainant and was placed at the scene by Pw2 and Pw3. Counsel also said that penetration had been proved by medical evidence, and disagreed that Article 50 of the Constitution was violated.

10. The Principal prosecuting counsel finally stated that the defence of the appellant in which he alleged a fight with Pw2 the mother of the complainant, was an afterthought as he did not cross-examine her on that issue.

11. This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record, and come to my own independent conclusions and inferences. I rely on the case of; **OKENO –VS- REPUBLIC 1972 (E.A) 32.**

12. I have re-evaluated the evidence on record. The prosecution called five (5) witnesses. The appellant tendered sworn testimony in his defence and was cross-examined. He did not call any other witness.

13. This is a defilement case, and the prosecution was required to prove the age of the complainant, secondly penetration even if partial, and thirdly the identity of the culprit or perpetrator of the crime.

14. Having re-evaluated the evidence on record, I find that the age of the complainant was proved by the prosecution beyond reasonable doubt. Though no birth certificate was relied upon, nor did the complainant PW1 say when she was born, and the mother PW2 MG also did not give her age, the record of UNHCR registration of the family as refugees shows that the complainant was born on 20<sup>th</sup> August, 2011. The magistrate, also the appellant saw her in court and the age was not questioned. The complainant also gave a very short statement in her evidence and was not cross –examined which in my view confirms that she was a child of tender years of 4 years at the time of commission of the offence. I find that the prosecution proved the age of the complainant beyond any reasonable doubt.

15. I now turn to penetration, the complainant stated that the assailant inserted his private parts into her on that day. She was sent for medical examination the same day, and the doctor PW4 Dr. Salma found her to have been traumatized. In Part “C” of the P3 form, the doctor found that labia majora was inflamed and hymen missing. Again this evidence was not challenged. I find that the penetration was also proved by the prosecution beyond reasonable doubt, as that even partial penetration is adequate to satisfy the legal requirement of the offence of defilement.

16. With regard to identification of the culprit, the evidence on record in my view does not establish beyond reasonable doubt that the appellant was a culprit. This is because the prosecution left a lot of gaps, due to their failure to call crucial witnesses. Firstly, the older sister of the complainant said to be aged 9 years, who was taking care of her at that time, was not called by the prosecution to testify, and no reason was given by them. Secondly, the people who came to the scene, and found the appellant held by Pw3 AS A a young man were not called by the prosecution. The said witness S was also described by PW2 as a youth but his actual age was not clarified in the evidence which means he might even be a child of tender years. Lastly, the Administration Police officers who initially took the appellant into custody from the public were also not called to testify. The Police officer PW5 Cpl Patrick Oroko who testified did not give any description of the place, circumstances, and reason for the arrest of the appellant.

17. The above defaults by the prosecution is not availing crucial witnesses in my view, created a big gap in the chain of evidence relating to the identification of the appellant as a culprit that he has to be given the benefit of the doubt in line with the reasoning in the case of **BUKENYA -VS- UGANDA (1972) EA 549.**

18. The appellant also in his defence that he was arrested on the road, and that could as well be true. The learned magistrate did not weigh the prosecution evidence against the defence as required by law. I thus find that the identity of the appellant as the culprit was not proved by the prosecution beyond any reasonable doubt. On that account, the appeal will succeed.

19. Counsel for the appellant Mr. Nyaga has argued that the appellant rights to a fair trial under Article 50 of the Constitution were violated because he was not allowed to cross –examine the complainant. No violation of the constitutional rights of the appellant was committed by the court for not allowing him to cross –examine the complainant as she was neither sworn nor confirmed. When evidence is tendered in court not on oath or affirmation, then cross-examination does not apply. This principle applies equally to the prosecution and the defence. The only thing that is affected is the weight to be given to that evidence. Unsworn evidence does not have the same weight as sworn evidence is required and a trial court should make that distinction.

20. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated, Signed and delivered at Garissa this **14<sup>th</sup>** day of March, 2018.

**George Dulu**

**JUDGE**

**In the Presence of;**

Martin / Mohammed - Court Assistants.

Appellant in Person

Mr Okemwa for State.

**George Dulu**

**JUDGE**