



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 177 OF 2013

AHMED HILLOW IBRAHIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Conviction and Sentence in Garissa CM Criminal Case No. 74 of 2013 by H. N. Ndungu -CM)

JUDGMENT

1. The appellant was charged in the magistrate's court at Garissa with defilement Contrary to Section 8 (1) (3) of The Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 13th January, 2013 at [particulars withheld] in Lagdera within Garissa County intentionally caused his penis to penetrate the vagina M.A.I (name withheld) a child aged 14 years.
2. In the alternative, he was charged with indecent act with a child Contrary to Section 11 (1) of The Sexual Offences Act. The particulars

were that on the same day and place, willfully and intentionally touched the vagina of M.A. I (name withheld) a girl under the age of 14 years.

3. He denied both charges. After a full trial he was convicted on the main count of defilement, and sentenced to serve 20 years imprisonment.

4. He has now come to this Court on Appeal. He filed his appeal on 23rd December, 2013. Before the appeal was heard however, he filed an amended petition of appeal with written submissions. He relied on the amended petition of appeal.

5. The grounds of appeal are as follows:-

(i) The trial magistrate erred with convicting him without considering that complainant's age was not proved beyond reasonable doubt

(ii) The trial magistrate erred in convicting him without considering that evidence adduced by Prosecution witnesses was contradictory and full of inconsistencies contrary to section 163 of The Evidence Act.

(iii) The trial magistrate erred in convicting him without considering that the assailant of the complainant, was not positively identified.

(iv) The P3 form adduced in court as evidence could not support Prosecution allegation contrary to section 36 of Evidence Act.

(v) The magistrate erred in convicting him without considering that despite the bruises seen, there was no connection of the incident with the alleged date.

(vi) The trial magistrate erred in convicting him without considering that very crucial witnesses were not summoned to ascertain the truth of the prosecution allegation, contrary to section 150 of The Criminal Procedure Code.

(vii) The trial magistrate erred in convicting him without considering that the arrest was not conducted properly thus raising doubt on whether he was arrested at the scene of crime or not.

6. At the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered.

7. The Learned Prosecuting Counsel Mr. Okemwa submitted that the appellant was charged and convicted of defilement.

8. Counsel submitted that age was proved through the Refugee registration card to be 14 years. Though the Doctor made an entry in the P3 form that she was 36 years of age, he explained that discrepancy in his testimony in court. With regard to penetration, counsel submitted that this was also proved, as two eye witnesses were chased away by the appellant, when he held the complainant in the bush.

9. In response, the appellant stated that he had nothing more to add.

10. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I am required to bear in mind that I did not see the witnesses testify in order to determine their demeanour and give due allowance to that fact See the case of: **Okeno -vs- Republic (1972) EA. 32.**

11. I have re-evaluated the evidence on record. I have perused the Judgment and exhibits tendered in court. I have also considered the submissions by the appellant and the Prosecuting Counsel.

12. The appellant was charged with defilement and in the alternative with indecent act. He was convicted on the main count of defilement and sentenced. He has now come to this court on appeal.

13. The age of the complainant was testified to by herself as PW1 She stated that she was 14 years of age. The entry in the P3 form by the Doctor was that she was 36 years of age by estimation, while the entry in the same form by the police was that she was 14 years of age. The Doctor PW2 Mwanabure Ahmed stated in court that the complainant was 15 years of age. The parents of the complainant did not testify in court and it is not clear why.

14. In my view, the Prosecution should have been more serious in trying to establish the age of the complainant. However, with the evidence on record, am of the view that the age of the complainant was established to be 14 years at the time of the incident.

15. With regard to penetration, the evidence on record is clear that penetration did occur. The complainant said so. It was in broad daylight. Medical evidence was that there were bruises in the genital area of the complainant as well as around the neck. I find that penetration was proved beyond reasonable doubt.

16. With regard to the culprit, he was seen by eye witnesses PW3 Sardia Mohammed Aden and PW4 Hawa Abdi Bilkan who testified. The appellant was later arrested away from the scene. There was no evidence he was pointed out by eye witnesses. In my view there was possibility of mistaken identity, as the person or persons who arrested the appellant was not called to testify. It could be a case of mistaken identity.

17. I thus find merits in the appeal. I 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 20th day of April, 2018

George Dulu

JUDGE