



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 73 OF 2016**

**RAMADHAN AWADHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the Conviction and Sentence In Garissa CM Criminal Case No. 3340 of 2015 By M. Wachira – CM**

**JUDGMENT**

1. The appellant was charged in the magistrate's court at Garissa with defilement contrary to Section 8(1) read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the Offence were that on 31<sup>st</sup> March, 2015 at 16.30 hours at [particulars withheld] Trading Center Bura Tana District within Tana River County willfully and unlawfully did commit an act which caused penetration with his genitals penis to the genital organs vagina of S.I.( name withheld) a girl aged 12 years.

2. In the alternative he was charged with indecent act with a child aged 12 years contrary to section 11(1) of the Penal Code. The particular of the offence were that on the same day and place willfully and unlawfully did commit an indecent act with a child aged 12 years by touching her private parts.

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

4. Aggrieved by the decision of the trial court, the appellant has appealed to this court. He filed his appeal on 19<sup>th</sup> December, 2015. However before the hearing of the appeal he filed an amended Petition of Appeal and written submissions, which he relied upon.

5. The ground of appeal are as follows:

***(i) The trial magistrate failed to consider the fact that all the children found him in the house as they chased a snake and that he was not found defiling the complainant.***

***(ii) The magistrate erred in convicting him without considering that the evidence adduced by prosecution witnesses was contradictory.***

***(iii) The trial magistrate erred in convicting him without considering that the incident had many witnesses, who were not brought to court thus very crucial evidence was not tendered.***

***(iv) The age of the complainant was not proved to be 12 years, and the magistrate's decision which he ignored this was prejudicial to his fundamental rights of fair hearing.***

***(v) That the dates of commission of the offence was not certain as prosecution evidence was incredible.***

***(vi) Medical evidence report was not consistent with the statements of prosecution witnesses.***

***(vii) No adequate evidence was adduced to prove that he indeed defiled the complainant, as alleged by her grandmother.***

6. At the hearing of the appeal, the appellant relied on his written submissions and elected not to make oral submissions. I have considered the written submissions of the appellant.

7. The learned Principal Prosecuting Counsel Mr. Okemwa submitted that this was a first appeal, and the Court should evaluate the evidence

afresh.

8. With regard to age, the Prosecuting Counsel stated that the age of the complainant was given by the complainant herself verbally, as well as the grandmother of the complainant. As such, age of the complainant was proved.

9. Counsel also submitted that penetration was proved by the evidence of the complainant and the entries in the P3 form. With regard to identity of the culprit it was clear that the appellant and the complainant knew each other well, and the incident occurred in broad daylight. Therefore there was no possibility of mistaken identity.

10. I have re-considered the evidence on record as am required to do in a first appeal. **See Okeno -vs- Republic ( 1972) EA 32.**

11. The burden is always on the prosecution to prove a criminal charge, beyond any reasonable doubt. An accused does not have burden of proofing his or her innocence.

12. Having re-evaluated the evidence on record, I note that the complainant PW1 stated that she was aged 12 years. Her grandmother PW2 M H M also stated that the complainant was aged 12 years. The entries in the P3 section 'C' stated that the complainant was estimated to be aged 12 years. That was also the age stated by the Police in part I of the P3 form.

13. It is obvious that no documentary evidence either of a birth certificate or age assessment or school entry record was produced in court by the Prosecution to support the statement about the age of the complainant. The complainant was a primary school pupil in [particulars withheld] Primary School Standard 2.

14. The age of the complainant was a crucial element for the offence of defilement which carries a very severe sentence. However, in this particular case the prosecution did not set out to establish the age of the complainant. There is no evidence that they even asked the complainant to say when she was born. They also did not ask the grandmother PW2 to state when the complainant was born. In those circumstances, I am of the view that the age of the complainant was not proved beyond reasonable doubt.

15. I now turn to penetration. From the evidence on record, I find that penetration was established. The incident was reported immediately, and medical examination conducted. It was found that the hymen of the complainant was broken and there were also fresh lacerations. In my view, penetration was proved.

16. With regard to the culprit, I find that it was proved that the appellant did have sexual intercourse that afternoon with the complainant in a house at [particulars withheld]. There was no issue of mistaken identity as the appellant and the complainant knew each other well. The grandmother of the complainant PW2 also knew the appellant well. The incident also occurred in broad daylight, therefore it was proved by the prosecution that the culprit was the appellant.

17. On the totality of the evidence however, and in view of the fact that prosecution did not prove the age of the complainant, beyond reasonable doubt, I find that the prosecution did not prove the appellant guilty of the offence of defilement. The appeal will thus succeed on that account.

18. Consequently and for the above reasons, 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 20<sup>th</sup> day of April, 2018**

**George Dulu**

**JUDGE**