



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT GARISSA**  
**CRIMINAL APPEAL NO. 28 OF 2017**  
**GIDEON CHANGAMWE.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**  
**(FROM THE CONVICTION AND SENTENCE IN GARISSA**  
**CM CRIMINAL CASE NO. 207 'B OF 2016**  
**BY T. L. OLE TANCHU –SRM)**  
**JUDGMENT**

1. The appellant was charged in the 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 diverse dates between 1<sup>st</sup> January, 2015 and 28<sup>th</sup> February, 2016 at [particulars withheld] in Garissa Township within Garissa County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of M.M (name withheld) a child aged 10 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 of the offence were that on the same diverse dates, at [particulars withheld] in Garissa Township within Garissa County, intentionally touched the vagina of M.M a child aged 7 years with his penis.

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

4. Dissatisfied with the decision of the trial court, the appellant came to this court on appeal. He filed his appeal on 23<sup>rd</sup> May 2017. Before his appeal was heard however, he filed an amended petition of appeal as well as written submissions which he relied upon. The amended grounds of appeal are as follows:

*(i) The trial magistrate erred in law to convict him when the prosecution failed to estimate in accuracy age of the complainant as required by law.*

*(ii) The trial magistrate erred in law and fact to convict him without considering*

*that the alleged penetration was not caused by him as alleged.*

*(iii) The learned trial magistrate erred in accepting or admitting complainants evidence which was tailored by coercion been imposed by her mother*

*(iv) The trial magistrate erred in law and fact to convict him without considering that the evidence adduced by the prosecution witnesses was contradictory and full of inconsistencies.*

*(v) The Prosecution failed to prove their case beyond reasonable doubt.*

*(vi) The medical evidence was dubious.*

*(vii) There was an existing vendetta between him and the complainants mother*

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

6. The learned Principal Prosecuting Counsel Mr. Okemwa submitted that the prosecution called four witnesses in the trial court, and that this being a first appellate court it should review evidence on record.

7. With regard to age, counsel submitted that the age of the complainant was proved by the evidence of the complainant, and the age assessment report.

8. Penetration was proved because the complainant said that the appellant did bad things to her, and later said that he f\*\*\*\* her. Counsel however felt that this evidence was suspicious, and added that Doctor's reports these days were suspect, because of the way they were done.

9. With regard to the perpetrator, counsel submitted that the appellant lived in the same house with the complainant and her mother, and was the complainant's step-father. Counsel pointed out however that there were conflicting statements between the mother and the complainant on what exactly happened. In addition, it also arose in cross-examination, that there were existing disagreements between the complainant's mother and the appellant which disagreement the appellant raised in his defence.

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

11. I have re-examined and re-evaluated the evidence of the four prosecution witnesses, and the defence of the appellant. I have also perused the Judgment of the trial court.

12. The prosecution in any criminal case is required to prove the charge and all its elements beyond any reasonable doubt.

13. An accused person does not have a burden to prove his or her innocence. The elements of defilements are:

(i) Age of the complainant, which has to be below 18years.

(ii) Penetration

(ii) Identity of the culprit.

14. The age of the complainant was testified to by the complainant in her affirmed evidence. She stated that she was a standard four pupil at [particulars withheld] Primary School. Earlier on, when she was been examined by the trial court as to her intelligence and her understanding of an oath, she said she was ten (10) years of age.

15. In my view the complainant should have been led by the prosecution to state her age during the affirmed testimony, even if she had mentioned her age when she was been tested for intelligence. The mother PW2 A K M did not testify to the age of the complainant, who was her daughter. She should have done so.

16. The only evidence on the age of the complainant on record, was the age assessment report form dated 29<sup>th</sup> February, 2016, whose maker did not appear in court to testify, nor was he identified in evidence by anybody.

17. The learned magistrate, must however have seen the complainant, when he determined that she was a young person who could not even be sworn for testimony.

18. The complainant was obviously a Primary school pupil in standard four. However, with the evidence on record, one cannot say that the prosecution proved the age of the complainant beyond reasonable doubt. The fact that one is in standard four, and the fact that he or she does not understand the nature of an oath itself does not prove age of a person. The age assessment report was also neither produced by its maker nor was the maker identified. Therefore, it is worthless.

19. I thus find that the age of the complainant was not proved by the prosecution beyond reasonable doubt. Age being a very important ingredient in defilement matters, where it is not proved like in the present case, an accused person is entitled to an acquittal.

20. The second issue is on penetration. The complainant stated specifically that the appellant had penetrated her on that date 28<sup>th</sup> February, 2016. She also stated that the appellant had defiled her twice before but could not remember the dates.

21. The mother PW2, stated that she was keenly observing the appellant on that day. That she pretended to sleep and saw the appellant move from their nearby mattress naked and got on top of the child, the complainant. She did not say anything more than that, regarding penetration but stated in cross-examination that she had suspected the appellant, because previously he used to leave the mattress where they slept together and go to the children mattress when drunk.

22. In the treatment notes for the complainant, it was recorded that the hymen was broken with an old scar. This information was also contained in the P3 form which was filled later. Both documents were produced in court.

23. The Prosecuting Counsel has stated that these days, there are doubts as to the contents of medical reports. In my view, in this area of Garissa some of the medical documents, such as the age assessment report are filled casually. Even P3 forms and other reports of a medical nature are filled casually. However, it all depends on the circumstances of the case, for the court to determine whether indeed they were genuine.

24. The medical reports, and the P3 form seem to follow the narrative already reported by the complainant and her mother, that the appellant had defiled her severally before, and also on the 28<sup>th</sup> February 2016. Both reports are thus suspect. In my view in the particular circumstances of this case, I find that there was no medical evidence of penetration. As such penetration was not proved.

25. To add to the above, there was an obvious disagreement between the appellant and the mother of the complainant. The mother of the complainant had children. The appellant also had children with another woman in Ukambani. The appellant and the mother of the complainant,

met in Garissa and decided to live together in a one room house, where they also slept with the children of the mother of the complainant.

26. It is the appellants defence, and also the mother of the complainant's story, brought up in cross-examination that the two had disagreements, and their relationships had been strained for some time, though they were still living together. According to the appellant, the main reason for the disagreement was because he had indicated to the mother of the complainant, that he wanted to bring his children with another woman to Garissa to attend school in Garissa, and live with them. According to him the complainant's mother was strongly opposed to that suggestion, and thus the cause of the disagreement.

27. In the circumstances of this case, that disagreement might as well be true. It could also have been the cause of the report to the police about the defilement of the complainant. Since this evidence of both prosecution and the defence has created a doubt, the benefit of that doubt should have been given to the appellant by the learned magistrate. On that account also, the appeal will succeed.

28. In my view though this appeal succeeds, the appellant should not go back and live in the same house with the complainant's mother. If he has his things there, he should go and collect them and find an alternative place to live.

29. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be released forthwith from custody, unless otherwise lawfully held.

**Dated, and Delivered at Garissa this 18<sup>th</sup> day of April, 2018**

**George Dulu**

**JUDGE**