



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 26 OF 2017**

**PATRICK MUTWIRI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Wajir Senior Principal Magistrate Criminal Case No. 296 of 2016 by Hon. Amos Makoross (SRM))**

**JUDGEMENT**

1. The appellant was charged in the Magistrate's Court at Wajir 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 diverse dates between 31<sup>st</sup> August 2016 and 2<sup>nd</sup> September 2016 at [particulars withheld] Sub-Location in Habaswei District within Wajir County intentionally caused his penis to penetrate the vagina of K. K. (name withheld) a child aged thirteen (13) 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 between the same diverse dates and the same place intentionally touched the vagina and breast of K.K. (name withheld) a girl aged thirteen (13) years.

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

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his petition of appeal on 9<sup>th</sup> May, 2017. Before his appeal was heard however, he filed an amended petition of appeal as well as written submissions. He relied on his amended petition of appeal and written submissions. He listed five (5) grounds in his amended petition of appeal as follows –

**(1) The trial magistrate erred in law and fact in convicting him without considering that the house in which the victim was found was a shop which was not proved to be appellant's house.**

**(2) The trial magistrate erred in law and fact in convicting him without considering that the age of the complainant was not proved beyond reasonable doubt.**

**(3) The trial magistrate erred in convicting him without considering that the prosecution's case was not proved beyond reasonable doubt contrary to section 109 and 110 of the Evidence Act.**

**(4) The trial magistrate erred in convicting him without considering that prosecution witnesses were contradictory and full of inconsistencies contrary to section 163 of the Evidence Act.**

**(5) The learned trial magistrate erred in convicting him without considering that there was religious conflict which erupted and which put his life in danger.**

5. During the hearing of the appeal, the appellant relied on his written submissions which I have perused. He said that the court should assist him as he did not understand the English language.

6. Mr. Balongo learned Prosecuting Counsel submitted that he opposed the appeal as PW1 the complainant positively identified the appellant as the culprit. Her evidence was corroborated by other prosecution witnesses and the appellant was placed at the scene as the incident took prolonged period. Counsel stated that the age of the complainant was proved by medical evidence in the P3 form.

7. In response to the Prosecuting Counsel's submissions, the appellant wondered why the complainant did not call people to witness the

incidence while the allegations that the incident occurred in town. He also said that the doctor did not examine the complainant and that both the complainant and the doctor gave false evidence before the trial court.

8. 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 conclusions and inferences. In doing so, I have to bear in mind that I did not see witnesses testifying to determine their demeanour and give due allowance to that fact. I rely on the case of **Okeno vs Republic [1972] EA 32**.

9. I have re-evaluated the evidence on record. This is a case of defilement in which the prosecution is required to prove beyond reasonable doubt all the elements of the offence of defilement.

10. The first ingredient of the offence to be proved is the age of the complainant. In her evidence, the complainant who testified as PW1 stated that she was thirteen (13) years of age. Her mother PW3 by the name D A said that the complainant was fourteen (14) years of age. No birth certificate was produced as an exhibit and no date or year of the birth of the complainant was mentioned by these two (2) witnesses.

11. A P3 form was filled by PW5 Abdi Osman in respect of the appellant as well as the complainant. He was a Medical Officer though his qualifications, where and when obtained were not given in his testimony. In both P3 forms, under Section C the age of the two is indicated as estimated age of fourteen (14) years. It is clear to me therefore that no age assessment was done on the complainant.

12. From the evidence on record, I am not convinced that the age of the complainant was proved by the prosecution beyond any reasonable doubt.

13. The next issue is on whether penetration actually occurred. The complainant was in the house of shop of the appellant for about three (3) days. She was found there by the mother PW3. She testified that she engaged in sexual activity with the appellant during that period. The appellant denied in his defence that he committed such an act. He said that it was a frame-up after he gave the mobile phone the mother of the complainant to the complainant, the mother was not happy and thus framed him. The appellant was not cross examined to challenge his defence statement. The report in the P3 form for the complainant filled on 5<sup>th</sup> September 2016, found that the stitches of the FGM had been widened and a conclusion was that there was forceful penetration of the vagina. The age of the opening of the stitches was not indicated.

14. In my view, the totality of the evidence is that indeed penetration of the sexual nature did occur in those three days when the complainant was in the house of the appellant.

15. The third issue is whether the appellant was responsible for that sexual penetration. Again the totality of the evidence leads to no other conclusion than that it is the appellant who penetrated the complainant sexually within those three (3) days. There was no possibility of another person penetrating the complainant sexually on those three (3) days as she was confined in the house or business premises of the appellant throughout that period.

16. Because the prosecution failed to prove beyond reasonable doubt the age of the complainant, this appeal will succeed. It is a very important and critical element of the offence of defilement that the age of the complainant to be proved to be below eighteen (18) years. The prosecution not having proved the age of the complainant to the required standard of beyond any reasonable doubt, the appellant should have been acquitted by the trial court. The conviction of the appellant for the offence of defilement cannot therefore stand.

17. 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 in open Court at Garissa this 29<sup>th</sup> day of June, 2018.**

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**GEORGE DULU**

**JUDGE**