REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 57 OF 2014

MOHAMED ADEN ALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 344 of 2014 by Hon. M. Wachira (CM)

JUDGEMENT

1. The appellant Mohamed Aden Ali was charged in the Magistrate's Court at Garissa with defilement contrary to section 8 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 4th October, 2013 at about 1900 hrs in Fafi District within Garissa County intentionally and unlawfully caused his penis to penetrate in anus of F.I. (name withheld) a child aged nine years.

2. In the alternative, he was charged with indecent act contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place willfully and unlawfully touched the vagina (should be anus?) of F.I (name withheld) a child aged nine years with his penis.

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

4. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his initial appeal in July 2014. Before the appeal was heard however, he filed an amended petition of appeal and written submissions.

5. At the hearing of the appeal, the appellant relied on the amended petition of appeal and written submissions and added orally that he cared for his parents and wanted the court to re-examine the case.

6. The learned Assistant Director of Public Prosecutions Mr. Omondi opposed the appeal and relied on the evidence of the five (5) prosecution witnesses. Counsel submitted that the evidence of the prosecution witnesses was consistent and the identification of the appellant as the culprit was positive. Counsel urged that this court should uphold the conviction as the incident occurred in broad daylight at about 5 pm in the evening.

7. In response to the Assistant Director of Public Prosecutions' submissions, the appellant said that only two witnesses attempted to connect him with the offence; that is the complainant and his father. He stated that people in Refugee camps had a habit of implicating one another in crimes to obtain clearance to travel to Europe. He added that he worked for the father of the complainant in a restaurant and that the father of the complainant refused to pay him his dues.

8. This is a first appeal and 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 but bearing in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanour. See the case of **Okeno vs Republic [1972] EA 32.**

9. I will start by acknowledging that the disposal of this appeal was unduly delayed. The mistake was in the court registry which kept this file for a long time from 2014 todate. The file was brought to the judge for admission of the appeal on 10th July, 2017.

10. In summary, the evidence of the prosecution was that on 4th October 2013 the complainant who testified as PW1 was on a football play field with other boys when the appellant approached and persuaded him to go into the bush to assist him in fetching firewood. At around 6.45 pm, the appellant threatened the complainant in the bush and then penetrated his penis into the complainant's anus and left him. The complainant then spent a night in a neighbour's house.

11. The father of the complainant PW2 I.F, tried to look for his son from around 6.30 pm but did not find him until 6 am the following day when he reported the missing child to Hagadera Police Station only to receive information that a child had been found in Block J the

previous day. On going to the house, he found his son who gave him the story. Investigations were then carried out, the complainant taken for medical examination and the appellant arrested the next day after being identified in the playground by the complainant.

12. The evidence connecting the appellant to the incident of defilement was that of a single witness PW1 (the complainant). The father of the complainant PW2 merely repeated what he was told by the complainant. The complainant was said to be aged nine (9) though no birth certificate was produced in court. In my view, the learned magistrate must have seen the appearance of the complainant and carried out an examination to find his intelligence and whether he knew the importance of saying the truth. The complainant ultimately gave his evidence on oath and was cross-examined. I find no reason to doubt the finding of the trial court that the complainant was aged nine (9) years.

13. The medical evidence given by Dr. Rapenda Kennedy PW4 was that medical examination was done on the complainant by a Dr. Were who had resigned from the service and left the country. He produced the P3 form. The conclusion in the P3 form was that there were lacerations in the anus of the complainant, and that sodomy had occurred.

14. The doctor who testified could not be cross examined on the entries in the P3 form as he was not the one who conducted the examination or filled the P3 form on 21st February, 2014. Penetration in the anus of the complainant might have occurred, however it is curious that the offence occurred on 4th October, 2013 and the P3 form was filled about five (5) months later. It is also instructive from the entries in the P3 form that the injuries were said to be merely one day old. If the injuries were one day old on 21 st February 2014 when the P3 form was filled, then such injuries could only have been inflicted on 20th of February, 2014 and not 4th October, 2013. The injuries therefore, if they were found, could not be said to have been caused on 4th of October, 2013 as alleged.

15. The major issue in this appeal was the failure of the prosecution to call crucial witnesses. It is unbelievable that a stranger would have taken a boy of nine (9) years into the bush from a group of boys playing football at around 6 pm and then defile him knowing fully well that the other boys could easily have identify him. It is also curious that the victim after being defiled went and slept in another stranger's house instead of proceeding to his home without any explanation at all on why he did not go to his father's house.

16. Importantly, none of the boys who were playing football with the complainant were called to testify, especially a boy mentioned by the complainant in cross examination called H. In addition to this, the owner of the house where the complainant is said to have spent that night was not called by the prosecution to testify and no explanation was given. In those circumstances, I am of the view that the learned magistrate erred in concluding that the evidence of the single minor witness was believable.

17. In my view, the failure of the prosecution to call these two crucial witnesses could only lead to the inference that their evidence would contradict that of PW1 (the complainant) which should have been a ground for acquittal of the appellant. I rely on the reasoning in the case of **Bukenya vs Uganda [1973] 549.**

18. In conclusion, and for the above reasons, I find that the prosecution did not prove its case against the appellant beyond reasonable doubt. I thus allow the appeal, quash the conviction and set aside the sentence. I order the appellant be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Garissa this 14th June, 2018.

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George Dulu

JUDGE