



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL CASE NO. 58 OF 2015**  
**ABDIKADIR TAKOW OMAR.....APPELLANT**  
**VS**  
**REPUBLIC.....RESPONDENT**  
**(From the conviction and sentence in Garissa CM Criminal**  
**Case No. 1404 of 2016 – M. Wachira (CM)**

**JUDGEMENT**

The appellant was charged in the Chief Magistrates Court at Garissa with defilement contrary to section 8(1) as 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> July, 2014 at [particulars withheld] in Dadaab District within Garissa County intentionally and unlawfully caused his penis to penetrate the vagina of KAB a child aged 15 years. 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 on the same day and place he intentionally and unlawfully touched the vagina of KAB with his hand against her will.

He denied both counts. After a full trial he was convicted of the main count of defilement, and sentenced to serve 15 years imprisonment.

The appellant has now come to this court on appeal on the following grounds.

1. The age of the complainant was not proved to be under 18.
2. That the prosecution failed to prove its case to the standard required under section 109 and 110 of the Evidence Act.
3. That the evidence of the complainant was false.
4. That there were contradictions in the prosecution evidence.
5. That crucial witness were not called.
6. That the court brought into the judgment extraneous matters.
7. That the court rejected the appellant's defence which was strong without good reason.

The appellant also filed written submissions, which I have perused and considered.

During the hearing of the appeal, the appellant stated orally that he did not know the girl he was said to have defiled. He also stated that there were contradictions between the evidence of the girl and her mother. He denied that the girl was found in his house.

Learned Principal Prosecuting Counsel Mr. Okemwa submitted that there were several contradictions on the age of the complainant. Secondly, the doctor did not establish recent penetration. Thirdly, that since the complainant said that she lost consciousness, it was difficult to say that she could recognize or identify the culprit. Counsel emphasized that sometimes false evidence was given in similar circumstances in the refugee camps so that alleged victims be moved to Australia or Canada.

This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. See the case of **OKENO-VS-REPUBLIC (1972) EA32**.

I have re-evaluated the evidence on record. The prosecution evidence is that the complainant PW1 went to buy a memory card on 31<sup>st</sup> July 2014 in the shop of the appellant. The appellant handed to her the memory card but she immediately fell unconscious and discovered after 2 hours that she was in the appellant's house where the appellant had defiled her. The mother of the complainant PW2 A A I looked for her until 2 am. The next day, she was told by a Sheikh reading the Quran where the complainant was, according to PW2. It transpired that the house where the complainant was belonged to "Arab" who was arrested and charged with the offence. "Arab" was said to be the appellant.

The first issue relates to the age of the complainant. She stated that she was 15 years of age. The mother, PW2 also stated that she was 15 years of age. Reliance was placed on the registration form for refugees that the complainant was born in 1999. No age assessment was done, and no document of any earlier record of age was produced.

The date of registration as a refugee was 12<sup>th</sup> April 2003. In my view, the age of the complainant was not proved beyond reasonable doubt. Her mother PW2 did not go to school and therefore was illiterate. That being so, and the mother not having stated the year and month when the complainant was born and where, in my view the age of the complainant was not established to the required standard.

The second issue relates to the house where the complainant was found. The complainant was alleged to have been found in the appellant's house. However, no evidence was tendered by any witness who knew the appellant's house, to establish that indeed that house belonged to the appellant. The appellant is said to have been living with neighbors. PW2 the mother of the complainant said that there were neighbors to that house. None of the neighbors was called to testify. In my view, either those neighbors or a headman from that area or Assistant Chief should have been called to confirm that indeed the house where the complainant was found belonged to the appellant.

In defilement cases, penetration has to be proved. The doctor found that the complainant had gone through FGM and hymen was missing and therefore she had had sexual intercourse before. The doctor did not find any evidence that there was recent sexual activity. Taking into account that the medical examination was done just the next day 1<sup>st</sup> August 2014, I am of the view that sexual penetration was not proved by the prosecution to the required standards beyond reasonable doubt.

Consequently, I find that the appeal has merits. I quash the conviction of the appellant, and set aside the sentence imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa on 30<sup>th</sup> June, 2017.**

**GEORGE DULU**

**JUDGE**