REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 27 OF 2017

SALA MOHAMED……...……..…….APPELLANT

VS

REPUBLIC……RESPONDENT

(From the conviction and sentence in Garissa

Chief Magistrates Criminal Case No. 94 or 2014 – Hon. M. Wachira)

JUDGEMENT

The appellant was charged in the Chief Magistrate's Court at Garissa with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No.30 of 2006. The particulars of the offence were that on 28th December 2013 at [particulars withheld] within Garissa County intentionally and unlawfully caused his penis to penetrate the vagina of MNS a girl aged 10 years. In the alternative, he was charged with committing an 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 he intentionally and unlawfully touched the vagina of MNS a child aged 10 years with his penis.

He denied both counts. After a full trial, he was convicted on the main account of defilement and sentenced to life imprisonment. He has now come to this court on appeal against both conviction and sentence.

His appeal was filed by M/S Tolo and Associates Advocates who also filed written submissions to the appeal Counsel for the appellant relied on the written submissions.

The Learned Principal Prosecuting Counsel Mr. Okemwa supported the conviction and stated that evidence of prosecution witnesses was consistent and truthful. Counsel submitted that under Section 124 of the Evidence Act Cap.80, there was no requirement that evidence of a single minor victim of a sexual offence be corroborated.

The summary of the evidence is as follows. The prosecution evidence was that on 28th December 2013 the appellant called the complainant to his house at Hagadera Refugee Camp. At that time, the complainant was playing with her two siblings. The appellant then locked the house from inside, and one of the children PW2 Hawa Nure Suni peeped into the house and saw the appellant dressing up while the complainant was lying down naked. She reported the incident to the mother. The issue was then reported to the police and the appellant was arrested and charged.

In his sworn defence, the appellant denied committing the offence and stated that the case was a frame up.

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 conclusion and inferences. See the case of **OKENO-VS-REPUBLIC (1972) EA 32.**

I have re-evaluated the evidence on record. The complainant stated that she did not know her age. The father PW3 Nure Suni Rone stated on 20th March 2014 that the complainant was aged 11. Reliance was placed on a refugee registration from which was neither produced by the complainant nor by her father but by PC Moses Jepkoech PW5 who was neither its maker, nor worked for UNHCR which issued the same. In my view, the age of the complainant was not proved beyond reasonable doubt. The prosecution in my view in the circumstances of this case should have conducted an age assessment of the complainant to establish her age as the UNHCR form was hearsay evidence, and the complainant said that she did not know her age.

Secondly, PW2 stated clearly that she reported the incident to her mother. The mother was not called by the prosecution to testify and no reason was given by the prosecution for the failure to call her to testify. The mother of the complainant was indeed a crucial witness both regarding the incident and establishing the age of the complainant. In my view therefore the failure of the prosecution to call this crucial witness tends to show that her evidence would otherwise have contradicted the rest of the prosecution evidence. I give the benefit of that doubt to the appellant, and rely on the reasoning in the case of **BUKENYA-VS-UGANDA (1972) EA549.**

In addition to the above, the appellant gave sworn testimony in his defence. He denied committing the offence. He stated that the case was a frame up. The prosecution did not ask a single question to challenge the sworn testimony the defence. The dismal testimony thus remained unshaken. As such, it displaced the prosecution evidence.

I thus find that the prosecution did not prove its case against the appellant beyond any reasonable doubt. I allow the appeal, quash the conviction and set aside the sentence.

I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa on 29th June, 2017.

GEORGE DULU

JUDGE