



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**  
**APPEAL CASE NO. 13 OF 2017**

**NOOR ABDIRIZAK.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Wajir SRM Criminal Case No. 344 of 2016-Mugendi Nyaga RM)**

**JUDGEMENT**

The appellant was tried on two main counts and one alternative count. Count I was for assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence on 4th October 2016 at Barwaqo Location within Wajir County unlawfully assaulted YAA thereby occasioning her bodily harm. Count II was for 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 29th December 2015 to 4th October 2016 at the same place caused his penis to penetrate the vagina of YAA a child aged 15years. 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 diverse dates between 29th December 2015 to 4th October 2016 at the same place committed and indecent act with YAA a girl aged 15years.

Because of an amendment to the charge, it is apparent that count I was inadvertently also listed as count 3 with the same particulars of the offence.

The appellant denied count I but remained silent with regard to the other count and the alternative count.

The magistrate recorded a plea of not guilty on all counts and a full trial was conducted. The appellant was ultimately convicted of defilement and assault causing actual bodily harm. He was sentenced to 25 years in jail for defilement and 3years in jail for assault, which was described by the magistrate as count 1 and count 2 respectively. The sentences were ordered to run concurrently.

The appellant has now come to this court on appeal. He filed his initial petition of appeal on 14th March 2017. However, before the appeal was heard, Odiya and Associate advocate came on record for the appellant and filed an amended petition of appeal with 24 grounds of appeal, which they relied upon.

At the hearing of the appeal, Mr. Kinaro for the appellant made oral submissions. Counsel relied on several case authorities. He submitted that the rights of the appellant to fair trial were denied as he was tried for an offence of assault and an offence of defilement which should have been tried separately. According to counsel, the acceptance by the magistrate of amendment of the charge was a mistake. Counsel emphasized that the confusion was quite clear because the conviction by the magistrate was also

confusing. Counsel relied on a case of HAMISI MUNGALE BUREHE-VS- REPUBLIC Mombasa Criminal Appeal No. 37 of 2013 where the need for separate trials was emphasized by the Court of Appeal.

Counsel also submitted that the appellant was a child during trial. Though his age was not assessed then, an age assessment had been done on appeal in which it was indicated that he was 18years old thus he must have been 17years when he was tried. Counsel therefore submitted that the sentence of imprisonment was a violation of the provisions of the Children Act.

Counsel also submitted that section Section 200 of the Criminal Procedure Code was not complied with when a succeeding magistrate took over. Counsel relied on a case of PHILLIP MUIRURI NDARUGA-VS-REPUBLIC(2016)eKLR and the case of ANTHONY MUSEE MALINGE-VS-REPUBLIC(2012)eKLR wherein it was stated that there was a requirement for strict compliance with that section otherwise an appeal should succeed.

Counsel further submitted that as the complainant had misled the appellant that she was above 18, and the two were said to have been married and lived together as husband and wife, the appellant should not have been convicted under the Sexual Offences Act.

Mr. Okemwa for the State submitted that assault was proved. However, there were technicalities regarding disjoinder of the charges. Counsel submitted also that from the facts on record, the complainant had made the appellant believe that she was above 18 and as such the defence under section 8(5) of the Sexual Offences Act, was available to the appellant.

This is a first appeal. As a first appellate court I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. See the case of OKENO-VS-REPUBLIC (1972) EA 32.

I will first deal with the technical issues. Counsel for the appellant has argued very strongly about the joinder of charges. I have considered the circumstances of this case and I am of the view that the appellant was not embarrassed by being tried for both assault and defilement.

The complainant was the same person. What was initially reported was the assault and the issue of defilement arose from the investigations and thus the need to add the charges under the Sexual Offences Act. Though there was a mix up in the numbering of the charges, with the charge of assault being repeated as if it were two charges in the charge sheet, I find no embarrassment caused to the appellant as he pleaded only to the charge of defilement and alternative of indecent act and one charge of assault causing actual bodily harm. I thus find that the situation herein did not militate against fair trial, and in my view apparent irregularity could not vitiate the proceedings herein arising from the joinder of the charges. I dismiss that complaint.

The second issue is with regard to compliance with the provisions of section 200 of the Criminal Procedure Code(cap 75) by the succeeding magistrate Mugendi Nyaga RM, who took over from Hon. Cheron SPM (now a Judge).

From the record of the proceedings on 10th February 2017, the succeeding magistrate recorded as follows:-

**“ Court: Provisions of section 200 CPC have been complied with.**

**Accused: Let us proceed to take the doctor's evidence. The matter should not start afresh.”**

Though counsel for the appellant has stated that section 200 of the Criminal Procedure Code was not complied with, in my view, it was complied with by the trial court. Indeed, it is mandatory for a succeeding magistrate or judge in criminal proceedings to comply with section 200 of the Criminal

Procedure Code where part of the case or evidence has been heard by another. The magistrate, took a shortcut by saying section 200 CPC has been complied with. However, the response from the accused person clearly showed that he understood all the options available to him and he said clearly elected that they should proceed to take the doctor's or the clinical officers evidence and also specifically that the trial should not start afresh. I find that section 200 of the Criminal Procedure Code was explained to the accused person and he elected to proceed with the trial from where it had reached. I dismiss that ground.

I turn to the age of the complainant. She stated in her evidence that she was married to the appellant for two years. The appellant confirmed so.

There is no evidence to the contrary. Both confirmed that they had indulged in voluntary sexual intercourse as husband and wife regularly. It was the prosecution position that the complainant was 15years of age. However, her conduct was such that she convinced the appellant that she was above 18years, to be specific as the appellant stated that she was 20.

As they were living as husband and wife, their parents must have known about the relationship. In my view therefore, the defence available to the appellant under section 8(5) of the Sexual Offences Act applied in this case. On that ground the appellant should not have been found guilty of the offence of defilement. He should have been acquitted of that offence.

It has been argued by counsel for the appellant that he appellant was below 18years at the time of the offence or the trial. Such issue was not raised before the trial magistrate. I am also doubtful about the entries in the age assessment document that was provided to this court on appeal. In my view, the appellant was an adult otherwise he should have raised that issue at the trial court. This court has never called additional evidence on the issue of age nor has the maker of that document been asked any questions.

With regard to the offence of assault causing actual bodily harm, a knife was produced in court and the complainant was obviously injured. The complainant and the appellant were living together as husband and wife when the complainant got injured. There is no suggestion that a 3rd party assaulted the complainant. The appellant merely seems to be suggesting that he gets out of his mind from time to time and that is what caused him to stab the complainant whose mistake was merely failure to burn incense in the house for the pleasure of the appellant.

Having re-evaluated all the evidence on record, I come to the conclusion that the prosecution proved the charge of assault causing actual bodily harm against the appellant beyond any reasonable doubt. I will thus uphold the conviction on that count. The appellant was sentenced to 3years imprisonment on that charge.

The maximum sentence under section 251 of the Penal Code is 5years imprisonment. He used a knife but was a 1st offender. In my view, the sentence of 3years imprisonment was justified in the circumstances as he used the opportunity of his relationship with the complainant to seriously injure her with a weapon.

To conclude, I find that the prosecution did not prove the charge of defilement beyond reasonable doubt. I quash the conviction for defilement and set aside the sentence of 25years imprisonment.

I find however, that the prosecution proved its case against the appellant on the charge of assault causing actual bodily harm. I uphold the conviction and the sentence of the trial court of 3 years imprisonment.

It is so ordered.

**Dated and delivered at Garissa on 19<sup>th</sup> October, 2017.**

**GEORGE DULU**

**JUDGE**