REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 41 OF 2017

HASSAN IBRAHIM WEYRAH…..…APPELLANT

VS

REPUBLIC……..……RESPONDENT

(Form the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 535 of 2013- B. J Ndeda SPM)

JUDGEMENT

The appellant was charged in the Chief Magistrate's Court at Garissa with two counts of defilement and two alternative counts of committing indecent act with a child.

Count 1 was for defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 3rd May 2013 at *[particulars withheld]* in Dadaab district within Garissa County intentionally caused his penis to penetrate the vagina of NOB a girl aged 11years. In the alternative, he was charged with 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 touched the vagina and breasts of NOB a child aged 11years with his hands.

Count 2 was for defilement contrary to section 8(1) (2) of the Sexual Offences Act. The particulars of the offence were that on the same day and place he intentionally caused his penis to penetrate the vagina of NOB (another girl) aged 8 years. In the alternative he was charged with committing and indecent act with a child 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 touched the vagina, buttocks and breasts of the same NOB a child aged 8years with his hands.

It is worth noting that the two girls (victims) were sisters. He denied all the offences. After a full trial, he was convicted on the two main counts of defilement and ordered to serve 10years custodial sentence without the court stating whether it was on each of the two offences. The magistrate however stated that the sentence was to run concurrently which means the magistrate thought that he sentenced the appellant to 10years imprisonment on each of the two counts.

The appellant has now come to this court on appeal. He filed his first petition of appeal in February 2014. Before the appeal, was heard however the appellant filed an amended petition of appeal which he relied upon, on the following grounds:-

> **"1. The trial magistrate erred in law and fact by convicting him without considering that the prosecution witnesses' evidence was full of inconsistencies and contradictions thus creating doubt on its credibility.**

2. The trial magistrate failed to weigh the evidence on the complainants' age which was not proved beyond reasonable doubt.

3. The trial magistrate erred in convicting him without considering that penetration was not proved to have been caused by the human penis since complainants had gone through FGM(Female Genital Mutilation).

4. The Prosecution evidence was fabricated against him in order to suit the complainants intended mission for travelling overseas.

5. The sentence was severe as at the time of the alleged offence the appellant he was 17years old and a pupil in class 7.

6. The magistrate did not consider his mitigation and his rights under the Children Act.

7. His defence was strong and congent and reverted the prosecution's allegations.

The appellant also filed written submissions which I have perused and considered. In particular he relied on the provisions of section 109 and 110 of the Evidence Act (chapter 80) of the Laws of Kenya which required that a person who alleges the existence of a fact should prove the same.

At the hearing of the appeal, the appellant added that the mother of the complainant wanted to relocate to the United States of America and used the two girls who had just gone through FGM to allege that they were defiled so that they get passage to the United States of America.

The learned Principal Prosecuting Counsel Mr. Okemwa submitted that he initially wanted to ask for enhancement of sentence. However, on perusal of the proceedings, he noticed anomalies that made him change his mind. Counsel submitted that age of the complainants was not proved to the required standards, as no age assessment was done and no document or certificate on age of the complainants was relied upon in court.

Counsel also doubted the narrative of the victims that the appellant defiled one of them after another on the same mattress in short succession. Counsel also said that one of the complainants was found to have venereal disease while the other did not, and in counsel's view therefore, there were serious challenges on the credibility of prosecution witnesses.

Counsel submitted also that there was also clear evidence that both complainants had gone through FGM and that the appellant was born in 1996 almost same age as the complainants. Counsel left the matter at the discretion of the court.

This is a first appeal. As a first appellate court, I am required to have a fresh evaluation of the evidence on record and come to my own independent conclusions and inferences. I am required to bear in mind that I did not have the opportunity of the trial court to see witnesses testify and determine their demeanor. See the case of OKENO-VS-REPUBLIC (1972) EA 32.

The prosecution called five witnesses, and the appellant gave sworn defence testimony and called one witness. PW1 and PW2 were the complainants and claimed to have known the appellant well before.

They do not indicate the time when the appellant defiled them but stated that they were sleeping on a mattress in a temporary house when the appellant came and defiled them one after another. They did not talk about any light, though it was apparent that the time of the alleged incident was at night.

PW3, Dr. Adan Koropu tendered evidence on the P3 forms filled by a Dr. David Ndirangu of Dagahaley Swiss Hospital who had moved to Kitale. According to the entries in the P3 forms, each of the complainants had gone through FGM and the hymen of both was missing. PW4 R A Y the mother of the complainants (complainants)talked about the report to her made by her daughters about the incident. She

stated that she knew the appellant as a relative who came to take meals from her house. PW5 was the investigating officer PC Humphrey Kipngetich, who handled the investigations after a report was made to the police.

Having re-evaluated the evidence on record, the first issue is on proof of age of the complainants. The trial court treated the complainants PW1 and PW2 as minors. PW1 stated that she was 8years of age, and the magistrate asked her a few questions and came to the conclusion that she was too young to be sworn. She thus tendered her evidence not on oath but was cross-examined. In my view the cross-examination should not have been allowed by the trial court. Once a witness tenders evidence which is not on oath, he or she should not be cross-examined. The weight to be put on evidence which was not tendered on oath is lower than that of evidence is tendered on oath.

Once the same witness is cross-examined, it will not be clear whether such evidence which is not on oath should be put on the same level as that of the witnesses who tendered evidence on oath. Such confusion should be avoided.

PW2 also stated before the court that she was 8years old. She was brought to court on a wheelchair which means she was physically challenged. The magistrate found that she was too young to be sworn, and she tendered evidence not on oath but was also wrongly cross-examined, creating the confusion I have referred to on the weight to be put on the evidence of PW1.

The charge sheet talks of PW2 being aged 11, while PW1 was also alleged to be aged 8years. The magistrate saw both these witnesses, who testified that each was aged 8years, which does not agree with the charge sheet regarding PW2. I have no doubt however that both were below the age of 18.

I however, have a problem with the proof of their actual age, as no evidence was tendered to support or confirm their age, and their mother PW4 merely stated that one was 8years the other 11 years of age, with no indication as to when they were born.

The above situation in my view, gave the magistrate a hard time as sentencing in sexual offences committed against minors is determined by age brackets. That in my view was the reason why the magistrate opted for the minimum sentence of 10years imprisonment. The mistake that created the problem was on the prosecution.

The second issue is whether penetration of a sexual nature did occur. The entries in the P3 forms showed clearly that FGM had been conducted on both complainants. The hymen in both cases is said to have been missing. There is no indication however of recent penetration of a sexual nature.

The appellant’s defence was that the case was all a fabrication against him. During appeal, he stated that he was implicated so that the complainants’ mother gets clearance to migrate to the United States of America. It is my finding that though the hymen of both complainants might have been found to be missing, it was not established that the breaking of the hymen was due to sexual penetration by a penis. In the circumstances of this case where the complainants had gone through FGM, it was necessary for the prosecution to prove through evidence that the breaking of the hymen was caused recently and could only have been caused by sexual intercourse through the penis. Such evidence is not on record. I thus find that the breaking of the hymen was not necessarily caused by a penis. The prosecution thus did not prove beyond reasonable doubt that penetration of sexual nature occurred.

The third issue is on identification. From the evidence on record, it is apparent that the incident occurred at night. In such a situation it was very important for the complainants to have given evidence on the kind of lighting at the scene and how they identified the culprit. No such evidence was tendered by the prosecution witnesses. Assuming that the incident did occur, which I find did not, then it is possible that the culprit was another person.

In my view, the appellant was implicated merely because he was a person known to the family of the complainants, and his name was easy to mention since he was a young man. I find that there was no

positive identification of the appellant as the culprit.

On that ground alone, in my view the appeal should succeed as there was no proof to the standards required in criminal cases that the appellant was the culprit.

Arguments have been made that the appellant was aged 17years when the incident occurred. From the record, I find no evidence on the age of the appellant. I only find that he stated at the trial that he attended Juba Primary school in class 7. The fact that the appellant was in class 7 at that time did not mean he was below the age of 18, as some people go to school early while others attend school late. I dismiss that ground.

To conclude, I find merits in the appeal. I allow the appeal quash the conviction on both counts of defilement 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 17th October, 2017.

GEORGE DULU

JUDGE