



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 70 OF 2015

RAMADHAN MUGASHEMBAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 1322 of 2014 B. J Ndeda SPM)

JUDGMENT

The appellant was tried 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 (3) of 2006. The particulars of the offence were that on 1st August 2014 at Z[particulars withheld] area in Garissa Township within Garissa County intentionally and unlawfully caused his penis to penetrate the vagina of Z A 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 unlawfully and intentionally touched the vagina of Z A a child aged 15 years with his penis.

He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to 20 years imprisonment.

He has now come to this court on appeal against both conviction and sentence. He filed his initial petition of appeal in July 2015. Before the appeal was heard however, in June 2017, he filed amended petition of appeal and written submissions.

In summary his grounds of appeal are that the prosecution did not prove their case, that the evidence of PW1 the complainant was brought to court to destroy his report to the police of having been assaulted, that it was at night and he could have been mistakenly identified, that his defence was not considered by the trial magistrate. He asked that the conviction be quashed and the sentence be set aside.

At the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered.

The Principal Prosecuting Counsel Mr. Okemwa submitted that age of complainant was proved. With regard to penetration, counsel submitted that the evidence was not conclusive as the appellant was said to have been found sitting on the complainant and the contents of the medical report appeared to be hanging.

Counsel also stated that the appellant had made a report to the police of an assault.

Lastly, counsel submitted that identification of the culprit was shaky as the complainant said that she identified the appellant through light from the Mosque after he was captured by the grandfather.

This being a first appeal, I am required to evaluate the evidence in record afresh and come to my own independent conclusions and inferences. See the case of **Okeno -Vs- Republic (1972) EA 32**.

I have re-evaluated the evidence on record. The appellant stated at the trial that he was assaulted while going to the Mosque after 6.00 am. His three witnesses DW2 R G, DW 3 H S and DW 4 S B say so. However, the prosecution witnesses testified that the incident occurred at 3.00 am. One of the prosecution witnesses, PW4 M G, who was related to the appellant stated that the appellant had told him that he had gone to the house of the grandfather of the complainant to ask for a clarification on an issue they had discussed earlier, when H PW 2 (the complainant's grandfather) came out with a panga and assaulted him.

Having re-evaluated the evidence on record, I find that in deed the appellant was not going to the Mosque but had gone to the homestead of PW 2 H the grandfather of the complainant. I thus find that the appellant went to the homestead of the grandfather of the complainant, and not to the mosque.

With regard to the age of the complainant, though a medical age assessment report was produced, it did not show how the said age assessment of the complainant was done. The name of the person who made that report was also not recorded in the form. In my view, anybody at the Garissa Provincial General Hospital could have filled such a form. I thus find that the age of the complainant was not established to the required standards in a criminal case.

On penetration, the P3 form refers to bruises on the labia minora and that the hymen was broken. However, the Clinical Officer PW 5 Isaac Abdalla Yatich was quite clear that there were no traces of blood stains found. The age of the bruises was also not established. In my view therefore, and in the circumstances of this case where the appellant had already reported a case of assault to the police, penetration was not proved to the required standards.

In view of the above findings, the appeal of the appellant has to succeed.

I thus 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 23rd November, 2017.

George Dulu

JUDGE