REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 26 OF 2016

MOHAMED ALI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the original conviction and sentence in criminal case No.3000 of 2010 of the Chief Magistrate's Court at Maua by W.F Andayi – Principal Magistrate)

JUDGMENT

The appellant, **MOHAMED ALI**, was convicted for the offence of defilement of a girl contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on the 3rd day of August 2010 at *particulars withheld* Igembe North District of Eastern Province the appellant intentionally caused his penis to penetrate the vagina of **N.B** a child aged 4 years.

The appellant was tried and was convicted of the offence. He was sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by M/s J. Nelima, learned counsel. She raised six grounds in the supplementary petition of appeal which can be summarized as follows:

1. That the learned trial magistrate failed to make a finding that there was a possibility of the police tampering with exhibits.

2. That the learned trial magistrate erred in law and in fact by convicting the appellant where the ingredients of the offence were not proved.

3. That the learned trial magistrate convicted without sufficient evidence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

The appellant called the complainant into his house. When she went in, he lured her with a promise to buy her some biscuits and asked her to sleep with him. He defiled her and left her in the house. She went and reported to her mother.

The appellant denied any involvement in the offence and contended that he was framed up due to unpaid wages .

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

The charge in the substantive charge was wrongly drafted. It ought to read:

> **"...contrary to section 8(1) as read with section 8 (2)..."**

The appellant was not prejudiced in any way for it is clear from the proceedings that he understood the charge and he fully participated in the trial. This is curable under section 382 of the Criminal Procedure Code.

It would appear the ground on the possibility of exhibits being tampered with by the police was abandoned. The appellant's counsel did not address it in her oral submissions. My perusal of the record does not reveal any basis for the complaint.

In her submission the appellant's counsel raised an issue with the failure to produce the medical report of the appellant in spite of the fact that he had been examined. This was not a vain ground. The clinical officer testified that he examined the appellant.

In the case of **HAMISI SULEIMAN** vs. **REPUBLIC [2004] eKLR** the court observed:

> **Appellant contends that the charge was not proved because he was not taken for medical examination. There is no requirement that he should have been examined. The court can still find on guilty if satisfied on the evidence on record that there has been a rape or defilement.**

In the instant case I will endeavour to find if the prosecution proved their case in spite of the fact that the medical report in respect of the appellant was not produced. I will revert to this issue while addressing the issue sufficiency in evidence. In the case of **GEORGE OWITI RAYA Vs REPUBLIC [2013] eKLR** the court in defining defilement said:

The trial court correctly identifies the ingredients of defilement as penetration and minority age of the victim. The trial court observed that the foregoing two ingredients of defilement must be proved before conviction can issue.

The third ingredient is whether the alleged perpetrator was the culprit.

The complainant's evidence, that of her mother, and that of Jillo Dabaso (PW3) clearly show that the appellant was defiled. On the same day of the alleged offence, these witnesses testified about her state. This was corroborated by the medical evidence of Dr. Salesio Murungi (PW5) who examined the complainant on the same day of defilement. He found her with fresh bruises to her genitalia and the presence of spermatozoa. This was prove of penetration.

It is now settled law that the age of a sexual victim can be proved by other means other than by a birth certificate. In the case of **FAPPYTON MUTUKU NGUI V REPUBLIC [2012] eKLR** the court said:

> **I would be prepared to clarify that “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.**

In the instant case, I make a finding that the age of the complainant was proved.

The complainant identified her perpetrator as the appellant. Although the learned trial magistrate said that PW3 could not be relied upon to tell the truth, there was ample evidence on record to show that the appellant was the perpetrator. This is in spite of his examination report having failed to be produced. The defence the appellant tendered was clearly an afterthought for he never challenged the complainant's mother with such facts.

The upshot of the foregoing analysis is that the appeal lacks merit. The same is dismissed.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE