



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Criminal Appeal 272 of 2009**

REPUBLIC.....RESPONDENT  
VERSUS

DAMMAR MUSA ALI.....APPELLANT

*(From original conviction and sentencing in Criminal Case No. 846 of 2009 of the Chief Magistrates Court at Garissa, Hon. M. M.Gicheru Chief Magistrate on 28th June,2009).*

**JUDGMENT**

The appellant was charged with the offence of defilement of a Girl under the age of 16 years contrary to Section 8 (4) of the Sexual Offences Act No. 3 of 2006.

It was alleged in the particulars of the charge that on diverse dates between 16<sup>th</sup> June 2006 and 2<sup>nd</sup> July 2006 at Garissa District within North Eastern Province Estate, he had carnal knowledge of a child below the age of 16 years.

The appellant had originally been charged with the offence of abduction of the Complainant against the will of the Parents. He was convicted and held in custody for a period of 3 years. The High Court however quashed this conviction and ordered a retrial.

The appellant denied the offence but after the re-trial he was convicted of the offence of defilement of a girl under the age of 16 years contrary to Section 8 (4) of the Sexual Offences Act No. 3 of 2006, and sentenced to ten years imprisonment. This is an appeal against both the conviction and sentence.

In his appeal he blamed the trial magistrate for failing to accord him a fair and impartial trial and violating his fundamental right by failing to have an interpreter. Further that the prosecution case was not proved and was only based on flimsy and sketchy evidence. There was also no medical evidence to support the charge of defilement and finally, he complained that his defence was not given due consideration.

The complainant gave an account of what transpired on the date of the alleged offence, she described how she had left for school on 16<sup>th</sup> June 2006 at 7:30 am. She met the appellant near the school gate at about 10:30 am. The appellant lured her into a house where upon reaching, he beat her up and defiled her by

forcing her to lie on a mattress and to remove her clothes. He then defiled her from 11 am till noon, after which he locked her inside the house and left. He came back the same day and continued to defile her. He did this for the following 17 days. Her mother PW1 came after the 17 days ordeal with two police officers and rescued her. The appellant was then arrested. They were taken by the police to record a statement at Dagahaley Police Post, after which they were released to go home.

She testified that she was injured on her legs, private parts and other parts of her body. She was examined by doctor who she said would confirm together with her parents that she was indeed assaulted and defiled.

PW1 is the mother to PW2. She narrated how she received information of her daughter's disappearance from her sister PW4 on 16<sup>th</sup> June 2006. She went to look for PW3, her husband, so that they could embark on a search for PW2. They found her the following day on 17<sup>th</sup> June 2006 in a house near the livestock market with the help of police officers, whereupon they arrested the appellant and took him to the police post. PW2 informed her mother that the appellant had had sexual intercourse with her.

PW3 who was PW2's father testified that on receiving the report of their daughter's disappearance, they looked for her for a period of 17 days before they eventually found her in a house near the livestock market. Her hair was unkempt; she looked depressed, was unable to talk and was crying. He said that she only managed to talk after two weeks and could not explain how she ended up in the Appellants house. She had been injured on her body and even had swellings.

PW4 reported the matter to her mother PW1. She recalled that on the said date of 16<sup>th</sup> June 2006, while in school, she was informed that her sister PW2 had gone and left behind her books. She recollected seeing her last standing next to the appellant and learnt later that she had left with the him. She informed her mother and later on assisted in finding her after 17 days. She identified the appellant as the person she had last seen her with. He happened to be a neighbour and therefore she recalled him well.

PW5 received the report of this offence at Dagahaley Police Station on 17<sup>th</sup> June 2006 from PW1. He conducted investigations and had the appellant arrested after about two weeks. He took the complainant to Dagahaley GTZ hospital where she was examined by Doctors, before issuing her with a P3 form.

The complainant narrated her ordeal to him. He testified however that though he did the investigations, he did not know the findings of the Doctor in this case.

I note from the court record that no medical evidence to support this charge of defilement was adduced at the trial and the trial magistrate noted this on the record.

The trial court invoked section 179(2) of the CPC which provides for the conviction of a minor cognate offence, in the event the main charge is not proved and there are facts proving the minor cognate offence, and convicted the appellant of the offence of child prostitution under section 15(a) of the Sexual Offences Act.

The issue is whether this cognate offence was indeed proved at the trial court. That is, whether there was ample, credible, cogent and weighty evidence to incriminate the appellant of this charge against him

On the record, I note that there is no medical evidence in support of this charge of defilement of the complainant, even though all the witnesses testified that PW2 was examined by a Doctor and that there was a medical report which apparently no one knew its contents. Besides this, even the P3 form which would have lent credence to this charge was not produced in court.

In his defence the appellant denied the offence and blamed the complainant for implicating him due to the differences that their families had. In effect his position is that he had nothing to do with the defilement of the complainant. The appellant however failed to establish an alleged incident involving the assault of a pregnant woman by PW2 and PW4 that he prevented, and for which he opined to these fabricated

charges against him. He does not cross examine them on this alleged incident and thus this issue of fabrication is not proved.

I also note on the record that the trial court found corroboration in the evidence of PW2 and PW4 that the PW2 was indeed abducted by the appellant from school. Further, PW1 and PW3 corroborate each other's evidence that they were both present when the complainant was found at the appellants house after 17 days.

However, the fact that the complainant was found 17 days later raises doubt. This is so because, although PW1 received the information of her daughter's disappearance from her elder daughter PW4 on 16th June 2006, she testifies on record that they found her the following day on 17th June 2006 in a house near the livestock market with the help of police officers, which was one day later and not the 17 days alleged. PW2 on the contrary testifies that her mother PW1 found her after 17 days when she came to her rescue with 2 police officers.

Secondly, although PW5 received the report of this offence at Daghaley Police Station on 17<sup>th</sup> June 2006 from PW1, he conducted investigations and arrested the appellant after about two weeks which would be on 1<sup>st</sup> July 2006, which date the appellant confirmed.

I find the evidence on these dates contradictory, raising serious doubt whether the complainant was indeed found and appellant arrested after 17 days as alleged. The Investigating officer did not produce his investigation diary as an exhibit in court in support of his findings. Furthermore, the fact that PW2, PW3 and PW4 identified the appellant as their neighbour, which PW2 denies, raises doubt. If that were the case, I find no plausible reason why it took them 17 days to find PW2 or even establish his whereabouts earlier if indeed he stayed close to them as they testified.

In the premise, I find that the prosecution failed to prove the cognate offence under section 15(a) of the Sexual Offences Act beyond reasonable doubt in the face of inconsistent and insufficient evidence to support the charge.

With respect, I disagree with the assessment of the evidence by the learned trial magistrate. I find that, no sufficient evidence was adduced to justify the conviction. Accordingly, this appeal is allowed, conviction and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

**Dated and delivered at Nairobi this 13th day of March, 2013.**

**A. MBOGHOLI MSAGHA**  
**JUDGE**