



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 257 OF 2009

HASSAN MOHAMMED FILLE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 06 of 2009 of the

Senior Resident Magistrate's Court at Mandera by R.Odenyo – Senior Resident Magistrate)

JUDGMENT

The appellant, **HASSAN MOHAMED FILLE**, was convicted for the offence of Defilement of a child contrary to **Section 8 of the Sexual Offences Act**.

The particulars of the offence were that the appellant unlawfully penetrated the complainant, B.M.A, a girl aged 14.

When the complainant testified, she told the court that she was 13 years old. She also told the court that prior to the material day, she had not known the appellant.

As she was herding goats, at about 10.00a.m.;

“Suddenly, a man came from behind me and held me. I turned and saw him. He started to pull me towards a thicket. He boxed me in the face then took my headscarf which he used to tie my hands.”

The assailant then dragged the complainant, and also half-carried her over a distance of 50 metres. The assailant then molested the complainant sexually.

However, when he saw **PW 3** approaching, he ran away, in the opposite direction.

PW 3 testified that she found the complainant in the forest, when **PW 3** had gone to search for one of her camels, that was lost. She was attracted to the scene, by the cries of the complainant.

However, **PW 3** could not identify the assailant, as he ran away when **PW 3** was about 50 metres away.

PW 4, DR. MOHAMED ABDI ABDULLE, examined the complainant, some 5 days after the incident. He found that the complainant's neck was tender, which implied that she could have been strangled.

Upon examining her genitalia, **PW 4** found no lacerations or bruises. However, some whitish discharge was coming from her vagina, whilst the hymen was not intact. As a consequence, **PW 4** assessed the complainant's case as one of rape.

That is significant because the doctor actually assessed the complainant's age as being 18.

PW 5, PC BENJAMIN MUTUA, testified that the complainant informed him that her assailant blindfolded her before he assaulted her sexually.

If indeed, the complainant was blindfolded before being raped, she may not have had sufficient time and opportunity to positively identify an assailant whom she had only met that one morning. The best way of ascertaining whether or not the complainant had identified the assailant, would have been through an Identification parade. That is because the complainant only learnt of the assailant's arrest, some 2 days after it had happened. In other words, she did not lead to the arrest of the appellant.

Secondly, there was no evidence concerning how the appellant was arrested; who identified him to the persons who arrested him; and the basis upon which the said person or persons had identified him.

Furthermore, and in any event, it does appear that the only eye-witness to the incident was the complainant. Therefore, the chances that somebody else had been responsible for identifying the appellant, as the assailant are basically non-existent.

As matters stand, the prosecution failed to tender any evidence to show the reasons for the arrest of the appellant. That failure is even more pronounced when the P3 form filled in by the police indicates that the assailant was known to the complainant, yet when she testified during the trial, the complainant said that she had never met the assailant before the material day.

Another vital issue that was not addressed by the prosecution is the age of the complainant. The charge sheet cites her age as 14, whilst the complainant said that she was 13.

And the doctor who examined her placed the complainant's age at 18.

Using a formula that is not disclosed, the learned trial magistrate held that the complainant was between 15 and 16. That conclusion is not supported by any evidence.

In a nutshell, the age of the complainant remained un-determined: Or at the very least, the evidence tendered in that regard was not only inconsistent, but also did not support the charge.

Evidence as to the age of the victim of an offence of defilement is critical, because it enables the trial court ascertain the applicable statutory provisions pursuant to which the accused ought to be convicted, and therefore the sentence to be handed down.

For those reasons, the learned state counsel, Ms Mwanza, was very right to have conceded this appeal.

In the event, the appeal is allowed; the conviction is quashed and the sentence set aside. I order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 11th day of May, -2011

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FRED A. OCHIENG

JUDGE