



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. E013 OF 2020

HUSSEIN ABDI IBRAHIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of D. K. Mtai – Resident

Magistrate Mandera in a judgement that was delivered on

the 14th of June, 2018 in Mandera SPM Criminal Case No. 123 of 2018)

JUDGEMENT

1. This is an appeal arising from the Judgement of Hon. D. K. Mtai, Resident Magistrate in SPM Criminal Case No. 123 of 2018, Mandera which was delivered on the 14th of June 2018.

2. In the case, the Appellant was faced with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are that on the 9th day of March 2018 at 4.00 am at [Particulars Withheld] in Mandera North Sub-County within Mandera County the Appellant defiled a minor ZAI (name withheld), a girl aged 15 years.

There was an alternative count of indecent assault contrary to Section 11(1) of the Act.

3. The Appellant denied the charge and the matter proceeded to full hearing. The Appellant was found guilty of the main count, convicted and sentenced to 20 years imprisonment.

4. The Appellant being dissatisfied with the Judgement preferred this appeal on grounds as follows;

- **Prosecution evidence was full of contradictions and inconsistencies.**
- **The prosecution case was not proved beyond all reasonable doubt; and**
- **The trial court dismissed a plausible defence.**

5. The appeal was heard by way of submissions summarized as follows;

Appellant's Submissions

The Appellant's and the complainant's age is the same 17 years and 18 years respectively. Though no birth certificate nor document proving age was produced in evidence; upon assessment of the complainant the clinical officer assessed her age at 17 years.

As for the prosecution witnesses the Appellant submitted that the evidence of PW1, 2 and 3 was inconsistent contrary to the court's finding. Further since the complainant was a minor and it appears that she was coached. Further the evidence of the complainant was not corroborated contrary to Section 124 and 126 of the Evidence Act.

Respondent's Submissions

Both PW2 and PW3 stated the age of PW2 to be 15 years which fact was further corroborated by the clinical officer, PW1, who at examination established that PW2 had visible superficial bruises to the upper and lower part of the vaginal cervix. She also had a whitish discharge. A high vagina swab indicated epithelial and pus cells suggesting venereal infection. It was concluded that the injuries were as a result of forceful penetration.

As for the identity, PW3 put on a torch that enabled her to see the Appellant who was on top of the victim and who happened to have been in the same clothes he was in while in court. Further PW4 who responded to the distress call saw the Appellant leave the house of PW3, chased him without losing sight till the Appellant was arrested.

It was also submitted that the defence was considered by the trial court but it failed to dislodge the prosecution case.

Lastly the appeal lacks merit and ought to be dismissed.

6. As the first appellate court, this court has to examine, evaluate and analyze the evidence on record in order to arrive at its own independent opinion.

In the case of Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal had this to say of a first appeal

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

The above principles are equally applicable when the High Court considers an appeal from the magistrates court, as the first appellate court.

7. The prosecution case briefly is that while PW2 and PW3 were asleep in separate beds in one room, the Appellant went to the room and where the victim PW2 slept, covered her mouth, removed her dera (type of loose dress) and defiled the said victim, PW3 heard movements and the victim scream, she switched on her torch and saw the Appellant on top of the victim defiling her. She directed her torch on the Appellant who stopped and ran away. Both PW2 and 3 screamed attracting the attention of neighbors who gave chase to the Appellant at close promptly without losing sight and arresting him.

8. PW2 the victim informed the court that she was 15 years of age. This was supported by PW3 her grandmother who stays with her. This information was given to PW1 **Stephen Thurania Murea** a clinical officer at Rhamu Sub-County Hospital, who in the process of assessing age carried out a dental examination and found that PW1 had 28 teeth. He informed the court that clinically before attaining age 17 one is supposed to have 28 teeth with the error of 1 tooth.

The Appellant based on the above information has challenged the age of the complainant and urges that she was 17 years.

9. Age is a critical factor when it comes to punishment in a case of defilement.

In Kaingu Elias Kasumo vs Republic Criminal Appeal No. 504 of 2010 the Court stated

“Age of the victim of sexual assault is a critical component. It forms part of the charge which must be proved the same way as penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

10. Scientifically, dental formula is said to be one of the most reliable methods of chronological age estimation. (See an Article on Defining Dental Age for Chronological Age Determination by Fatma Deniz Uzuna and Another)

11. PW1 in his evidence gave two ages 15 years from information which was not supported by evidence and 17 years upon dental examination. The dental formula assessment has scientific backing and since age assessment has bearing on this case, the court will adopt the assessment that has backing and therefore finds as a matter of fact that the victim of the alleged crime was a girl of 17 years.

12. Was the prosecution evidence contradictory? PW2 stated that she had not seen the Appellant before she only saw him on the material day when he was arrested as he wore the same clothes he had in court.

13. PW3 on her part stated that while she was sleeping on the material day the 9th of March 2018, she heard PW2 screaming. She put on her torch and saw the Appellant on top of PW2 defiling her; she directed her torch which prompted the Appellant flee. She also observed that he was dressed in the same clothes he had in court.

14. PW4 HHA a neighbor recalled that on the 9th of March 2018 at 4 am as he was on his way to the mosque, he was attracted by screams of PW2 and PW3, he immediately rushed to the place and saw a person emerging from PW3's homestead. There was moonlight and the visibility was up to about 50 meters, he also found an KRF officer **Hussein Hassan Dalo** and 2 Other persons when they gave chase to the person without losing sight and managed to arrest him. He knew the suspect, as he had been employed as a herder within their area.

15. The Appellant denied that he visited the homestead of PW3 as alleged and was arrested as he fled having defiled PW2. However, his testimony does not dislodge the evidence of the prosecution witnesses. It does not add up why people unknown to him would frame him. The

evidence of **PW2**, **PW3** and **PW4** appear credible and worth of belief.

The court therefore forms the opinion that the Appellant is the person who had entered **PW3's** house, defiled **PW2** and was arrested while attempting to flee.

16. **PW2** informed the court that the Appellant defiled her. She had injuries she sustained while he forcefully put his penis in her vagina. **PW3** saw the Appellant in the act. **PW1** on the other hand corroborated the evidence of the two in his findings that **PW2** had visible injuries to her upper and lower part of the vagina area. She had a whitish discharge and a higher vagina swab indicated presence of epithelial and pus cells suggestive of venereal infection.

He assessed degree of injuries as harm. He also found that the injuries were caused by partial penetration of the vagina and the resistance is what caused the injuries.

In cross examination he informed the court that he examined the Appellant as well. He had his urine tested and the Appellant was found to have pus cells an indicator of venereal disease.

17. Based on the above evidence and in as much as the court believes the evidence of the victim as provided for by the proviso to Section 124 of the Evidence Act, there is evidence before court that corroborates the evidence of the said victim. Therefore, the court does concur with the trial court that the prosecution evidence was proved beyond all reasonable doubt that the Appellant was the defiler and equally returns a verdict of guilt.

18. The court is also of the opinion that contradictions if any were too minimal as to affect the substance of the prosecution evidence.

The Appeal therefore flops on this score.

19. The court having made a finding on the age of the victim this fact has an implication on the sentence.

Section 11(4) of the Sexual Offences Act provides that

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen is liable upon conviction to imprisonment for a term not less than 15 years.”

20. Based on Section 11(4) of the said Act this court sets aside the 20 years jail term meted out to the Appellant based on the age assessment of the victim placed at age 15 and in its place sentences the Appellant to 14 years and 5 months taking into account the 4 months he was in custody awaiting his trial. The appeal therefore succeeds to this extend.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 4TH DAY OF NOVEMBER, 2021.

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ALI-ARONI

JUDGE