



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 41 OF 2019**

**JAMAA DAHIR SHEIKH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. Cosmas Maundu,*

*Chief Magistrate Garissa in Chief Magistrate Case No. 39 of 2019*

*delivered 31<sup>st</sup> October 2019)*

**JUDGEMENT**

**Background**

1. The appellant herein **Jamaa Dahir Sheikh** was charged, tried, convicted and sentenced to twenty-five (25) years imprisonment for the offence of Defilement contrary to **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act.** (The Act)
2. The particulars of the offence are that on the 26<sup>th</sup> October 2018 at about 1300hrs at [Particulars Withheld] Area in Garissa Township within Garissa County the Appellant caused his genital organs namely penis to penetrate the genital organ namely anus of **KAS** (name withheld) a child aged 10 years.
3. Being aggrieved and dissatisfied with the trial court's decision the appellant filed grounds of appeal on 5<sup>th</sup> November 2019 as follows;
  - a. **That the learned trial magistrate erred in law and in fact in convicting the appellant without considering that the prosecution evidence was not enough to warrant a safe conviction.**
  - b. **That the learned trial magistrate erred in law and in fact in convicting the appellant without considering that there were no eye witnesses who witnessed the alleged offence hence the evidence adduced was hearsay.**
  - c. **That the alleged doctors report was incomplete due to the fact that he did not bother to examine me.**
  - d. **That the trial magistrate erred in law and in fact in failing to consider the bad relations between the appellant and his wife and that the complainant's evidence had been influenced by the differences.**
  - e. **That the prosecution witness's testimony was inconsistent with the charge sheet.**
  - f. **That the trial magistrate failed to consider the appellants defence which was firm enough to rebut the prosecution's evidence.**

**Submissions**

4. At the hearing of the Appeal the appellant denied that he committed the alleged act and further questioned why the prosecution did not call witnesses. If at all the offence was committed by the roadside as alleged.

5. The Respondent on its part urged that the age of the complainant was proved by her own testimony and the Birth Notification card. There was proper identification since the complainant testified that she knew the appellant before the alleged incident, further penetration was proved by the evidence of the complainant and that of the clerical officer. The offence was proved, Appeal ought to be dismissed.

### **Analysis and Determination**

6. As this is a first appeal, the Court is required to reconsider, evaluate and analyze the evidence afresh in order to arrive at an independent opinion bearing in mind that it neither saw nor heard the witnesses testify [see **Okeno v Republic [1972] EA 32**].

7. **PW1 K.A.S**, the complainant herein testified that she is aged 11 years old. A birth notification was produced in evidence. Further she testified that on xx/xx/xxxx at 1:00 p.m. as she was walking from [Particulars Withheld] having gone for some vegetable from her mother, and as she headed back, she came across the appellant, who she had known as a watchman at Excel High School. The Appellant followed her, on noticing this she ran but fell and the appellant caught up with her pulled her hijab, took her behind a block of building stones and sodomised her.

8. After the incident she was afraid to tell her parents what had transpired as the appellants act injured her and she became incontinent. The situation was bad and after twenty days she informed her mother who took her to Garissa County hospital and a private hospital where she was offered treatment. Thereafter the matter was reported to the police and the Appellant arrested. An identification parade was conducted where she positively identified the appellant.

In cross-examination she was categorical that it was the appellant who defiled her.

9. **PW2 HH** testified that she is the mother to the complainant and carries business at [Particulars Withheld] market. That on the material day she had asked the complainant to get food stuff for the house from her at the market. Ten (10) days later the complainant informed her that she had been sodomised by the appellant as she came from the market and was incontinent. The witness sought for medical assistance from a pharmacist to no avail, she then took the child to Garissa County Referral Hospital, the child did not improve and she had to take her to a second hospital. With the help of a children's rights NGO, she reported the matter to the police where together with her daughter they were interrogated. The Appellant was thereafter arrested. She was known to the Appellant as a watchman at a school.

10. **PW3 Dr. MacDonald Kidambi** is a clinical officer attached to Garissa County Referral Hospital. He testified that the complainant came to their facility on xx/xx/xxxx with a defilement allegation. Upon examination she was found to have lost sphinary control. He assessed injury to have been five weeks old and classified the same as grievous harm. He formed the opinion that there was sufficient proof that the minor was defiled. He filled the P3 form.

11. **PW4 Robert Ndiema** confirmed that he took statements from the complainant and **PW2**. He also issued the complainant with a P3 form that was filled at Garissa County Referral Hospital. On 3/12/2018 they arrested the Appellant who was later identified by the complainant at an identification parade.

12. **PW5 Inspector Duncan Otieno** conducted the identification parade. He informed the Court that the Appellant stood as the 5<sup>th</sup> person on the line and was positively identified by the complainant. He also testified that the Appellant did not raise any objections at the parade. He produced the I.D. parade form and the certified copy of birth notification as exhibits in the case.

13. On being placed on his defence, the appellant testified that he is a watchman at Excel Secondary School. That he was mistakenly identified and prosecuted as he did not commit the alleged offence.

14. In order for the offence of defilement to be proved the following ingredients must be established;

**I. age of the victim,**

**II. penetration and**

**III. identification or recognition of the offender.**

15. The age of the complainant is not in dispute. She informed the court of her age which was supported by a notification of birth bearing the date of birth. The court therefore finds as a matter of fact that the complainant was aged 11 years at the time of the alleged incident and therefore a minor.

16. The complainant in her testimony stated as follows; -

**“I passed the accused person. I reached where there was a corner. After walking a short distance, I saw the accused person following me. I started running. I fell down. I stood up. I started running again. I fell down. Accused reached where I was and he pulled my Hijab. He took the vegetables I was carrying. He placed them on the side. I started crying. He ordered me to keep quiet. He held my hand. He took me behind some stones. The stones had been poured there. They were building stones. He removed my trouser. He also removed his trouser. I was not wearing a panty. He made me lie facing downwards. He came behind me. He inserted a big thing inside my anus. I did not see the object which he inserted in my anus.**

**I felt the big thing inside my anus. It was part of his body. Later he asked me to put my trouser. When I wore my trouser,**

**he ordered me to go home.”**

From the above extract of the complainant’s testimony, she gave graphic details of how the Appellant accosted her and defiled her.

She further stated; -

**“After about 20 days I informed my mother. I used to pass stool a lot that is why I informed my mother. I had no control. I could not control my bowels. My mother took me to hospital.....”**

17. **PW3** a clinical officer at the Garissa County Referral Hospital examined the complainant and found that she had lost control of her bowels. There was no grip of sphincter muscle. He concluded that the injury was as a result of the insertion of the penis and classified the degree of injury as grievous harm.

18. The evidence of penetration of the complainant was clearly describe by her and left no doubt in the mind of the court that she told the truth. This evidence was corroborated by **PW5** thus proving the second ingredient.

19. The complainant told the court that she used to see the Appellant who manned a school gate. He was a person known to her and on the material day she saw him twice as she went to the market and on her way back. In deed the police arrested him at the same place. The court is convinced that the complainant knew the perpetrator well and recognized him at the time of the incident.

20. As was submitted on behalf of the Appellant, indeed, there are some inconsistencies in the testimonies of the witnesses. The question to ask is if the same are so grave as to affect the substance of the prosecution evidence. The Court of Appeal in **Erick Onyango Odeng’ v. Republic [2014]eKLR** cited with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in wherein it was held; -

**“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”**

The court guided accordingly finds that the contradictions and or inconsistencies are not so grave and do not in anyway affect the substance of the prosecution case.

21. There is an allegation that the appellant was being incriminated by the complainant based on differences he had with his wife. The Court notes that during the trial the appellant never sought to cross-examine on the issue. This appears to be an afterthought.

22. In his defence the appellant only alleged that this was a case of mistaken identity, weighed against the prosecution’s evidence the same did not controvert the prosecution’s case.

23. Lastly the appellant took issue with the fact that he was not medically examined. **Section 36(1) of the Sexual Offences Act** provides as follows:

**“Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”(emphasize added)**

24. Further, in **Robert Mutungi Muumbi v Republic [2015] eKLR** the Court cited the case of **George Kioji Versus Republic Criminal Appeal no. 270 of 2012 Nyeri** where it had expressed itself thus on proof of commission of a sexual offence:

**“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond any reasonable doubts that the defilement was perpetrated by the accused person. In deed under the proviso to section 124 of the Evidence Act Cap 80 laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone if the court believes the victim and records the reason for that believe,”**

25. The Court resonates with the sentiments made in the above case. Further, the provision of Section 36 of the Sexual Offences Act is not couched in mandatory terms. Medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.

26. Based on the above the court is of the opinion that the conviction was proper and finds no reason to interfere with the same. As for the sentence the same is within the law.

27. The appeal is found to lack merit and is hereby dismissed.

**DATED SIGNED & DELIVERED AT GARISSA THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2021**

**ALI-ARONI**

**JUDGE**

**In the presence of; -**

Present in person.....Appellant

Mr. Mulati.....for the state