REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 2 OF 2019

ABUKAR BASHIR ISSACK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Resident Magistrate

Hon. D. K. Mtai in the Senior Resident Magistrate's Court at Mandera in Criminal Case No. 36 of 2018)

JUDGEMENT

1. The appellant was charged with offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. Particulars being that on 10/1/2018 at [particulars withheld], Mandera East Sub-County, Mandera County, intentionally caused his penis to enter the anus of AAM a boy child aged 2 years.

2. Alternative charge was committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

3. On same particular touched anus of a boy child aged 2 years with his penis.

4. He pleaded not guilty and matter was fully heard and he was found guilty, convicted and sentenced to serve life sentence.

5. Being dissatisfied with the above decision he lodged instant appeal and set out the grounds thereof which can be compressed as follows:-

(1) Whether prosecution proved its case beyond reasonable doubt?

(2) Whether his defence was considered?

(3) Whether the sentence is harsh, excessive and unconstitutional?

6. Parties were directed to canvas appeal via submissions. Prosecution relied on evidence on record which appellant filed handwritten submissions.

7. After going through the evidence adduced and submissions on record, I find the issues are:

(1) Did prosecution prove case to the required standard?

(2) Was sentence excessive?

ANALYSIS AND DETERMINATION

8. I have carefully considered the evidence on record. The appellant is charged with the main count with the offence of defilement contrary to section 8(1) of the Sexual Offences Act which provides that any person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

9. Section 8(2) of the Sexual Offences Act further provides that any person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. Section 2 of the Sexual Offences Act defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

10. Under section 2 of the Sexual Offences Act genital organ is defiled as the whole or part of male or female genital organs and includes the anus. The prosecution's case herein is that the appellant intentionally caused his penis to penetrate the anus of AAM, a male child aged 2½ years.

11. Evidence relating to the age of AAM was adduced by PW2 and PW4. PW2 HH, who is a AAM's biological mother testified in court on the 8th May 2018 which is about months after the offence herein was committed and stated that AAM was born neither did she produce a birth certificate, clinic card or any other document to support her testimony.

12. She however availed AAM in court on the same day and by physical observation he appeared to this court to be a child between the age of 1 and 3 years.

13. Further thereto the evidence of PW2 was corroborated by the evidence of PW4, a medical doctor, who produced in court a P3 form (Pexh 1) which was prepared and signed by one Dr. Yunis Hussein who had examined AAM on the 11th January 2018 and estimated his age to be 2 years old. The issue of AAM's age was not contested or challenged by the appellant and is therefore uncontroverted.

14. In the case of Francis Omuron vs Uganda Cr. Appeal No. 2 of 2000 the Court of Appeal of Uganda held as follows on how age is to be proven:

> **"In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian and by observation and common sense."**

15. On the basis of the evidence tendered by PW2 as corroborated by PW4 together with the trial court's own observation of the child on the 8th May 2018 the trial court was persuaded that AAM's apparent age was indeed 2 years old. The trial court stated that it had no doubt in it's mind that AAM was a child below the age of 11 years.

16. On the issue of penetration, PW4 identified and produced in court a P3 form dated 11th January 2018 (Pexh 1) in respect to AAM which had been prepared and signed by one Dr. Yunis Hussein who examined AAM on the 11th January 2018.

17. Dr. Yunis examined the child's trouser (Pexh 2) and found that it had blood stains around the area covering the anal region. He also noted that the child was crying and appeared agitated. He was also fearful even to his mother on being touched.

18. On examination of the anal region Dr. Yunis found lacerations at the anal opening and noted some bleeding and presence of some whitish fluids which were seminal in nature. He therefore concluded that the injury may have been as a result of a forceful penetration by a male penis. The evidence of PW4 corroborated the evidence of PW2 who is the mother to AAM.

19. She testified that on the 10th January 2018 at about 6.30pm she placed the child to sleep on the verandah at home and proceeded to a shop nearby where she remained for about 15 minutes before turning home. The appellant, who resides in a room within the same compound as PW2, was the only other person present apart from AAM.

20. When PW2 returned home she found the appellant seated on a mattress where AAM had been sleeping. AAM was then crying and bleeding from the anus hence she suspected that the appellant had defiled AAM. She claimed that the appellant then told her that the devil had made him sodomise AAM.

21. Immediately thereafter she screamed and alerted one Amran and Saadia who arrived at the scene. PW2 did not disclose to the trial court what action Amran and Saadia took or whether they had examined the AAM or confronted the appellant.

22. PW2 however claimed that the appellant later locked himself in his room where he remained until about 1.00 am when he was arrested by KPR officers led by PW1 who had been called by one Nunow Dube on the instructions of PW2.

23. Saadia Amran and Nunow Dube did not appear before the trial court to tender their evidence to explain the conditions under which they found AAM in at the time they arrived at the scene.

24. In effect it was only the evidence of PW2 which place the appellant at the scene of the offence at the time it was committed. PW1 who was the arresting officer arrived at the scene at about 1.00am. He did not know what time the offence was committed or who the perpetrator was hence his evidence relating to the identity of the perpetrator was premised on what he had been told by PW2.

25. The appellant in his evidence intimated that he was not present at the scene at the time when the offence is said to have been committed. He did not dispute the fact that he resided in a room within the same compound where AAM and PW2 resided but claimed that he arrived home on the material day from work to be confronted with allegations by PW2 that he had committed the sexual assault against AAM.

26. Whether the appellant was present at scene at the time (or shortly thereafter) the offence was committed or whether AAM had indeed been left in his custody prior to the incident is mater that has been asserted by PW2 and denied by the appellant.

27. However I see no reason why PW2, with the intention of fabricating the charge herein, would falsely claim that she had left AAM at home with the appellant. PW2 and the appellant are relatives who have resided together in the same compound for about 2 months without any history, present or past, of any conflict or disagreement.

28. In the circumstances I find the evidence of PW2 to be more credible, believable and sufficient to prove that the appellant was at the scene of the crime at the time it was committed.

29. It therefore follows that nobody else could have committed the sexual assault against AAM except the appellant since there was nobody else at the scene prior to the incident save for the appellant and AAM.

30. The evidence of PW2 that the appellant was the perpetrator of the offence further derives credence from the evidence from the evidence adduced by PW4.

31. He stated that Dr. Yunis had examined the appellant on the 11th January 2018 at Mandera County Referral Hospital, a fact which was acknowledged by the appellant.

32. His findings thereof were that the appellant's clothings were wet and that there were some seminal fluids around his penis region which indicated that the appellant had very recently ejaculated. He therefore concluded, as recorded at part 6 of the P3 form (Pexh 1) that:

> **"There is sufficient evidence to suggest that the accused person may have defiled the complainant based on the findings from examination of both the accused person and the complainant."**

33. From the evidence on record as adduced by PW1, PW2 and PW3 the appellant was arrested on the night of 10th January 2018 and escorted to Mandera Police Station where he was detained. Thereafter he was escorted by PW3 together with PW2 and AAM to Mandera County Referral Hospital.

34. The appellant and AAM were then examined by Dr. Yunis Hussein who recorded his findings as quoted above. His conclusion thereof was entirely premised on what he had observed as an expert in the medical field.

35. Though there was no eye witness account of the commission of the offence, the evidence on record directly point at the accused person as the perpetrator of the sexual assault against AAM.

36. In light of the foregoing I find that all the ingredients that constitute the offence of defilement under section 8(1), (2) of the Sexual Offences Act were proved beyond any reasonable doubt by the prosecution.

37. Thus the finds that the appeal on conviction has no merit. On sentence the court finds that the appellant was awarded life sentence as a mandatory sentence without his mitigations being considered.

38. The fact that he was a first offender ought to have considered along with other mitigations which would have persuaded the trial court that in the circumstances life sentence would be harsh and excessive.

39. Further the supreme court case of Francis Kariuoko Muruatetu 2017 eklr and subsequent superior courts decisions have changed narrative on mandatory nature /aspect of the sentences by declaring them unconstitutional.

40. Thus the will temper with the sentence lessen and/or diminish its harshness and excessiveness.

41. Thus the court makes the following orders;

> **i) Appeal is dismissed on conviction and same is upheld.**
>
> **ii) The life sentence is set aside and in lieu it is substituted with an order that appellant will be sentenced by the trial court at Mandera Law Courts. File to be sent to Mandera Magistrate Court for sentencing.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 18TH DAY OF FEBRUARY, 2020.

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C. KARIUKI

JUDGE