



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 121 OF 2016**

***(From Original Conviction and Sentence in Criminal Case No. 1894 of 2010 of the PM's Court at Kwale: Hon. E. K. Usui Macharia Ag. SPM)***

**HAMISI MASUDI GAMBERE.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act and alternative count of indecent act with a girl contrary to Section 11(1) of the Sexual Offences Act. He was found guilty of defilement of a girl contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act and sentenced to serve fifteen years in prison. The particulars of the offence were that on diverse dates of the month of March, 2010 and April, 2010 at Msambweni Location, Kwale County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of MN a child aged 17 years old. He denied the charges. The prosecution called in a total of seven witness and after a full trial, the Appellant was convicted on the main count of defilement and sentenced to serve 15 years imprisonment.

2. Being dissatisfied with the conviction and sentencing, the Appellant filed this appeal based on five grounds as follows:

(a) The learned trial magistrate erred both in law and fact in convicting the Appellant and sentencing him to serve 15 years imprisonment on a fatally and purely defective charge as reflected on the fact of record and acknowledged by the trial magistrate in his Judgment.

(b) The learned trial magistrate erred in law and fact in failing to appreciate that the prosecution case failed to meet the threshold of corroboration of evidence on material facts and wrongly went ahead to convict and sentence the Appellant on uncorroborated evidence.

(c) The learned trial magistrate erred in law and fact in failing to consider the inconsistency of the evidence given against the Appellant.

(d) The learned trial magistrate erred in law and fact by sentencing the Appellant without justifying herself to the exact age of the complainant.

(e) The learned trial magistrate wrongly and unfairly failed to appreciate the Appellant's well corroborated and water tight defence of high probative value which watered down the prosecution evidence.

3. The prosecution called a total of seven (7) witnesses. PW 1, the complainant, vividly narrated how the Appellant entered her mother's house where the accused was and forcefully raped or had sex with her, and telling her that he would marry her. The complainant did not inform anybody of this incident until after five months when she found she was pregnant.

4. PW 2 was the complainant's mother who confronted her daughter after five months when the pregnancy became visible and she opened up and told the story.

5. PW 3 was the complainant's father who was also the employer of the Appellant in a Madrasa. He learnt of the defilement and pregnancy of her daughter from his wife.

6. PW 4 was Investigations Officer who arrested the Appellant. PW 5 was government analyst who carried out the DNA tests and concluded that there was 99.99% chance that the Appellant was the father of the complainant's child. PW 6 was the Clinical Officer who

filled in the P3 Form and also established that the complainant was 17 years at the time of examination.

7. What is noteworthy is that apart from the complainant all the prosecution witnesses did not witness the crime being committed. Further, their awareness of the offence took place more than five months after it was alleged to have happened. That notwithstanding the trial court was satisfied that their evidence could be relied upon to sustain both the conviction and sentence in this matter.

8. The Appellant in his grounds of appeal states that he was convicted on a defective charge sheet and that the evidence of witnesses were contradictory. The prosecution has dismissed this as not true and supported the conviction. The Appellant also states that the evidence of the prosecution witnesses were not corroborated and that it was unsafe to convict on the same.

9. I have carefully considered the appeal and submissions of parties. This being the first appeal I have also carefully reviewed the evidence before the court and re-evaluated the same to enable me reach an independent decision herein. Accordingly, in order to address the stated grounds of appeal, the issues I raise for determination are as follows:

(a) Was the alleged act of defilement proved?

(b) Was the sentence meted proper?

10. In answer to above issues the court notes that there was only one witness to the alleged crime, and that was the complainant. The complainant narrated how the Appellant entered their house during the day, and forced her into sexual act. She did not tell her parents of this act, because she was threatened with dire consequences by the Appellant. Five months down the line the complainant was found to be pregnant. The DNA on the child reveals that the Appellant is the father. The trial court had also noted that the child was born within nine months from the date of alleged defilement. PW 6, the Clinical Officer who examined the complainant, testified that the complainant's hymen was absent, that she was 26 weeks pregnant and concluded that she had penetrative sexual act and produced a P3 Form as exhibit. Further, the complainant testified that she had never had sex before, and that it was her first sexual act when the Appellant defiled her. If the Appellant denies all these, then it also means that the Appellant is lying to the court because the DNA result reveals him to be the father of the complainant's child.

11. There was allegation by the Appellant that the learned trial magistrate did not take into account the Appellant's defence. The Appellant had stated that the complainant's father was unhappy with him as a teacher at the Madrassa, and that the charges herein were a witch hunt by the said father. However, the trial court, rightfully in my opinion, found such allegation to be a peripheral one. It cannot displace the fact that it is now proved that the Appellant had penetrative sex with the complainant out of which a child was born. Further, the Appellant did not give any other circumstances under which he may have fathered the complainant's child. He did not demonstrate a period of friendship, if at all, with the complainant during which a sexual act could have taken place in order for him to have fathered the said child. While the Appellant agrees that he had expressed interest to marry the complainant, there is no evidence that the two courted, despite the complainant being under age.

12. On the issue that the charge was defective, this court finds the allegation to be mere allegation without proof and the same is dismissed.

13. On the second issue as to whether the sentence meted out was proper, the learned trial magistrate jailed the appellant for 15 years. It is my view that the sentence is a little too steep. The Appellant is the father of the complainant's child who needs father care. Therefore, in these circumstances, it should be the policy of sentencing to give the minimum sentence allowable in law to enable the father serve time and return to the society to take care of his child. Accordingly therefore, I reduce the sentence herein to eleven (11) years.

14. In the upshot, this court upholds the conviction, of the appellant but reduces sentence from fifteen (15) years to eleven (11) years.

That is the Judgment of the Court.

**Dated, Signed and Delivered in Mombasa this 15<sup>th</sup> day of January, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Isaboke for DPP

Appellant in person