REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 38 OF 2018

PATRICK WAFULA MWASI…….. APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

(Being an appeal from the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 1126 of 2015 by Hon. C. Maundu (CM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Garissa with defilement contrary to section 8(1) as read with section (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that on 9th October 2015 at [particulars withheld] Academy in Garissa County unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina FAB (name withheld) a child aged 12 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place he intentionally committed an indecent act by rubbing the vagina of FAB (name withheld) a child aged 12 years with his penis.

3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to serve 20 years imprisonment.

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his appeal on 15th July 2018. Before the appeal was heard however, he filed amended grounds of appeal as well as written submissions. His grounds of appeal in the amended petition of appeal are as follows:-

> **(1) The trial magistrate erred in law and fact to convict him without considering that the charge sheet of the prosecution was fatally defective contrary to section 134(1) of the Criminal Procedure Code.**
>
> **(2) The trial magistrate erred in law and fact in convicting him without considering that the prosecution's case was not proved beyond reasonable doubt contrary to section 109, 110 and 111 of the Evidence Act.**
>
> **(3) The trial magistrate erred in law and fact to convict him without adhering to the provisions of section 235(a), (b), (c) of the Criminal Procedure Code.**
>
> **(4) The trial magistrate erred in law and fact to convict him without considering the massive contradictions and inconsistencies in the prosecution evidence adduced in court contrary to section 163 of the Evidence Act.**
>
> **(5) The trial magistrate failed to note that the alleged penetration as per the doctor's report was caused by the FGM which had chopped of the hymen.**
>
> **(6) That there was no age assessment to reveal the real age of the complainant.**
>
> **(7) That the trial magistrate was biased and unfair to the defence in making the decision without considering that this case emanated from an existing vendetta.**

5. At the hearing of the appeal, the appellant stated that though PW1 said that offence was committed on 9th October 2015 and a report made to PW3 on the same day, no report was made to the police or the hospital that day. The appellant also complained that PW4 the father of PW1 said that he arrived at night the same day and he reported to the police but the police did not say so.

6. The learned Principal Prosecuting Counsel Mr. Okemwa stated that this was a first appeal and the court was required to re-evaluate the evidence.

7. With regard to age, counsel submitted that the complainant said she was 12 years old and an age assessment conducted confirmed that age, however, counsel felt that the court should consider whether the document met the required standard.

8.With regard to penetration, counsel submitted that PW1 said she was defiled at break time on a sofa set and was later treated at the Provincial General Hospital. The documents from the hospital were to the conclusion that there were signs of penetration.

9.With regard to the perpetrator, counsel submitted that the appellant was well known to the complainant as he was her teacher. Identification was thus positive.

10. In response to the Prosecuting Counsel's submissions, the appellant stated that age of the complainant was not scientifically determined and the person who assessed the age was not identified.

11. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. In doing so, I am required to bear in mind that I did not have the opportunity to see the witnesses testify in order to determine their demeanor and give due allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32.**

12. I have re-evaluated all the evidence on record, I have perused the judgment of the trial court and I have considered the submissions of the appellant both oral and written as well as the submissions of the learned Prosecuting Counsel. I must say at the outset that the predicament of not having seen witnesses testify to determine their demeanor was also applicable to the magistrate who delivered judgement in the trial court. This was because all evidence for the prosecution and the defence was tendered before Hon. Margaret Wachira (CM). The judgement was however written and delivered by Hon. Maundu (CM). Therefore, the magistrate who delivered the judgment just like this appellate court did not have the opportunity to see witnesses testify to determine their demeanor.

13. At the trial, the prosecution called 7 witnesses. PW1 was the complainant who stated that she was a Std. 2 pupil aged 12 years and was defiled at 9 am in the school in the headmaster's office by the headmaster who was the appellant. She also stated that a friend and schoolmate PW2 BI peeped through a window and saw the appellant defiling her. Both witnesses said that they reported the incident to the mother of the complainant PW3 FB on the same day.

14. PW4 AB the father of the complainant said he was called on the phone the same day by his wife PW3 and came to Garissa and the next day he proceeded to the school and when the manager of the school confirmed the incident, he reported the matter to the police. PW5 Jeremiah Musbei a Clinical Officer at Garissa Provincial General Hospital said that on 13/10/2015 he conducted medical examination on the complainant and found an FGM scar and the hymen was missing. He also found extremely red discharge which was evidence of a vaginal penetration. There was also whitish vaginal discharge which was abnormal and he thought that it must have emanated from a man ejaculated even though spermatozoa were not present. PW6 was PC Angatho Wanjugu the investigating officer who said that she received a report of the incident on 13/10/2015 at 10.30 am from the father of the complainant PW4. This witness produced an age assessment form. The witness also said that according to her investigations, PW2 informed the mother of the complainant PW3 about the incident on 12/10/2015. Though she conducted investigations and went to the school, she did not enter the headmaster's office and instead entered the manager's office.

15. The appellant gave a sworn defence testimony in which he described the physical facilities or buildings of the school and how the school operated. The day in question was a Friday and he stated that the complainant's class teacher by the name S made a report to him that some pupils including the complainant had refused to eat lunch. The report was made at 1 pm and he investigated the incident and punished the said pupils. According to him, this punishment was the cause of the grudge to implicate him. He denied calling or defiling the complainant. He said that all occurrences of the school were recorded in the log book.

16. The prosecution was required to prove the three elements of the offence of defilement beyond any reasonable doubt. These elements were the age of the complainant, penetration and lastly the identity of the culprit.

17. With regard to age, I have considered the evidence on record. The complainant said that she was aged 12 years. The mother PW3 did not indicate when she was born. The father of the complainant PW4 also did not indicate when the complainant was born. No birth certificate or notification of birth of the complainant was tendered in court. What was produced in court was an age assessment report dated 13/10/2015 and produced as exhibit No. 4. The said document is headed Provincial General Hospital Garissa but does not say the process that was used in determining the age. It is signed by somebody whose name is not indicated. It only says that it was done by a dental officer whose qualifications are also not given in that report. In my view, that report, even if properly produced in court could not be relied upon as being an assessment of age of the complainant.

18. In addition to the above concerns, the report was produced by the investigating officer PW6, who was not the maker of the report and no explanation was given why the maker could not produce the same to comply with section 77 of the Evidence Act (Cap. 80). In effect therefore, the report was hearsay evidence and not admissible. It could not be relied upon to establish the age of the complainant.

19. In my view therefore, the prosecution did not prove beyond any reasonable doubt that the complainant was aged 12 years. The fact that she was a Std. 2 pupil in Primary School did not mean that she was 12 years old as some pupils go to school late in life.

20. I now go to the issue of penetration which is also an important element of the offence. The complainant said that she was penetrated sexually by the appellant on that day. She went further to say that she had been previously penetrated by the appellant sexually on several occasions and even added that she was sexually penetrated by the appellant after the day of the incident. The appellant was however not charged with defilement for the previous claimed penetrations and the subsequent sexual penetration.

21. With regard to the date in question that is 9/10/2015, it is worth noting that the complainant was taken to hospital on 13/10/2015 which was atleast four days later. The conclusion of the Clinical Officer PW5 was that there was reddening of the vaginal discharge from which he considered that there must have been sexual penetration. Secondly, the hymen was missing and that to him meant that there was sexual penetration. Thirdly, he said he saw whitish discharge which must have come from discharge from a man and that could confirm that there was sexual penetration. The Clinical Officer also said he found many epithelial cells to indicate friction on the vaginal canal showing sexual penetration.

22. With regard to the reddening of the discharge, there is no proof that that discharge was blood from the complainant. There is no laboratory report on that. With regard to the missing hymen, we are not told when the hymen was broken, whether recent or long time ago. With regard to epithelial cells, we are not also told whether those epithelial cells would be connected to penetration of sexual nature which occurred on 9/10/2015, which was atleast four days previously. With regard to the alleged male discharge which was said to be whitish, no spermatozoa were found. In addition, there is no indication of a lab report that the discharge was human semen. Therefore, the conclusion that it was semen or male discharge is just guess work.

23. In those circumstances, I find that penetration of a sexual nature was not proved to have occurred on the 9/10/2015 as alleged by the prosecution.

24. With regard to the identity of the culprit, indeed the appellant was the head teacher of the complainant. The complainant knew him well. PW2 a pupil of the same school also knew him well. The time of the alleged incident was 9 am which was in broad daylight.

25. There were a number of inconsistencies and loose ends in the prosecution evidence however, that it cannot be said that the prosecution proved that even if the incident occurred, it was caused by the appellant in the way described and on the date given.

26. The description given of the scene of crime, the office of the headmaster, is not consistent with the allegation to connect the appellant to defilement. The office is in the school compound very close to the manager's office, visible from classrooms. The investigating officer did not enter that office to find whether the description given was consistent with the allegations. Instead she merely went to the manager's office leaving a huge gap in the prosecution's evidence.

27. The second disturbing thing is that though the incident is alleged to have occurred on 9/10/2015 and PW1, PW2 and PW4 claimed that the incident was reported to PW3 on the same 9/10/2015 and that PW3 reported the incident to PW4 who came to Garissa on the same day and reported the incident the next day to the manager of the school who appears to have known the incident, as well as to the police, PW6 the investigating officer said that the incident was reported to her on 13/10/2015 which contradicts the evidence of the other prosecution witnesses. In addition, all the hospital documents also show that the medical action and reports were done on 13/10/2015, which is consistent with PW6 evidence.

28. In my view therefore, even assuming there was sexual activity between the complainant and a man, such could not be related to the allegations of 9/10/2015. The prosecution thus did not prove beyond reasonable doubt that the culprit was the appellant.

29. I will have to mention here that in addition to the fact that the magistrate who wrote the judgment did not have the advantage of seeing witnesses testify, the magistrate also failed to weigh the defence of the appellant as against the evidence of the prosecution. In the analysis and determination in the judgment the learned magistrate proceeded on the premise that he was dealing with truthful prosecution witnesses and did not mention or consider the defence of the appellant or evaluate it against the evidence of the prosecution witnesses. He merely dismissed it by stating that he was not convinced that the charge against the appellant was a frame up because he had punished girls who had refused to take lunch, which in my view was an error.

30. To conclude, I find merit in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that appellant be set at liberty unless otherwise lawfully held.

Dated and delivered in open court at Garissa this 19th February, 2019.

…….

George Dulu

JUDGE