



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 57 OF 2015

ABASS ABDULLAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from conviction and sentence in Garissa Chief Magistrate

Criminal Case No. 794 of 2014 by Hon. M. Wachira (CM)

JUDGEMENT

1. The Appellant was charged with offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. Particulars being that on 24/4/2014 at [particulars withheld] village, Bura District, Tana River County intentionally and unlawfully did commit an act which caused penetration of genital organ namely vagina of NW (NW) a girl aged 16 years.
3. He pleaded not guilty and matter went into full trial. Appellant was found guilty and was convicted and sentenced to serve 15 years imprisonment.
4. Being aggrieved by the above decision the appellant lodged an appeal in which he complained of –
 - (1) P3 form was wrongly filled and lacked crucial information.
 - (2) That age of victim was not proved.
 - (3) That the victim was coerced or forced to give incriminating evidence against him.
 - (4) That there were contradictions in evidence adduced.
 - (5) That prosecution failed to prove its case beyond reasonable doubt.
5. When the matter came for hearing the parties agreed to canvass appeal via submissions. Both appellant and respondent filed same and served.
6. The duty of this court is to evaluate the evidence on record and reach its own conclusion. See **Okeno vs Republic**.
7. After perusing the whole record the court notes that during ***voire dire*** examination, the victim confirmed she was 16 years and in Std 7. She was a Muslim and knew the seriousness of the swearing which one must test the truth under oath because of fear of God and God's punishes if one lies. The victim would thus testify on oath. This was on 27/6/2014.
8. On 11/7/2014 the appellant sought to be furnished with witness statements and court ordered he be so provided.
9. On 27/8/2014 matter came for hearing again and ***voire dire*** was conducted in which victim was held to understand oath, and thus allowed to testify oath just like on 27/6/2014 when matter was adjourned. The hearing commenced and after she introduced herself the court noted "the witness declines to speak" thus matter was adjourned to 3 pm. Then later on oath she stated "that on 25/4/2014 at 11.00 pm she left her

parents' house and went towards accused house where she spent a night and they did not have sexual intercourse; that the accused did not penetrate his penis into her vagina.

10. The following morning she was taken home. They had agreed the previous day that she would go to his house. Then court noted again, "witness goes silent again".

11. Prosecution again sought an adjournment without giving accused a hearing on adjournment issue, the court adjourned matter to 10/9/2014. Accused was remanded till then.

12. After mentions and hearing amounting to 6 times, the matter came for hearing on 25/11/2014. This time the clinical officer testified as PW2 and produced P3 form which showed offence was committed on 25/4/2014 yet charge sheet talked of 26/4/2014 as date of the offence. Only part (c) 1 and 2, page 3 of the P3 form were filled which noted only hymen absent, whitish discharge. In testimony the PW2 stated that hymen was broken, the girl was pregnant – yet P3 form had no such information on pregnancy issue.

13. Come 23/3/2015 after a period running from 27/8/2014 when victim testified to 23/3/2015 close to 7 months she was back on the witness box. This time she changed story on oath that she had sex with the appellant. She alleged during last time she testified the appellant was beckoning her while testifying thus had denied they had sex.

14. Even if without looking at the evidence of the other witness PW3 her father and investigating officer who were called, I find the record disclosed gross violation of appellant rights of fair trial.

15. First he sought statements of witnesses to be called but despite court ordering same be supplied, there was no indication they were supplied. In any event the order for supply was made after PW1 had started testifying. Of course this breaches the provisions of Article 25 and 50 of the Constitution on fair trial.

16. Further the complainant who was 16 years and held to understand nature of the oath clearly testified that no sex or penetration had occurred between her and the appellant. But instead of asking the accused to cross examine her, the prosecutor applied for adjournment which was granted without the appellant being asked whether he objected to the same.

17. After 7 – 8 months the same PW1 is brought to testify after clinical officer PW2 testified and made an about turn on her earlier testimony on oath. This justifies the appellant as he submits that she must have been coerced to change the story and/or couched.

18. Taking into account that the appellant was unrepresented, the trial was being casually conducted in total disregard of appellant's right to fair trial which is an absolute right under Article 25 of the Constitution.

19. The trial court in its judgement, it ignored the aspect of the PW1 change of story on oath which was fundamental and especially her being the only witness who allegedly witnessed the incident.

20. The appellant has already spent 5 or so years in prison thus the court finds that it would be unfair to order for a retrial. This is also strengthened by the fact that the P3 and charge sheet are at variance on the alleged date of the offence.

21. Thus this court makes the following orders –

(i) The conviction is quashed, the sentence is set aside and appellant is set at liberty unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT GARISSA THIS 13TH DAY OF JUNE, 2019

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HON. CHARLES KARIUKI

JUDGE