REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 4 OF 2016

ABDALLAH OMAR SHORA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa CM Criminal Case No.738 of 2014 – M. W. Wachira CM)

JUDGEMENT

1. The appellant was charged in the Chief Magistrate's court at Garissa with defilement of a child contrary to Section 8(1) (3) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on 23rd December, 2013 at [particulars withheld] area in Fafi Sub-County within Garissa County unlawfully and intentionally caused his penis to penetrate the vagina of MMD a child aged 13 years.

2. In the alternative he was charged with 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 intentionally and unlawfully committed an indecent act with MMD a child aged 13 years by touching her private parts namely vagina.

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 initial grounds of appeal on 22nd January, 2016. Before the appeal was heard however, he filed an amended petition of appeal as well as written submissions. His amended grounds of appeal which he relied upon are as follows:-

> **1. The trial magistrate erred in convicting him without considering that his fundamental rights were infringed as he was not allowed to exercise his rights under Section 200 of the Criminal Procedure Code.**
>
> **2. Trial magistrate erred in convicting him without considering that the age of the complainant was not proved beyond reasonable doubt.**
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> **3. The trial magistrate erred in convicting him without considering that he complainant's evidence was inconsistence and full of fabrications.**
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> **4. The medical evidence was not supportive of the charge.**
>
> **5. The trial magistrate erred in convicting him as the prosecution case was not proved beyond reasonable doubt contrary to Section 109 of the Evidence Act as there was a vendetta existing between him and the complainant.**
>
> **6. The magistrate erred in convicting him without considering that prosecution evidence was contradictory and inconsistent contrary to Section 163 of the Evidence Act.**

5. At the hearing of the appeal, the appellant relied on his written submissions and opted not to make oral submissions. I have perused and considered the written submissions of the appellant.

6. The learned Principal Prosecuting Counsel Mr. Okemwa, submitted that the prosecution called 5 witnesses, and that the complainant PW1 who was 13 years at the time of the incident gave a detailed story of what happened but did not inform anybody about the incident until a teacher informed the parents about the pregnancy 4 months afterwards.

7. According to counsel, from the evidence on record, only PW1 the complainant connected the appellant to the offence. Counsel felt that

though the court could convict on the evidence of a single witness who was a victim of the sexual offence, this court should reconsider the evidence in record and come into its own conclusions.

8. This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see 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.

9. In criminal cases the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. The accused does not have a burden to prove his innocence. See the case of LEONARD ANISETH –VS- REPUBLIC [1963] EA 206.

10. Having considered the evidence on record, I find that the age of the complainant was not established. The complainant PW 1 and her father PW 2 O I A testified in this case. The complainant stated that she was 3 years of age. The father PW3 also stated that she was 13 years old. No document was however produced to support that allegation nor was the complainant medically examined on her age. It was only the entry by the police on the P3 form which indicated that the complainant was 13 years and then overwritten to read 14 years. In my view, in the circumstances of this case where the complainant was pregnant, some additional evidence on her age needed to be provided as none of the witness gave the date of birth of the complainant. School records might have been of assistance, and short of that a medical age assessment of the complainant should have been done. I find that the prosecution did not prove beyond reasonable doubt that the complainant was below the age of 18 years.

11. The Principal Prosecuting Counsel has stated that no injuries were found by the doctor or Clinical Officer who medically examined the complainant. In my view, it would not be practical to find any injuries that would suggest sexual activity, as the complainant was said to have been defiled in December 2013 while the medical examination was done in April 2014 about 4 months afterwards. However, in my view, if the prosecution wanted to prove that the appellant was the culprit then it was necessary for the prosecution to have produced evidence of DNA tests to establish the paternity of the pregnancy. The failure of the prosecution to do so, meant that prosecution failed to prove the allegations made by the complainant connecting appellant to the alleged offence. On that account also this appeal will succeed.

12. The trial was conducted by two magistrates, Hon. B.J Ndeda SPM who heard all the prosecution witnesses before Hon. Margret Wachira CM took over the case. The succeeding magistrate on request of the appellant under Section 200 of the Criminal Procedure Code (Cap. 200) ordered a fresh trial. She however later varied her orders because the prosecution witnesses who had previously testified were not available as being pastoralists they had relocated. She then heard the defence case and also prepared and delivered the judgement. The appellant has complained that this denied him his statutory rights.

13. In my view, in the circumstances of the case and since the prosecution witnesses would not possibly be availed, the learned magistrate was right in reviewing the earlier court orders of a fresh trial and proceeding with the trial in accordance to the provisions of Section 34 of the Evidence Act (Cap 80) and Article 159 (2) of the Constitution of Kenya 2010.

14. However, a close look at the judgement of the trial court shows that the learned magistrate mixed the proceedings in the case herein with the proceedings in another case which caused injustice to the appellant. Though she started the judgement by referring to the complainant as a female, on page 8 of her judgement she referred to a male victim which meant that she had in her mind another case file. In particular the magistrate stated as follows;

> **"In the voire dire statement of the complainant the court established that he attended madrasa lessons where he received teachings about the Quran and about being truthful. Court also established he understands the importance of being truthful and the consequences of telling lies. His evidence is not contradicted or disputed by the defence. The court is satisfied that he is a truthful witness. Her evidence is admissible under Section 124 of the Evidence Act. This court admits his evidence as credible and truthful evidence."**

15. The magistrate had also on page 7 of the judgement referred to a penis being inserted into the anus and also stated that the evidence of PW2 was that he saw injuries bleeding and discharge from the complainant's anus as he ran out of the accused's house crying. All the above findings were not supported by the evidence on record.

16. In my view, the above shows that the magistrate convicted the appellant on the evidence in another case which cannot be entertained by this court as it was wrong and illegal. I will thus allow the appeal.

17. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 6th February, 2018

George Dulu

JUDGE