REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.70 OF 2017

ABDIFATAH BASHIR.....APPELLANT/ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Court Criminal Case No. 1371 of 2013 (Hon. M. Wachira – CM)

JUDGEMENT

1. The appellant was charged in the magistrates court at Garissa with defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.The particulars of the offence were that on 5th October, 2013 at about 11.45 hours in Fafi district within Garissa County intentionally caused his penis to penetrate the vagina of DI [Particulars Withheld] a child aged 3½ 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 and unlawfully touched the vagina of DI a child aged 3½ years with his penis.

3. He denied both charges. After a full trial, he was convicted on the lesser offence of attempted defilement and sentenced to life imprisonment.

4. He has now come to this court on appeal. He filed his initial appeal in 2015. Before the appeal was heard however and with the permission of the court he filed an amended petition of appeal and written submissions which he relied upon. His grounds of appeal in the amended petition are as follows-

> **1. The trial magistrate erred in convicting him without considering that the trial was unfair in that the prosecution opted to amend the charge at the close of their case without giving him a chance to explain or make a fresh plea.**
>
> **2. The attempt by the prosecution to coach the complainant on what to say was unconstitutional and against the rule of law.**
>
> **3. The trial magistrate erred in finding him guilty in reliance on contradictory and inconsistent evidence of prosecution witnesses.**
>
> **4. The trial magistrate erred in convicting him without considering that the alleged penetration was not ascertained or proved as required in law.**
>
> **5. The medical evidence was not supportive of the complainant's allegation and penetration was not proved.**
>
> **6. Life imprisonment sentence was harsh and excessive.**
>
> **7. The prosecution evidence was tailored and fabricated in order to destroy his life due to a vendetta and ulterior motive.**

5. At the hearing of the appeal, the appellant relied on his written submission which I have perused and considered. He also added orally in court that he came from school at 12.30 pm and was arrested at home while he was with his father. He complained that the arresting officer did not testify in court.

6. Mr. Okemwa, the learned Principal Prosecuting Counsel stated that the charge was amended to reflect the correct age of the complainant as 3½ years. Counsel submitted that the medical evidence established attempted penetration. However, the witnesses who alleged to have found the appellant in the act did not testify. In addition, there were several contradictions in the evidence of prosecution witnesses. Counsel

noted also that the court convicted the appellant for attempted defilement but used section 8 (2) of the Sexual Offences Act to sentence him to life imprisonment.

7. This being a first appeal, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. See the case of **Okeno vs Republic (1972) EA 32.**

8. I will start with the technical points raised in the grounds of appeal. Firstly the appellant has complained that the charge sheet was amended late in the proceedings without him being given a chance to plead afresh. Indeed the charge sheet was amended after PW5 PC Kanjija Abdi had testified. This witness was the last prosecution witness. The appellant was recorded by the magistrate to have stated that he have no objection to the amendment of the charge changing the complainant's age from 5 year of age to 3½ years.

9. In my view, though the charge sheet was amended late in the day, I find no substantive mistake as the appellant stated that he did not have any objection to the amendment, which related only to the age of the complainant and did not affect the substance of the charge. I dismiss that complaint.

10. The appellant has complained that the prosecution acted unconstitutionally in coaching or refreshing the memory of the complainant PW2.

11. The record shows that that the complainant who was certainly a small girl was not able to give her full testimony on the first attempt and had to be stood down. An hour later, she was able to give her brief testimony without swearing.

12. In my view, there was nothing wrong or unconstitutional with the prosecution assisting in calming down the complainant who was a minor and also refreshing her memory in order to give evidence. From what the complainant said also there is nothing to show that she was repeating something that she was told to say, as what she said was very brief, and she was not even asked to identify the appellant in court. She merely said that the accused did bad things to her. I find no merits in that complaint and I dismiss the same.

13. Having said so, the prosecution was required to prove penetration, the age of the complainant, and the perpetrator of the alleged offence all beyond reasonable doubt.

14. With regard to the age of the complainant, though no birth certificate was produced in my view, all the evidence showed that she was a young girl of the age indicated in the charge sheet. The medical immunization card produced indicated the name Benam born on 20th May, 2010. That in my view was a slight misspelling of the name of the complainant used in charge sheet. I find that the two names belong to one and the same person, the complainant and that she was born in May 2010. Therefore in my view, the age of the complainant 3 ½ years at the time of the incident was proved beyond reasonable doubt.

15. The appellant was convicted of attempted defilement under Section 9 (1) of the Sexual Offences Act. It follows that it was not necessary to prove actual penetration. The medical evidence was that there was a slight injury around the clitoris. It is not clear what caused that slight injury. It may or may not be due to an attempt to defile her.

16. The crucial thing was to connect the appellant to the offence, even if there was evidence of attempted defilement. There is no evidence on record from any of the witnesses that he/she saw the appellant attempting to defile the complainant nor having found the appellant in the vicinity. There is no evidence that the small child cried or made any noise.

17. There was a mention of an eye witness by PW5 by the name of Tahil. This witness did not testify. Nor did any witness who could testify to the identity of the culprit at the scene was called to testify.

18. In my view in the circumstances of this case where the incident is said to have occurred in broad day light and in the vicinity of construction workers, if the prosecution wanted to establish that it was the appellant who committed the offence then they should have called the evidence of somebody around the construction site who could testify about the activities of the appellant at that time and place. The absence of this key witness or witnesses without any explanation from the prosecution, leads to the inference that if those witnesses were called, their narrative would have contradicted what is on record from other witness. The benefit of that adverse inference created by prosecution had to be given to the accused. I rely on the case of **Bukenya vs Uganda [1972] EA 549**.

19. In conclusion I find merits in the appeal as the prosecution did not prove that even if an attempted defilement occurred, the appellant was the culprit. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 3RD MAY, 2018

……

GEORGE DULU

JUDGE