



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 26 OF 2016**

**H A.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Garissa Chief Magistrate's Court Criminal Case No. 1606 of 2014 by Hon. M. Wachira (CM))**

**JUDGEMENT**

1. The appellant was charged in the Chief Magistrate's Court at Garissa with defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act of 2016. The particulars of the offence were that on diverse dates between 1<sup>st</sup> May, 2014 and 30<sup>th</sup> June, 2014 at [particulars withheld] within Garissa County unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina M.H. (name withheld) a child aged 16 years.

2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve twenty five (25) years imprisonment.

3. Dissatisfied with the decision of the trial court, he filed an appeal in this court in March, 2016. Before the appeal was heard however, he filed an amended petition of appeal which was written in hand, whose grounds I summarize as follows:-

**(1) The trial magistrate had erred in convicting and sentencing him without considering that the age of the complainant was not proved.**

**(2) The trial magistrate erred in convicting him without considering that the P3 Form herein did not provide any evidence as medical examination was done three months after the alleged incident.**

**(3) That there was an existing vendetta between him and the complainant's mother which resulted in the fabrication of this case against him.**

**(4) That a neighbour was responsible for the complainant's condition and though the mother of the complainant did not complain a neighbour reported the matter and he was thus brought to court.**

**(5) That the magistrate did not consider that he was the one who took the complainant to hospital after he discovered that she was not eating properly.**

4. During the hearing of the appeal, the appellant relied on his amended petition of appeal and called it written submissions. Indeed, part of the grounds of appeal are drafted in the form of submissions. He opted not to make oral submissions.

5. Mr. Okemwa the learned Principal Prosecuting Counsel submitted that the complainant was sixteen years (16) years of age at the time of incident but had turned seventeen (17) on the hearing date, and stated that from the evidence on record the age of the complainant was proved.

6. With regard to penetration, counsel submitted that the complainant was a step child of the appellant, and said that the appellant threatened her with a knife before penetrating her. Counsel submitted that though medical examination was done weeks afterwards and there was no explanation for this delay, there was evidence of pregnancy. Counsel felt that the evidence of the complainant was sufficient to establish that in deed the appellant defiled her, though no DNA test was conducted.

7. With regard to identification of the culprit, counsel submitted that the complainant knew the appellant well and as such there could be no possibility of mistaken identity.

8. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences. I have to bear in mind that I did not see witnesses testifying to determine their demeanour and give due allowance to that fact. I rely on the case of **Okeno v Republic [1972] EA 32**.
9. I have re-evaluated the evidence on record. I have also perused the judgement of the trial court.
10. In a case of defilement, the prosecution is required to prove the age of the complainant. Secondly, the prosecution is required to prove penetration. Thirdly, the prosecution is required to prove the identity of the culprit.
11. In my view, the age of the complainant PW1 was proved beyond reasonable doubt. Though no birth certificate was produced in court, the Age Assessment Form dated 19<sup>th</sup> September, 2014 was not challenged by the appellant. At that time, the complainant was assessed to be seventeen (17) years of age which meant that she was a few months older than 1<sup>st</sup> May, 2017 to 3<sup>rd</sup> June 2014 when the incident was said to have occurred. I thus find that the age of the complainant was proved beyond reasonable doubt.
12. I now come to penetration. The complainant PW1 testified on oath and said that she was then living at Garissa Child Rescue Centre. It was her evidence that on 2<sup>nd</sup> June 2014 her mother went to the market and at around lunch time when she was with her brother, her father the appellant instructed the other children to go outside to play. Her father then called her from the bathroom and when she entered the house, he held her leg dragged her from her bedroom to his bedroom, then tore her "dira" dress from the neck down into two. He then went ahead to tear her underwear, put her to a bed and threatened her with a knife and penetrated his penis into her vagina and defiled her several times and ejaculated.
13. After the appellant went away, she informed a neighbour about the incident and though the mother came back at 8 pm, she did not tell her about it. According to her, the neighbour called N informed her mother about the incident and she was then taken to Garissa Provincial General Hospital where she was found to be three months pregnant, and later gave birth to a still born child prematurely.
14. The evidence of the mother of the complainant A A W PW3 was that in July 2014 she noticed her daughter looking depressed and when she enquired the daughter/the complainant did not say anything. She then took her to a private hospital for medication and the doctor told her that she was pregnant. A neighbour then talked to the complainant who then disclosed to that neighbour that it was the appellant who had defiled her.
15. In his sworn defence which was not challenged in cross-examination by the prosecutor the appellant stated that he had marital problems with the complainant's mother who had refused to sleep with him or have sexual relation with him. He stated that such was the reason why he was implicated by the girl.
16. It is observed that the complainant PW1 said that she disclosed the incident to N. N did not tender her evidence. The younger brother of the complainant who was said to be with her when the incident occurred on 2<sup>nd</sup> June 2014 also did not give evidence. The person who gave evidence was Mohamed Dabas Adoo PW2 an employee of Child Welfare Society who took the complainant into their custody in June 2014, when Aden Ali reported to them that there was a defilement case of a child by a father.
17. PW4 Jeremiah Muhomberi of Garissa Referral Hospital stated that on 19<sup>th</sup> of September 2014 he conducted a pregnancy test on the complainant who was twenty (20) weeks five (5) days pregnant.
18. In my view, from the evidence on record, penetration of a sexual nature by a male person with the complainant occurred. That is the reason why the complainant was pregnant by the time she was medically examined.
19. However, in my view it was not proved beyond reasonable doubt by the prosecution that such sexual penetration was by the appellant.
20. Firstly, the charge gives the duration 1<sup>st</sup> May 2014 to 30<sup>th</sup> June 2014 as the period within which the appellant was said to have penetrated the complainant on diverse dates, meaning a number of times. The evidence of the complainant on record the other hand, however, was that the penetration occurred only on 2<sup>nd</sup> June 2014. It was only on that day that the appellant penetrated her several times and ejaculated. This is a serious contradiction, which affected the truthfulness of the allegations of the prosecution against the appellant.
21. Secondly, the medical evidence is that by September 2014 the complainant was pregnant, as per the P3 Form entry, for twenty (20) weeks and five (5) days. From the contents of the charge sheet and the evidence of the complainant, there is no certainty that the pregnancy occurred on the date when the complainant PW1 said that the appellant had sexual intercourse with her in June 2014 or in May 2014. This meant that the prosecution was not sure about the time or month the pregnancy occurred. The evidence of the complainant in stating that it was only on one day in June 2014 that the appellant defiled her also shows that she was not able to explain or support the allegations in the charge sheet. In my view, therefore, there was a doubt on the truthfulness of her evidence, and the benefit of that doubt should have been given by the trial court to the appellant, which I hereby do.
22. The other clear weakness in the prosecution case was their failure to call crucial witnesses such as N, the woman mentioned by the complainant as the first person she reported the incident to, and the brother of the complainant who was present when the appellant called her into the house in broad daylight and defiled her, without the prosecution giving any explanation regarding failure to call these crucial witnesses. The inference created is that the evidence of these two crucial witnesses would not have supported the evidence on record from other prosecution witnesses. Such adverse inference is sufficient to lead to an acquittal of an accused person. See the case of **Bukenya v Uganda [1972] EA 549**.
23. In the result, I find that the prosecution did not prove beyond any reasonable doubt that the appellant was the person who defiled the complainant herein. The trial court thus erred in convicting him.

24. Consequently, I 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 9<sup>th</sup> May, 2018.**

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**GEORGE DULU**

**JUDGE**