REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 110 OF 2015

MUKTAR BONAYA DASHANO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 1646 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 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 1st June 2014 and 17th October 2014 at Madogo area within Tana River County intentionally and unlawfully caused his penis to penetrate the vagina of IDO (name withheld) a child aged 14 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 between the same dates and place, intentionally touched the vagina of IDO (name withheld) a child aged 14 years with his penis.

3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to serve ten (10) years imprisonment.

4. He has now come to this court on appeal. He filed his initial petition of appeal on 18th November 2015. Before the appeal was heard however, he filed an amended petition of appeal as well as written submissions which he relied upon. His grounds of appeal in the amended petition was as follows:

> **(1) The trial magistrate erred in law and fact to convict him without considering that the age of complainant was not proved beyond reasonable doubt.**
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> **(2) The trial magistrate erred in convicting him without considering that penetration was not proved to have been caused by him.**
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> **(3) The mode of arrest was poorly instigated.**
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> **(4) The trail magistrate erred in convicting him without considering that the girl went to his uncle's house for rescue after recognizing that she was pregnant due to fear.**
>
> **(5) The trial magistrate erred in convicting him without considering that the prosecution evidence adduced was contradictory.**
>
> (6) **The trial magistrate failed to put into consideration that the evidence adduced in court by prosecution witnesses was tailored against him.**

5. At the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered. He elected to make no oral submissions.

6. The learned Principal Prosecuting Counsel Mr. Okemwa opposed the appeal and stated that the prosecution called 4 witnesses. According to counsel age was proved as the complainant said that she was aged 14. In addition, an age assessment report was relied upon.

7. According to counsel, penetration was also proved as the complainant and appellant were lovers who intended to get married and the complainant said that they were engaged in sexual intercourse a number of times which was confirmed by the medical evidence that the complainant was pregnant by then.

8. With regard to identification of the culprit, counsel stated that as the complainant and appellant knew each other well, and used to board a vehicle together, there was no doubt that the identification of the appellant or culprit was positive.

9. 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 have the opportunity to see witnesses testify to determine their demeanour and give due allowance to that fact. See the case of **Okeno v Republic [1972] EA 32.**

10. I have re-evaluated the evidence on record. I have also perused the judgement, and considered the submissions of the appellant as well as the submissions of the Principal Prosecuting Counsel.

11. I will start with penetration. The evidence on record was that the appellant and the complainant who testified as PW1 were lovers and had engaged in sexual intercourse a number of times and even intended to marry. When complainant did not get her monthly periods, she decided to move to the home of the appellant who initially resisted but later took her to his father's home at Mororo from Garissa. The medical evidence from Nicholas Koech PW4 a Clinical Officer was that there was pregnancy of about 5 weeks at the time of reporting the incidence. In my view therefore, it cannot be doubted that penetration of a sexual nature occurred between the complainant and a male person. In my view, the prosecution proved penetration beyond any reasonable doubt.

12. I turn to the identity of the culprit. The evidence on record from the complainant PW1 was that they were friends or lovers with the appellant and had engaged in sexual activities a number of times. The evidence of the prosecution from other witnesses that was AOA PW3 and P.C Woman Lucy Chanzu PW4 also was that the complainant was found at the house of the father of the appellant in the absence of the appellant.

13. In his defence, the appellant gave sworn testimony and stated that he was a driver and one day he was called and informed that his father was at Garissa Police Station. When he went there he was arrested and placed in the cells. In cross examination, he denied knowing the complainant but said that she had boarded his vehicle several times.

14. He stated further that though he did not challenge the evidence of the complainant PW1 through cross examination, what the complainant said was not true, though he admitted that they had exchanged telephone numbers.

15. In my view, weighing the evidence of the prosecution against the appellant's defence, the appellant was proved beyond reasonable doubt that he was the culprit who had sexual intercourse with the complainant on several occasions. I thus agree with the findings of the learned trial magistrate that the prosecution proved beyond reasonable doubt that the appellant penetrated the complainant sexually.

16. With regard to age, I my view the evidence on record does not establish beyond reasonable doubt that the prosecution proved the age of the complainant beyond reasonable doubt. It was only in her statement during *voire dire* examination, that the complainant stated that she was 14 years old and a Std. 5 pupil in [particulars witheld] Primary School. In her sworn evidence however, she did not say anything about her age. Her uncle AOA PW2 and her father H

ON PW3 did not mentioned anything to do with age of the complainant.

17. In addition to the above, the age assessment report relied upon was produced by PW5 P.C. Woman Lucy Chanzu who did not disclose its maker was, nor was it clear how PW5 came into possession of that document. PW4 Nicholas Koech the Clinical Officer merely referred to the P3 form but did not talk about age assessment of the complainant.

18. From the above evidence, in my view, the prosecution did not treat the issue of age of the complainant with the seriousness that it deserved. In the result the prosecution failed to prove the age of the complainant beyond reasonable doubt. Since age is a crucial ingredient of the offence of defilement, in my view the fact that the prosecution failed to establish the age of complainant beyond reasonable doubt should have led the trial magistrate to acquit the appellant. The magistrate thus erred in convicting the appellant as the age of the complainant was not proved beyond reasonable doubt.

19. For the reason that the age of the complainant was not proved by the prosecution beyond reasonable doubt, I allow the appeal, quash the conviction and set aside the sentence. I order the appellant be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Garissa this 15th May, 2018.

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George Dulu

JUDGE