REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 44 OF 2017

MOHAMED FARAH..................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being appeal from the conviction and sentence in Wajir Senior Principal Magistrate Criminal Case No. 300 of 2016 by Hon. Amos Makoross (SRM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Wajir with defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that in the month of January 2016 at Wajir township within Wajir County, intentionally caused his penis to penetrate the vagina of M. O. (name withheld) a child aged sixteen (16) years.

2. He denied the charge and after a full trial, he was convicted of the offence and sentenced to serve fifteen (15) years in jail.

3. Dissatisfied with the decision of the trial court, the appellant has now come to this court on appeal. He filed his initial appeal on 30 th August 2017. Before the appeal was heard however, he filed an amended petition of appeal as well as written submissions. His grounds of appeal are as follows –

> **1. That without the DNA test, the prosecution's case remain unproved contrary to section 36 and 26 of the Sexual Offences Act.**
>
> **2. That the magistrate erred in convicting him without considering that age of complainant was not proved beyond reasonable doubt contrary to section 109 and 110 of the Sexual Offences Act.**
>
> **3. The trial magistrate erred in law and fact in convicting him even though the P3 form and medical examination were done eight (8) months after the incident.**
>
> **4. The trial magistrate erred in convicting him by relying on a medical report produced by Dr. Mohamed Mahat instead of Dr. Mohamed Kassim without following the law.**
>
> **5. The magistrate did not evaluate in details the complainant's allegations with regard to time and period of the events on the alleged incident.**
>
> **6. That the existed vendetta between him and the complainant which resulted in her fabricating this case against him.**

4. At the hearing of the appeal, the appellant relied on his written submissions and added orally that he was shown a woman who was eight (8) months pregnant and told that he was responsible for the pregnancy while the evidence of the doctor did not link him to the alleged defilement. He complained also that though he requested for a DNA test, the same was not done.

5. Learned Principal Prosecuting Counsel Mr. Okemwa said that other than an allegation that the complainant was sixteen (16) years old no any other evidence was tendered to prove her age.

6. Secondly, though the complainant said that they had eloped with the appellant no dates or months of that occurrence were given.

7. Thirdly, though the court ordered conducting of a DNA test and blood samples taken from the complainant, the appellant and the young child, no evidence was produced in court on the same.

8. This being a first appeal, I am required to re-evaluate all 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 testifying in order to determine their demeanour. See the case of **Okeno vs Republic [1972] EA 32**.

9. I have re-evaluated the evidence on record. I have perused the judgment as well as the written submissions of the appellant. I have also considered the oral submissions of the appellant and the response by the Principal Prosecuting Counsel.

10. The prosecution was required in this defilement case to prove that the complainant was aged below eighteen (18) years. They were also required to prove that there was sexual penetration. Thirdly, the prosecution was required to prove that the appellant was the culprit.

11. With regard to the age of the complainant PW1, she stated that she was sixteen (16) years but had dropped out of school in Class IV in 2011. She did not rely on any document such as a birth certificate, nor did she give the year of her birth. PW2 A N S a cousin of the complainant who was now living with her after the discovery of the pregnancy did not indicate the age of the complainant. It was PW3 Mohamed Mahat Mohamud a Chief Clinical Officer who produced a P3 form filled by Dr. Mohamed Kassim in which it was merely indicated that the complainant was sixteen (16) years of age. The entry of the age in the P3 form which was produced as exhibit 1 was done by the police on page 1 of the form. There is no independent entry by medical personnel in the P3 form that the age of the complainant was sixteen (16) years.

12. With the above evidence on the age of the complainant from the prosecution, it is clear to me that the prosecution did not set out to prove the age of the complainant. They relied on mere allegations by the complainant regarding her age, which in my view was not sufficient to prove the age of the complainant beyond any reasonable doubt, as there was nothing to indicate that she knew when she was born.

13. With regard to penetration of a sexual nature, with the uncontroverted evidence of pregnancy of the complainant and the birth of the child before conclusion of the trial, it cannot in my view be said that penetration of a sexual nature did not occur, even if as stated by the appellant in his grounds of appeal and submissions, the medical examination of the complainant was done eight (8) months after the incident. In my view, the fact of the pregnancy of the complainant and delivery of the child was sufficient proof beyond any reasonable doubt that sexual penetration did occur, as there is no suggestion of any artificial insemination.

14. With regard to the identity of the culprit, the appellant insisted throughout that a DNA test be conducted. During the prosecution testimonies, the court ordered that DNA test be conducted, but the prosecution came up with an explanation that facilities for conducting a DNA test were not available at Wajir Hospital. It was then ordered by the court that blood samples be taken to Nairobi, and still no DNA report was produced by the prosecution in court. During defence hearing also, the appellant insisted on a DNA test and the court again ordered blood samples of the complainant, the appellant and the young child to be taken to the Government Chemist in Nairobi for DNA test and comparison. Again, though blood samples were taken, the report from Nairobi was not forthcoming and after a number of adjournments, the trial court decided to deliver judgment to avoid further delays. Even today there is no indication from the State that such a DNA test was conducted on the blood samples.

15. Thus, the evidence on record about the identity of the culprit on the alleged incident of sexual activity for one night was that of only the complainant who testified as PW1 against that of the appellant. The complainant stated that the appellant took her to a far-away house and defiled her for one night and returned her to Wajir. The appellant on the other hand maintained that the allegation was a frame up. In my view, in the circumstances of the case, the prosecution should have made all efforts to produce in court the results of the DNA test from the Government Chemist in Nairobi in order to allay any doubts created as to the identity of the culprit.

16. Though it is not in all cases that a DNA test should be conducted, however, in the present case where a child was born out of the alleged sexual relation for one night between the complainant and the appellant, and the child was born before the close of the prosecution's case, it would be necessary for the prosecution to ask for a DNA test, even if the appellant did not insist on the same. Such DNA test was made more important by the fact that the appellant insisted on the DNA test as part of his defence.

17. It is thus clear to me that with the evidence on record, the prosecution did not prove beyond any reasonable doubt that the appellant was the cause of the pregnancy as alleged by the complainant. He should thus not have been convicted as he was not proved beyond reasonable doubt to be the culprit.

18. Consequently and for the above reasons, I find that the appeal herein has merits. 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 13th day of July, 2018.

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George Dulu

<u>JUDGE</u>