**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 106 OF 2014**

**ABDI OSMAN BULLE...............................APPELLANT**

**VERSUS**

**REPUBLIC................................................RESPONDENT**

**(From the conviction and sentence in Wajir Principal Magistrate Criminal Case No. 338 of 2013 by Hon. Linus Kassan (PM)**

**JUDGEMENT**

1. The appellant was convicted in Wajir Magistrate's Court of defilement contrary to section 9 (1) (2) of the Sexual Offences Act, the particulars being that on 8th August 2013 at Ganyure Location in Wajir West District of Wajir County intentionally caused his penis to penetrate the vagina/anus of R.M. (name withheld) a child aged 6 years. He was sentenced to life imprisonment.

2. He has now come to this court on appeal which he filed in December, 2014. The trial court file was however not forwarded to this court by the Magistrate's Court until June 2018, which is the reason for the long delay in disposal of the appeal.

3. Before the appeal was heard, the appellant filed amended grounds of appeal as well as written submissions. He relied on the amended grounds of appeal which are as follows;-

> **1. The learned trial magistrate erred in law and fact in convicting him without considering that the charge sheet was fatally defective contrary to section 134 of the Criminal Procedure Code.**
>
> **2. The trial magistrate erred in law and fact in convicting him without considering that penetration was not proved beyond any reasonable doubt.**
>
> **3. The learned trial magistrate erred in convicting him without taking into account that the prosecution witness PW1 revealed when she was being tested on her intelligence that she was not aware of the importance of an oath and therefore her evidence was unbelievable.**
>
> **4. The learned trial magistrate erred in convicting him without considering that his arrest was poorly carried out.**
>
> **5. The medical evidence was controversial and the findings should have been questioned as the prosecution did not discharge its burden and the appellant should therefore have been acquitted.**
>
> **6. The second doctor's medical report which was produced in court was unprocedural in that the first medical report had cleared him from the allegations of defilement.**
>
> **7. The trial magistrate erred in convicting him without considering that some crucial witnesses were not brought to court to adduce their evidence.**
>
> **8. The trial magistrate erred in convicting him on as unfair trial.**

4. During the hearing of the appeal, the appellant relied on his hand written submissions which I have perused, and elected not to make oral submissions.

5. Mr. Okemwa the learned Principal Prosecuting Counsel on his part submitted that initially there was a handwritten charge sheet for defilement, but there was a typed charge sheet of attempted defilement in the file, which was not in his file. Counsel submitted that there is no offence of defilement under section 9 of the Sexual Offences Act which section related to attempted defilement, and felt that there was

mischief in the typed charge sheet, as the magistrate did not amend the charge. In any case, counsel added, the age of complainant was not proved to be 6 years, though she was taken to Nairobi Women's Hospital for examination.

6. Counsel concluded by stating that the proceedings in the trial court amounted to a mistrial, but as it was an old case, the prosecution would not request for a retrial.

7. This is a first appeal. As a first appellate court, I am required to evaluate all the evidence on record afresh and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see the witness testify in order to determine their demeanor, and give due allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32.**

8. I have re-evaluated the evidence on record. I have also considered the submissions of the appellant as well as the submissions of the Prosecuting Counsel.

9. The Principal Prosecuting Counsel has stated that the charge sheet is defective, and that the trial court did not amend the charge. I have perused the record. The first charge that was registered on 13th August 2013 was for attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act. It was a typed charge sheet. A handwritten charge sheet drawn on 14th November 2013 which was later registered. This charge changed main count from attempted defilement to defilement was still under section 9 (1) (2) of the Sexual Offences Act.

10. According to the record, by this time no witness had testified and on 14th November 2013, Mr. Meroka for the prosecution applied to amend the charge to defilement. The new charges were then read and explained to the appellant in Somali language and he pleaded not guilty, and on the same day 3 witnesses testified in court. It cannot therefore be said that the charge of attempted defilement was not amended to read defilement.

11. That said; there was a defect on the charge with respect to the section of the law cited. Section 9 (1) of the Sexual Offences Act relates to attempted defilement, not defilement. It provides as follows:-

> **"9 (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."**

12. Though in other circumstances I might have found this not to be a fatal mistake, in sexual offences where the sentences make a lot of difference, such as the present case I find this to be a fatal defect. The prejudice visited on the appellant comes out clearly when one considers that he was sentenced to life imprisonment when the sentence for attempted defilement under section 9 (2) is 10 years imprisonment.

13. In addition to the above, the prosecution did not prove their case against the appellant beyond any reasonable doubt. The first reason is that the complainant who testified as PW1 stated in her evidence that another person called Abdullahi had done similar things to her. She stated as follows:-

> **"That is the man who did it to me (point at the accused). Abdullahi had done same thing to me before accused did it to me. He is a big man like the accused. Abdullahi came all the way and did what accused did to me."**

14. Such evidence from a child of 5 years who stated that she did not know God, in my view created a great doubt as to the identity of the culprit.

15. PW2 H M also, a 10 year old sister of the complainant who was said to be present stated as follows:-

> **"There was a man who had done the same thing to her. He is called Abdullahi. He lives at Shantabag. He is a young boy. His mother is called Khadija and dad is called Khalid."**

16. This narrative also supported the narrative of the complainant that another man Abdullahi might be the culprit.

17. The third reason has to do with the medical evidence. The complainant was taken for medical examination immediately after the incident, on the same 8th of August 2013, and the medical personnel stated that there was no indication of sexual assault or penetration. More than two months later on 24th October, 2013 however, the complainant was taken to a Nairobi hospital in critical condition and unconscious, and it is not clear why she was kept from 8th August 2013 to 24th October 2013 before getting treatment. She was certainly in a serious condition, but in the absence of an explanation for the delay in taking her for medical attention, it cannot be said that she was not defiled later by the person called Abdullahi, or another person. It cannot thus be said that the prosecution proved beyond any reasonable doubt that such defilement did occur after 8th August, 2013.

18. There is an allegation of an attempt to settle this defilement case outside court through the chief. Such is an illegal arrangement. It should not be done and worse still, with the support of a local government administrator. However, even if such attempt was made, it did not prove that the appellant committed the alleged defilement since, in this area if such an allegation is made against a person, it is the practice to broker a peace even where the allegation might not be true, in order to maintain peaceful co-existence.

19. On the evidence on record, I find that the prosecution did not prove their case against the appellant beyond any reasonable doubt.

20. 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 and delivered at Garissa this 4th day of October, 2018.**

**......................**

**George Dulu**

**JUDGE**