REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 32 OF 2018

ADAN ABDI GUUS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 592 of 2015 by Hon. M. Wachira (CM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Garissa with defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 4th June 2015 within Garissa County intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of H.A.W (name withheld) a girl aged 15 years.

2. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 20 years imprisonment.

3. He has now come to this court on appeal. He filed his appeal in 2015. However, the registry was not able to avail the file to this court for a long time until it was availed in May this year.

4. The grounds of appeal were in summary that:-

(1) The evidence of the prosecution was not adequate to support his conviction.

(2) That the trial magistrate shifted the burden of proof to him.

(3) That the language used distorted the evidence.

5. Before the appeal was heard, the appellant filed written submissions which I have perused and considered.

6. At the hearing of the appeal, the appellant relied on his written submissions and elected not to make any oral submissions.

7. Mr. Okemwa the learned Principal Prosecuting Counsel submitted that on perusal of the file he found that age was not proved as the victim did not mention her age. Secondly, penetration was not established through medical evidence, as what was noted in the medical report was only that the hymen was missing. He stated that the appellant was a familiar person to the family of the complainant and as such identity of the appellant could not be mistaken.

8. This is a first appeal and I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences.

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

10. The complainant testified as PW1. She stated that on the material day she was in Block H3 carrying a small child when the appellant opened the door and knocked her down. She did not mention her age. She also did not say that she was penetrated. In cross-examination, she said she was defiled inside a house.

11. PW2 was her mother S I who also did not mention the age of the complainant but only said that she was the third born of her children. The medical report from the P3 form produced by PW3 only observed that the hymen was absent but it was stated that there was no evidence of trauma or inflammation in the genital organs of the complainant.

12. In my view, the two important elements of a charge of defilement were not proved by the prosecution. These elements were first of all the age of the complainant. It was not proved by the prosecution that the complainant was below 18 years of age. It was not proved that she was aged 15 years as alleged in the charge sheet.

13. The second important element was penetration. The complainant did not say that she was penetrated sexually. The medical evidence also did not indicate that there was recent penetration.

14. In those circumstances, I agree with the learned Principal Prosecuting Counsel that the offence of defilement was not proved. The Principal Prosecuting Counsel was therefore correct in conceding to the appeal.

15. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith

unless otherwise lawfully held.

Dated and delivered at Garissa this 7th day of November, 2018.

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George Dulu

JUDGE