



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 144 OF 2013**

**ABDISALAM IBRAHIM YUSUF.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 379 of 2013 by Hon. H. N. Ndungu (CM))**

**JUDGEMENT**

1. The appellant was tried in the Magistrate's Court at Garissa in two cases. In criminal case No. 379 of 2013 he was tried and convicted of defilement. He was sentenced to serve twenty (20) years imprisonment. In Criminal Case No. 380 of 2013 also in the Magistrate's Court at Garissa, he was tried for stealing contrary to section 275 of the Penal Code and fined Ksh.3,000/= or in default to serve three (3) months imprisonment.

2. He has come to this court on appeal, which appeal was filed in 2013. However, he quoted the wrong file that is Criminal Case No. 380 of 2013 and thus the confusion and delay.

3. He later clarified that his appeal was related to Criminal Case No. 379 of 2013 wherein he was convicted of the offence of defilement contrary to section 8 (1) as read with section (3) of the Sexual Offences Act No. 3 of 2006. This appeal therefore is from Garissa Chief Magistrate No. 379 of 2013.

4. The appellant raised several grounds of appeal as follows-

**(1) That the learned magistrate erred in law and fact to convict him without considering that the prosecution evidence was contradictory and inconsistent.**

**(2) That the learned trial magistrate erred in law and fact to convict him in reliance on the complainant's evidence which was not supported by any material evidence.**

**(3) The learned trial magistrate erred in law and fact in failing to adhere with section 36 (1) of the Sexual Offences Act No. 3 of 2006 which states that DNA test has to be done to ascertain the truth of the prosecution allegations.**

**(4) That the prosecution did not discharge the burden of proof against the appellant.**

**(5) That the trial magistrate did not consider that the medical evidence was dubious and hence unworthy for supporting the prosecution case.**

**(6) The trial magistrate erred in convicting him without considering that the age of the complainant was not proved on any documentary evidence, which caused a miscarriage of justice.**

5. At the hearing of the appeal, the appellant elected to rely on his grounds of appeal and not to add anything orally.

6. Mr. Okemwa the learned Principal Prosecuting Counsel explained that the appellant was tried in two criminal cases; Garissa Chief Magistrate Criminal Case No. 380 of 2013 for stealing and Criminal Case No. 379 of 2013 for defilement and stated that the two files are now present before this court.

7. The appellant had referred to Criminal Case No. 380 of 2013 in his grounds of appeal whose contents were on the defilement case that is Criminal Case No. 379 of 2013.

8. Counsel submitted that evidence on age, penetration and identification of the perpetrator was given by the prosecution. Counsel urged this court to re-evaluate the evidence of record.

9. In response to the Prosecuting Counsel's submissions, the appellant stated that he was wrongly implicated with the offence.

10. This is a first appellate court. Being so, I am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences. See the case of **Okeno vs Republic [1972] EA 32**.

11. I have re-evaluated the evidence on record. The prosecution called five (5) witnesses and the complainant was PW1.

12. With regard to age, what was relied upon was the registration for refugee status of the complainant. PW5 Halima Yusuf the mother of the complainant did not say when the complainant was born. Depending on circumstances of each case, age can be proved otherwise than through medical records. In the present case, because the mother did not specifically say when the complainant was born, it is unsafe simply to rely on the refugee registration form.

13. I now turn to penetration. Dr. Mwanabuke Mohamed PW3 examined the complainant. She had a tear in her genital organs and red blood cells but no spermatozoa were noted. The evidence was also that the complainant was cut by the culprit with a knife in her private parts. The hymen was also perforated. In my view, penetration of a sexual nature was proved beyond reasonable doubt.

14. I now turn to the identity of the culprit. It is worth noting that neither the complainant PW1 nor the other two eye witnesses PW2 S A and PW4 I A described the appearance of the culprit to anybody. The appellant was arrested not because he was involved in this offence but because he was alleged to have stolen. None of the people who arrested him were called to court to testify. In my view, even if the complainant was sexually assaulted or defiled, the charging of the appellant for this offence is most likely on mistaken identity. The facts and evidence do not connect him to the offence. He was arrested on an allegation of theft. I find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.

15. For the above reasons, I find that the prosecution did not prove the age of the complainant, and also whether the appellant was the culprit. The offence of defilement was therefore not proved against the appellant.

16. Consequently, I allow the appeal, quash the conviction for defilement and set aside the prison sentence of twenty (20) years. I order that the appellant be released from custody unless otherwise lawfully held.

**Dated and delivered at Garissa this 11<sup>th</sup> day of December, 2018.**

**George Dulu**

**JUDGE**