**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 39 OF 2015**

**ABDI ADEN ABDULLAHI..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 15 of 2014 – B. J. Ndeda SPM)***

**JUDGMENT**

The appellant was charged in the Chief 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 11th September 2014 at Alango Arba Location Dadaab District within Garissa County intentionally caused his penis to penetrate the vagina of AHG a child aged between 12 and 15 years. In the alternative, he was charged with indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally touched the breasts and vagina of AHG a child aged between 12 and 15 years.

He denied both charges. After a full trial, he was convicted on the main charge of defilement, and sentenced to serve 10 years imprisonment. Dissatisfied with the decision of the trial court the appellant has come to this court on appeal. He filed initial grounds of appeal in May 2015. Before the appeal was heard however he filed an amended petition of appeal and written submissions. His grounds of appeal are as follows:-

1. That the trial magistrate erred in law and fact to convict him without considering that the victim's age was not proved beyond reasonable doubt as required by the law.

2. The trial magistrate erred in law and fact in convicting him without considering that the medical evidence was dubious and contravened section 36 of the Sexual Offences Act.

3. The trial magistrate erred in law and fact in convicting him without considering that a very crucial witness the doctor who held the truth of the whole case was not brought to adduce his evidence contrary to section 150 of the Criminal Procedure Code.

4. There was no proof that he was the person who accosted the complainant as alleged by prosecution witnesses.

5. His arrest was not proper and hence there was the possibility of mistaken identity.

6. The first report from the complainant's testimony failed to disclose the assailant's identity.

7. The prosecution witnesses failed to discharge the burden of proof against him to warrant a conviction.

The appellant also filed written submissions to the appeal and elected not to make oral submissions. I have perused and considered the written submissions of the appellant.

The Prosecuting Counsel Mr. Okemwa submitted that the mistakes on the charge sheet are curable. They related to a non existence section 8 (1) (3) instead of section 8 (1) as read with section 8 (3). Counsel also submitted that though particulars gave the age of the complainant as between 12 and 15 which was an anomaly, it was a curable anomally. He stated that with regard to evidence the age of the complainant was not proved beyond reasonable doubt, as the complainant said that she was 14 while the doctor said that she was 15 years.

With regard to penetration, counsel submitted that the doctor could not establish penetration. In addition, the arrest of the appellant by the public could as well have been a mistake. Counsel stated also that the appellant stated at the trial that he was a minor which the magistrate did not consider. The magistrate also convicted for count 1 for defilement, but gave a sentence of 10 years imprisonment which was illegal. Counsel urged this court to look at the record of the proceedings and come to its own conclusions.

This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. In doing so, I am required to bear in mind that I did not see the witnesses testify to determine their demeanor and give due allowance to that fact. See the case of ***Okeno Vs. Republic [1972] EA 32***.

I have re-evaluated the evidence on record. The appellant has raised several grounds of appeal.

With regard to the charge sheet, the defect relating to the section 8 (1) and (3) to me is a minor defect which is curable. The defect of the age of the complainant stated to be between 12 and 15 years however in my view is a serious defect. In defilement cases the age of a complainant is very important. It is not proper to use broad variance of dates because we could be talking of a completely different offences, attracting different sentences. Firstly the complainant is required to be below 18. Secondly, the particular age of the complainant has to be proved in order to prove a particular offence.

The mistake in the charge sheet could only be corrected if there was an official document tendered in court establishing the actual age of the complainant such as birth certificate or a medical age assessment report. Such evidence was not tendered in court. The evidence of the doctor from the P3 form is also at variance with that of the complainant, as the complainant said she was 14 years of age and the doctor said she was 15 years old. It appears that both the ages given by the doctor and the complainant were guess work. Even if penetration without consent was proved, in my view the offence would be one of rape rather than defilement. In sentencing the appellant to 10 years imprisonment, maybe the trial court was of the view that the offence committed was rape. However the view magistrate should not have convicted for defilement and then sentence for the offence of rape. In my view, due to the variance of age given, it is possible the complainant was an adult. A conviction for defilement cannot therefore stand.

The more important thing in this matter is proof that the appellant was the culprit. Though the prosecuting counsel has submitted that penetration was not proved through medical evidence, in my view depending on how soon the complainant was taken for medical examination after the incident and also whether she had had sexual encounter before, it is possible that no injuries would have been detected on medical examination after the incident. The complainant produced a torn dress which was cut using a knife. It is my view that she was actually sexually assaulted.

Is there a connection between the appellant and the sexual assault?

The appellant was arrested in the bush sleeping. He said in his own defence that he saw the complainant before he went to sleep under a tree. He denied that he defileded her. When he was arrested by members of the public, no evidence was tendered that he had a knife with which he could have cut the

complainant's dress. He certainly is a pastoralist and it is common for pastoralists to move in the bush and, when they get tired in the sun, they will sit or sleep under any shelter including a tree. There was thus nothing extraordinarily or unusual about the appellant being found sleeping under a tree not very far from the scene of the incident. That fact alone, does not connect him to the sexual assault against the complainant.

The evidence on record is that dress or torn clothses of the complainant had semen stains arising from the sexual assault by her assailant. No attempt was made to examine these semen stains to establish whether the semen stains had any relation with the appellant. In my view, the prosecution should have used this important link to establish whether or not the semen stains on the dress of the complainant emanated from the appellant. The failure of the prosecution to do so means that they did not establish that the appellant was the assailant. On that account also, the appeal will succeed as the conviction of the appellant cannot be sustained.

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 13th day of January, 2017**

**GEORGE DULU**

**JUDGE**