



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 39 OF 2016**

**MOHAMED ADAN ISSACK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From the conviction and sentence in Garissa Chief Magistrates Criminal case No.861 of 2015)

**JUDGEMENT**

The appellant was charged in the Chief Magistrate Court at Garissa with attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that diverse dates between January 2015 and 17<sup>th</sup> August 2015 at Tana North Sub- County within Tana River County intentionally attempted to cause his penis to penetrate vagina of A S a girl aged 9 years.

He was also charged with a second count of unnatural offence contrary to section 162(a) (i) of the Penal code. The particulars of the offence were that on diverse dates between January and 17<sup>th</sup> August 2015 at Tana North Sub County within Tana river county intentionally and unlawfully did committed unnatural offence which caused penetration with his genital organ namely penis in to the anus of A S a girl aged 9 years.

In the alternative to count 1, he was charged with indecent act with a child contrary to section 11(1) of the Penal Code.(Sexual offences Act).

The particulars of the charge were that on diverse dates between January and 17<sup>th</sup> August 2015 at Tana River County intentionally and unlawfully touched the buttocks and private parts namely vagina of A S a girl aged 9 years.

He denied all offences. After a full trial, he was convicted on both count 1 and 2 and acquitted of the alternative charge.. He was sentenced to serve 25 years imprisonment of count 1 of attempted defilement, and 21 years imprisonment on count 2 of committing un natural offence. The sentences were ordered to run concurrently.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal on 4<sup>th</sup> July 2015. Before the appeal was heard however, the appellant filed an amended petition of appeal, together with written submissions. His amended petition of appeal has grounds as follows:

1. The trial magistrate erred in law and fact to convict him without considering the age of complainant was not good.

2. The trial magistrate failed to consider that the evidence adduced by the prosecuting witnesses was contradictory, uncorroborated, and inconsistent contrary to section 163 of the Evidence Act.
3. The trial magistrate failed to consider that crucial witnesses who had crucial evidence were not summoned in court to establish the truth in the interest of justice contrary to section 150 of Criminal Procedure Code.
4. The trial magistrate while delivering verdict erred in law to add extraneous matters from the available evidence in order to find him guilty.
5. The sentence imposed on both counts was excessively harsh.

At the hearing of appeal he emphasized that the incident occurred during Ramadhan and being a Muslim he was prohibited from indulging in sexual activities during the day time at that time.

The learned prosecuting counsel Mr. Okemwa stated that the prosecution called four witnesses whose evidence was credible. Counsel stated that the doctor produced a P3 form and an age assessment report, and as such the age of complainant was proved. Counsel submitted however, that what was proved was indecent act. Counsel pointed out also that count 2 was an offence under Penal Code.

In response to the prosecuting counsel submissions the appellant stated that no birth certificate of the complainant was produced in court.

I have to start by warning myself that this being a first appeal, I am required to re-evaluate all the evidence on record and come to my conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witness testify to determine their demeanor and to give due allowance to that fact. I rely on the case of *Okeno versus Republic* [1972] JEA 32.

In brief the facts are that the appellant was an uncle of the complainant. The complainant a young girl was living with the family of the appellant, her mother having had marital problems. The appellant was actually married to a sister of the mother.

The prosecution case was that on several occasions from January, 2015 to 17th August 2015 the appellant had sexual intercourse with a complainant both through the vagina and anus. During the last encounter on 17<sup>th</sup> of August 2015, the appellant had sexual intercourse with the complainant through the anus. The complainant then revealed the incident. A report was made to the police and the appellant was arrested. The complainant received medical attention and was examined the next day 18<sup>th</sup> August 2015 and was found with an intact hymen, and her anus had healed bruises.

The appellant has raised a number of issues on appeal. The burden is always on prosecution to prove their allegation against an accused person beyond any reasonable doubt. An accused person does not have a burden to prove his or her innocence. An accused may only raise doubt in the prosecution case. See *WOOLINGTON VS DPP* [1935] AC 462

With regard to the age of the complainant, she testified as PW1 and claimed to be aged 9 years and was a pupil at [Particulars Withheld] primary school. Her father PW3 SAI who testified that he lived at [Particulars Withheld] testified but did not give the age of the complainant. The mother of the complainant did not testify. The P3 form and age assessment report were produced by PW4 police constable Victor Madegwa of Madogo police station. The persons who treated the complainant and prepared those forms were not called to testify. No reason was given for the failure of the prosecution to call these witnesses.

The magistrate however found that age of the complaint was proved. In my view there are circumstances where age can be proved without medical evidence. The situation herein however is wanting. The father of the complainant did not indicate the age of the complainant. The mother did not testify. The medical personnel did not testify either on age. The documents produced by police officer PW3, though

admissible in evidence under section 77 of the Evidence Act cap 80, were treated in a casual manner that one cannot say whether their use served the interests of justice. In my view they were so crucial in these proceedings and should have been testified to by a person who could be questioned on their contents.. The evidence of age thus before the magistrate regarding the complainant, was merely the complainants statement that she was 9 years old and the visual impression created in the mind of the magistrate by seeing her in court. In my view the prosecution should have done better. I find that the age of the complainant was not proved beyond reasonable doubt as is required in criminal cases.

The complainant also stated that she reported this incident to relatives that is grandfather, grandmother and uncles who informed elders and a meeting were called. None of these people, even those who were not related to the complainant were called to support the complainants story. These were crucial witnesses in this matter which involved a serious allegation against the appellant. The failure of the prosecution to call crucial witnesses including the elders and medical practitioners who attended to the complainant, seriously weaken the prosecution case. I rely on the case of BUKENYA VS UGANDA [1972] EA 549 in which the Court of Appeal for East Africa said that such a failure by the prosecution to call crucial witnesses with no explanation may create a doubt resulting in the acquittal of an accused person.

The medical evidence which was allegedly relied upon, even if it was admissible, did not support the prosecution allegations. Though the complainant said that the appellant had sexual intercourse with her severally between January and August 2015, she was found to be a virgin. This means that she was not saying the truth. The bruises that were found around the anal area of the complainant were healed while she alleged that the appellant had committed an unnatural act with her just the previous day 17<sup>th</sup> August 2015. In my view if it was true that the appellant had committed such an act on 17<sup>th</sup> August 2015, the bruises would have been fresh. In my view the bruises in the anal can be caused by various reasons including hard stool. I therefore find also that the prosecution failed to prove its case on this reason.

Consequently I find merits in the appeal. I allow the appeal, quash the conviction, and set aside the sentences imposed on the appellant for all offences herein. I order that the appellant be released forth with unless otherwise lawfully held.

**Dated and delivered at Garissa this 4<sup>th</sup> day of April, 2017.**

**GEORGE DULU**

**JUDGE**