REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 34 OF 2016

ABDULLAHI MOHAMED ABDINOOR.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged in the Chief Magistrate's Court as Garissa with defilement contrary to section 8 (1) as read with (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 4th August 2015 at [particulars withheld] in Dadaab District within Garissa County intentionally caused his penis to penetrate the vagina of H N O a child aged 9 years. In the alternative he was charged with committing an indecent act with a child contrary to S 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the same day and place he intentionally touched the vagina of H N O a child aged 9 years with his penis.

He pleaded not guilty to both counts. After a full trial, he was convicted on the main charge of defilement and sentenced to life imprisonment.

He has now come to this court on appeal. He filed his initial petition of appeal on 10th May 2016. Before the appeal was heard however, he filed another petition of appeal and written submissions which he relied upon.

In his amended petition of appeal, he complained that the age of the complainant was not proved. Secondly, that his Constitutional rights were infringed during trial. His third ground was that a key witness was not brought at the trial. His fourth ground of appeal was that the prosecution did not prove their case beyond reasonable doubt. The fifth ground was that medical evidence was dubious and the doctor was a maternal relative of the complainant. Lastly, that the sentence was harsh and excessive and did not take into account the mitigating factors.

At the hearing of the appeal, the appellant relied on the written submissions filed. He added that the case was a frame-up and that the doctor was a relative of the complainant.

Learned Principal Prosecuting Counsel Mr. Okemwa submitted that the prosecution had the burden of proving all the necessary ingredients of the offence. Though the doctor said that the complainant was 9years old, the complainant stated she was 10years and no clarification on the age was given to prove that the alleged offence would come under Section 8 (2) of the Sexual Offences Act.

The Prosecuting Counsel also submitted that the complainant testified that the appellant merely rubbed

her thighs and ejaculated. However, the doctor talked of breaking of the hymen which was a contradiction. In addition though it was alleged that there was maslaah mediation attempt, none of the participants in that maslaah was called to testify. Counsel urged the court to reconsider the whole evidence on record.

I have considered evidence on record, as I am required to do in a first appeal. I have considered the grounds of appeal and submissions of the appellant. I have also considered the submissions of the Principal Prosecuting Counsel.

As the first appellant court, I am required to re-evaluate the evidence and come to my own conclusions and inferences. See the case of OKENO-VS-REPUBLIC (1972) EA 32.

The appellant has raised a number of grounds of appeal. He has complained that his Constitutional rights to fair hearing were violated. I do not see any violation of his Constitutional rights from the record of the proceedings. I dismiss that ground.

With regard to age, the evidence on record is that the complainant was between 9-10 years of age. The complainant who testified as PW1 said she was 10years old at the time of testifying on 15th September 2015. When the offence was committed on 4th of August 2015, the complainant was said to be 9years old. The entry in the P3 form was that she was aged 9years. Though the Prosecuting Counsel said there was uncertainty on the age of the complainant, in my view the variation was such a small one that any court which physically saw the complainant in court, would come to the conclusion that the age of the complainant was proved beyond any reasonable doubt to be between 9 and 10years. She was less than 11years old and thus within the provisions of Section 8(2) of the Act, I thus dismiss the complaint of the appellant as regards the age of the complainant.

The appellant has complained that a crucial witness was not called to testify. The complainant said that his brother came to the scene after she screamed. She also stated that her brothers informed her mother about the defilement when she arrived home at 2pm. None of these brothers was called to testify. No reason was given for the failure of the prosecution to call these witnesses. This in my mind creates a doubt as to the truthfulness of the prosecution case in the circumstances of the present case, where the appellant put up a strong sworn defense and called several defense witnesses. I will give the benefit of the doubt to the appellant in line with the reasoning in the case of BUKENYA-VS-UGANDA (1972) EA 549.

That is not all. The complainant PW1 stated that the appellant merely rubbed her thighs and ejaculated. The doctor who was PW3 Salma Nanja stated that the complainant had gone through FGM and that the hymen had been broken. One of these two stories cannot be true. If indeed the complainant was penetrated she would have said so, and the doctor could have confirmed that fact.

It cannot be that the complainant would say something totally different from what the doctor said.

The appellant gave his sworn defence denying committing the offence. He called his mother DW2 Rahma Maalim who supported his version that she sent him to the UN camp to obtain her manifest for registration as a refugee. DW3 Ali Noor Hassan also stated that he was with the appellant at the UN camp on the alleged date of the offence.

The United Nations camp was the place where the Government Registration office of refugees was located at Dadaab refugee camp. In my view therefore, with the evidence on record, the prosecution did not prove beyond reasonable doubt that the appellant either defiled the complainant or committed an indecent act on her. The appellant gave a defence of an alibi which is believable as he called witnesses to support that defence. In my view, the learned magistrate erred in disbelieving the alibi defence of the appellant.

I find that the prosecution failed to prove the appellant guilty beyond reasonable doubt, on both the main and alternative counts. I will thus quash the conviction and set aside the sentence imposed.

Consequently, I allow the appeal, quash the conviction, and set aside a sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at **Garissa** this **13th** day of **June, 2017**

George Dulu

Judge