

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 91 OF 2014

MUHUMED HUSSEIN MUHUMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Wajir PM Criminal Case No. 93 of 2014 L. Kassan PM)

JUDGMENT

The appellant was charged in the magistrate's court at Wajir with defilement contrary to section 8 (1) and (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 7th March 2014 in Wajir South District within Wajir County intentionally caused his penis to penetrate the vagina of DHN a child aged 13 years. In the alternative he was charged with committing an 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 vagina of the same girl aged 13 years with his penis.

He denied both charges. After a full trial, he was convicted on the main count of defilement. He was sentenced to serve 20 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal against both conviction and sentence. He complains on appeal that the medical officer who adduced evidence in court was a cousin of the complainant. He also complains that he was implicated because the father of the complainant owned him Kshs. 52,000/= and the family wanted to conceal that matter. He also stated that no investigating officer attended court to give evidence. Lastly that the sentence of 20 years imprisonment was harsh and excessive.

During the hearing of the appeal, the appellant denied committing the offence and said that he had not been paid for herding goats by the father of the complainant for 13 months. That when he demanded payment he was told that it would be less Kshs. 8,000/= for two lost goats, which he declined to accept and they fought with the father of the complainant. He maintained that the charge was a frame up and the girl or complainant initially refused to testify in court.

Learned Prosecuting Counsel Mr. Okemwa submitted that the clinical officer Pw1 confirmed forceful penetration. However age did not appear to have been proved. The identity of the appellant though said to be positive, an eye witness to the incident was not called to testify. It was not known why. Counsel left the matter for the decision of this court.

I have perused the evidence. Indeed, the medical report shows that there were lacerations in the genital organs of the complainant. This would show or indicate penetration. However, in sexual offences of defilement the age of the complainant is very crucial. The identity of the culprit is also very crucial.

The burden is always on the prosecution to prove all the ingredients of a criminal case against an accused person beyond any reasonable doubt. The accused does not have a burden to prove his innocence. He merely has a right to raise doubts in the prosecution case. The appellant at the trial raised the issue of a grudge on failure to pay him his dues of Kshs. 52,000/=. He has raised the same issue on appeal.

It was imperative for the prosecution to establish the age of the complainant. The only evidence on the age is that of the complainant who initially was reluctant to testify and was stood down. Her verbal

evidence is therefore shaky. The father of the complainant testified in court but never mentioned anything to do with age. As such in my view the age of the complainant which was a very important element of the offence of defilement was not proved. On that account the appeal will succeed.

Another reason why the appeal will succeed is that the complainant said that an eye witness came to the scene and saw the appellant in the act. This witness was not called by the prosecution to testify and no reason was given for such failure. On the authority of the case of *Bukenya Vs. Uganda [1972] EA 549*, I hold that this created an important gap in the prosecution case, and the benefit of that doubt has to be given to the appellant which I do.

To conclude I find that the prosecution did not prove its case against the appellant beyond any reasonable doubt. 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 2nd day of September 2016

GEORGE DULU

JUDGE