



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 52 OF 2015**

*(From original conviction and sentence in Criminal Case No. 100 of 2014 of the Chief Magistrate's Court at Garissa – M. Wachira - CM).*

**R G M ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged in the Chief Magistrate's court at Garissa with attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 25<sup>th</sup> May 2014 within Garissa County unlawfully and intentionally attempted to cause his penis penetrate the vagina of FMK a child aged 12 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 unlawfully and intentionally touched the private parts or vagina of FMK a child aged 12 years.

He denied both counts. After a full trial he was convicted of the main count of attempted defilement. He was sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal challenging both the conviction and sentence. He filed his initial petition of appeal in June 2015. Before the appeal was heard however he filed an amended petition of appeal as well as written submissions. At the hearing of the appeal he relied on the written submissions filed. I have perused and considered the said written submissions.

Mr. Okemwa learned prosecuting counsel did not oppose the appeal. Counsel stated that there were clear contradictions in the dates of the incidents. The complainant talked of 25<sup>th</sup> April 2014 while the mother PW2 talked of 10<sup>th</sup> May 2014. PW3 gave the date as 25<sup>th</sup> May 2014 and PW4 a police officer said that they got the information on 2<sup>nd</sup> May 2014 while PW5 talked of 26<sup>th</sup> May 2014.

Counsel also submitted that the relationship between the appellant and the mother of the complainant was strained at the material time. The appellant had married PW2 the mother of the complainant. The complainant was a daughter of PW2 whom she brought from a previous relationship. Counsel emphasized that it was clear from the evidence that there were strained relationship and that though there were allegation of a struggle no evidence of injuries was tendered. There was also an allegation that the complainant's cloth was stained with semen but no evidence of that allegation was brought to court.

I have considered the evidence on record. I have considered submissions of the appellant as well as the position taken by the Prosecuting Counsel who conceded to the appeal.

This being a first appeal I am required to re-evaluate the evidence on record and come to my own conclusion and inferences see the case of ***Okeno -vs- Republic (1972) EA 32.***

The complainant was a step daughter of the appellant. The appellant had married the mother of the complainant PW2 and the mother brought her from a previous relationship. They lived together. The appellant and the mother of the complainant PW2 R M had a number of other children. They had a strained relationship because the appellant had stopped working where he had been employed as a labourer and was for sometime not providing necessities for the family. It was admitted that the appellant and PW2 had fought earlier on the day in question.

The incident is alleged to have occurred at around 1.00 Pm when the complainant and other children were at home. PW2 was also at home but had gone for a call of nature when it was alleged that the appellant called the complainant into the main house and started undressing her forcefully whereupon the complainant screamed and PW2 came and a crowd was attracted and started assaulting the appellant.

The evidence on the defilement incident is that of the complainant PW1 and the mother PW2. The other people who came and joined in beating the appellant, did not witness the incident. Indeed there is an allegation that the appellant used a lot of force on the complainant but there was no sign of injuries suffered. Infact the P3 form showed that the complainant was in good form and without any indication of trauma. It was also alleged by PW2 and another witness who joined in beating the appellant, that the cloth of the complainant was stained with semen from the appellant. No evidence was however tendered in regard to this crucial fact.

In addition to the above, there is the issue of dates that were given in the evidence. In my view the strained relationship between the appellant and PW2, the variance of the dates of the incident, the mention of semen which was not proved or supported in evidence, and the fact that no indication of any injury was found on the complainant shows that the case was a frame up. In my view the conviction was not sustainable.

In the judgment the learned trial magistrate appeared to have shifted the burden of proof on the appellant when she stated as follows:-

***“the accused did not introduce the issue of maintenance of children or divorce. Further in cross examination of evidence of PW3, the accused did not lay the basis of issue of divorce and maintenance which is raised in his defence”.***

It is of note that the appellant was not charged with an offence related to maintenance or divorce. He was charged with attempted defilement of a minor and was not required to defend himself on any other basis except on the charge of attempted defilement. It was still the prosecution burden to prove the evidence that the offence charged was proved beyond reasonable doubt.

The evidence on record fail far short of that proof. In consequence therefore the conviction has to be quashed and the sentence set aside.

The learned prosecuting counsel has conceded to the appeal, and I think rightly so.

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 14th day of September 2016.**

**GEORGE DULU**

**JUDGE**