**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 94 OF 2014**

**MOHAMED ADEN HAKAR..... APPELLANT**

**VERSUS**

**REPUBLIC…….……RESPONDENT**

**(*From the conviction and sentence in Garissa Chief Magistrates Criminal Case No. 860 of 2013 – B. J. Ndeda SPM*)**

**JUDGMENT**

The appellant was charged in the subordinate court 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 on 3rd July 2013 at [particulars withheld] in Dadaab District within Garissa County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of FHF a girl aged 11 years without her consent. In the alternative he was charged with indecent act contrary to section 11 (1) of the same Act. The particulars of offence were that on the same day and place did commit an indecent act with FHF a girl aged 11 years by rubbing his penis against her vagina. He was also charged with a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the same day and place unlawfully assaulted FHF thereby occasioning her actual bodily harm.

He denied all charges. After a full trial he was found guilty of both attempted defilement and assault causing badly harm. With regard to sentence, he was discharged with regard to count 2 on assault under section 35 (1) of the Penal Code. He was however sentenced to serve 10 years custodial sentence on attempted defilement.

Dissatisfied with the decision of the trial court the appellant has brought this appeal. His grounds of appeal are as follows:-

1. That the magistrate erred in convicting him without considering that the prosecution did not prove their case beyond reasonable doubt contrary to section 109 of the Evidence Act.
2. The trial magistrate erred in convicting him without considering that there was no direct evidence touching him as alleged by the prosecution.
3. The learned magistrate erred in law and fact in convicting him without noting that the evidence adduced in support of the prosecution case was contradictory contrary to section 163 of the Evidence Act.
4. The learned trial magistrate erred in convicting him without considering that the case was tailored and fabricated against him in order to destroy his life.
5. The leaned magistrate erred in finding him guilty as charged without considering that the mode of arrest was poorly executed.

The appellant also filed written submissions. At the hearing of the appeal he relied on the written submissions. I have perused and considered the said submissions.

The learned Prosecuting Counsel Mr. Mwangi opposed the appeal. Counsel submitted that the appellant was clearly identified by the complainant PW1 who described how she was chased by him and overcome. She was also injured. The appellant was thus clearly identified as the incident occurred at 11am when there was clear vision. With regard to corroboration counsel submitted that PW2 and PW3 the parents of the complainant were informed by her about the incident. That PW3 the father of the complainant traced the appellant through footprints and found him among people who pointed him out. He was thus arrested and later PW1 the complainant identified him at the police station. Counsel emphasized that the medical evidence from PW5 was consistent with that of PW1 and PW3.

With regard to the age of the complainant counsel submitted that PW2 the mother gave the age at 10 years. In counsel's view the evidence from the mother was the most sure way of establishing the age of the complainant. The complainant was thus below 18 years. Counsel submitted that there were no contradictions in the prosecution evidence, and that the prosecution had proved their case beyond any reasonable doubt.

In response to the prosecuting counsel's submissions, the appellant stated that his foot prints would not be distinguished from those of others. Secondly, no identification of him was done by the complainant at the police station. Thirdly, he stated that the doctor did not notice anything unusual with the complainant.

During the trial in the subordinate court, the prosecution called 5 witnesses. PW1 was the complainant. She stated that she was 8 years old and that she did not go to school. She did not give the date of the incident but said that on that day she was grazing goats. While there the appellant emerged and after removing all his clothes approached her with a knife and followed and restrained her. He then sat on her stomach, removed her pant and discharged something that looked like milk. This was in the forest area. The complainant shouted but nobody came to her rescue. However when the appellant heard students making noise from the nearby [particulars withheld] Secondary School he ran away. By that time he had injured her right arm with a knife. The complainant then went home and reported the incident to her mother who cried and informed the father. The father proceeded to the scene carrying a club. Later the complainant was taken to hospital and treated. It was her evidence that some boys led by one Abdullahi arrested the appellant. She stated that a P3 form was filled on her. She identified the clothes that she wore on that day in court. She also identified a knife which she said was used by the appellant to threaten her.

PW2 was A A Q the mother of the complainant. It was her evidence that the complainant was 10 years of age. That on the 3rd of July 2013 the complainant had gone to graze goats. At around 11am, she came back home running and bleeding from the right hand. The complainant then informed her that someone had forcefully removed her pant under a tree and that she struggled with him. The stomach and body of the complainant had traces of sperms. However she noted that the private parts of the complainant were normal. They then went to the scene which appeared disturbed and some boys from Dertu came and followed the footprints, while she took her daughter to hospital. In the evening, members of the neighborhood arrested the appellant and took him to the police station.

PW3 H F G was the father of the complainant. It was his evidence that the complainant was aged 10 years and did not go to school. That on the 3rd July 2013 at 11am he was informed while at the hospital at Dertu where he had taken a younger daughter, that the complainant had been raped and should rush home. He rushed home and met a crowd and found her daughter at home. He then went to the scene where his daughter had been defiled near [particulars withheld] Secondary School and found the scene disturbed. They then followed footsteps up to where they found some men trying to enter into another man's house. They went there and arrested the appellant who was the only stranger. According to him, when the complainant later saw the appellant she recognized him as the culprit.

PW4 was Mohamed Abdi Duro a Clinical Officer at Dadaab District Hospital. It was his evidence that on 5th July 2013 the complainant was brought to the hospital and he was requested to fill a P3 form. He examined the complainant who had soiled stains at the back of her clothes. She also had a stab wound on

the inner side of the right upper arm. There were also scratches on the upper elbow. The injuries were classified as harm. He filled the P3 form and produced the same as an exhibit. It was his evidence that he checked both the vagina and anus of the complainant and found no traces of sperms or blood.

PW5 was PC Chrisponce Juma. It was his evidence that on 4th of July 2013 at 11am he was instructed by Senior Sergeant Protus Wanyama to accompany other police officers to Dertu D.O's office to collect a suspect. He did so. Later he recorded witness statements. The appellant was thus arrested and charged. This witness produced a knife which was said to have been recovered from the appellant.

When put on his defence the appellant gave sworn testimony. He stated that he was from [particulars withheld] Refugee Camp. That during the month of Ramadhan he left the camp and went to herd goats. He was on foot. As he passed near house, he met people from [pariculars withheld] village among them Abdi Dofe with whom they had a disagreement. They had a struggle but later they reconciled and they went to sleep together. He stated that he could swear by the Qoran that he did not commit the present offences.

This is a first appeal. As the first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno Vs. Republic [1972] EA 32.***

I have re-evaluated the evidence on record. Indeed there is unchallenged evidence on record that the complainant was assaulted. She was physically injured, and the said injuries were visible. Her clothes were removed in an obvious attempt to defile her. Therefore somebody must have committed the assault as well as the attempt to defile her. The question is whether the appellant was the culprit.

The burden is always on the prosecution to prove that an accused person is guilty beyond any reasonable doubt. One of the important elements of that proof is the connection between the appellant and crime or crimes alleged. The complainant herein stated that she did not know the appellant before. She did not describe him to either her mother or the father or anybody before the appellant was arrested. She did not say that she was able to recognize or identify him.

The appellant was arrested after following footsteps. There is nothing to show that the area could not have footsteps other than those of the appellant. According to PW3 the father of the complainant, the appellant was arrested among people who were attempting to go into the house of another man merely because he was a stranger. He was not arrested because he had committed any offence or in connection with this particular incident. The people who assisted in arresting him were also not called to testify to say how the appellant could be connected with these offences. Further the appellant was arrested in the absence of the complainant. No identification parade was conducted to ascertain whether he was the real culprit. Merely finding the appellant at the police station or in court and saying this is the person, cannot be proper or sufficient identification. There is in my view the real possibility of mistaken identity in the present case.

Though I have no doubt that offences were committed against the complainant herein, I am of the view that the identity of the appellant as the culprit was in doubt. There was no positive identification which would connect him to the commission of the offence. As such I find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. I thus have to allow the appeal against both conviction and sentence.

To conclude I allow the appeal, quash the conviction and set aside the sentence imposed. I order that the appellant be released forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa this 2nd June, 2015**

**GEORGE DULU**

**JUDGE**