REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CRIMINAL APPEAL NO. 80 OF 2014

MOHAMED YUSUF RACHO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(from the original Criminal Suit No. 35 of 2014 at SRM Court at Hola).

J U D G M E N T

The appellant was charged in the subordinate court with defilement contrary to Section 8(1) as read with (3) of the Sexual Offences Act. The particulars of the offence were that on divers dates between February and August 2013 at [particulars withheld] Village Tanariver District within Tanariver County caused his penis to penetrate the vagina of MOH a child aged 15 years. In the alternative he was charge 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 divers dates between February and August 2013 at [particulars withheld] Village Tanariver District within Tanariver County intentionally touched the vagina of MOH a child aged 15 years. He denied both charges. After a full trial he was convicted on the main count and sentenced to serve 20 years imprisonment.

Aggrieved by the decision of the trial court he filed the present appeal. His grounds of appeal are as follows:-

1. DNA test was not conducted to ascertain the truth.
2. That a witness whom the complainant mentioned was not called to testify.
3. That the appellant is a first offender.
4. That he did not have any affair with the complainant.
5. That he was an orphan and a sole bread winner of his mother and the sentence imposed was harsh and excessive as he was a first offender.

The appellant also filed written submissions to the appeal which I have perused. He relied on case of ***Aristaco Ngesa odhiambo – vs- Republic (2013) eKLR***. He also relied on the case of ***Gaileth Mubarak Elkana -vs- Republic (2013) eKLR*** and the case of ***Philip Mosetti -vs Republic 2014 eKLR***. At the hearing of the appeal the appellant relied on his written submissions.

Learned prosecuting counsel Mr. Mwangi did not oppose the appeal. Counsel submitted that the complainant had two conflicting testimonies. She stated initially that she became pregnant in 2014. In Cross Examination however she stated that she became pregnant in 2013. Counsel submitted that the Doctor said in January 2013 the complainant was 28 weeks pregnant. Counsel wondered which version of the evidence was true. Counsel submitted that the brother of the complainant was not aware of what was happening. He was told by somebody else called A who was not called to testify. Counsel left the matter

to the court for a decision.

In response to the prosecuting counsel's submissions, the appellant asked this court to consider the evidence critically.

At the trial the prosecution called 5 witnesses. PWI was Dr. John Mwangi of Hola Distict hospital. It was his evidence that he medically examined the complainant who was 28 weeks pregnant by 30th January 2014. According to him the complainant was 15 years old and had undergone FGM.

PW2 was the complainant who stated that between January to July 2013 she engaged in un protected sex with the appellant and got pregnant. When she went to the home of the appellant his wife chased him away.

PW3 was M S a brother of the complainant. It was his evidence that on 23rd January 2013 he was called on his phone by his sister A who said that the complainant had disappeared. He traced her to the home of the appellant. The appellant chased her away because she was pregnant and as a result the witness reported the incident at Hola Police Station.

PW4 was a Clinical Officer from Hola Distict Hospital. He stated that he assessed the age of the complainant through dental examination. He established the age to be 15 years. He was also aware that the complainant was pregnant.

PW5 was PC Peter Ejole of Hola Police Station. He was the investigating officer who recorded statements and charged the appellant with the offence.

When put on his defence, the appellant gave sworn testimony. He stated that he lived in the same village with the complainant at [particulars withheld]. He denied commission of the offence and stated that the charge was a fabrication. He stated that the complainant went to his home and was chased away by his parents.

This is a first appeal. As a first appellate court, I am duty bound to evaluate all the evidence on record and come to my own conclusions and inferences taking into account that I did not see witness testify to determine their demeanor see the case of ***Okeno -vs – Republic (1972)EA 32.***

The evidence on the involvement of the appellant in defiling the complainant and impregnating her was that of the complainant herself. Nobody else said that they knew the relationship between the complainant and the appellant. Since the allegation was that the complainant was pregnant, the sensible thing to do to clear the doubt was for the prosecution to organize for a DNA test. They did not do so. No reason was given for the failure to carry out the DNA test. It cannot thus be conclusively said that the appellant had sexual relationship with the complainant and that he impregnated her.

In addition to the above there were two crucial witnesses who were not called. These were A the sister of the complainant who gave the report to PW3. There was also the mother of the complainant whom the complainant said instructed her to go to the person who had made her pregnant. These two witnesses were not called to testify and no explanation was given regarding the failure of the prosecution to call them to testify. This default creates a doubt in my mind as to whether if they were called they would support the prosecution evidence. I give the benefit of the doubt to the appellant. In this regard I rely on the case of ***Bukenya -vs- Uganda (1972) EA 549.***

Consequently and for the above reasons, 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 signed at Garissa this 2nd day of July 2015.

GEORGE DULU

JUDGE