



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 28 OF 2015**

**ZAMZAM MOHAMED HASSAN ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Garissa Chief Magistrates Criminal Case No. 111 of 2015 – M. Wachira CM)*

**JUDGEMENT**

The appellant was charged with benefiting from child prostitution contrary to section 15 (d) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between 1st January 2013 and 1st January 2014 in Fafi District within Garissa County being a close friend to BAF a child aged 15 years, took advantage of a relationship to procure her for sexual intercourse. She denied the charge. After a full trial she was convicted of the offence and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. She filed initial grounds of appeal in person. However later on 5th May 2015, supplementary grounds of appeal were filed on her behalf by Paul Mugwe Nyaga Advocate. At the hearing of the appeal counsel abandoned the initial grounds of appeal and relied on the supplementary petition under the following grounds:-

1. That the learned magistrate erred in law and in fact in admitting a document on refugee registration allegedly showing that the complainant was born in 1999 without calling the maker to ascertain its veracity.
2. The learned trial magistrate erred in law and fact in finding that the complainant was 15 years of age whereas the complainant was not subjected to medical assessment.
3. The learned magistrate erred in law and fact in convicting the appellant on the basis of hearsay evidence.
4. The learned magistrate erred in law by not finding that the prosecution had not dispensed with his burden of proof for not calling crucial witnesses.
5. The learned magistrate erred in law by not finding that the charge preferred against the appellant was fatally defective.

During the hearing of the appeal, Mr. Nyaga for the appellant argued that the refugee registration document showing the age of the complainant was admitted without proof when it was produced by the investigating officer PW4. In counsels' view it was important to call the United Nations High Commission for Refugee Official who entered the information on age of the complainant in the card to substantiate its contents. In addition counsel argued that the mother of the complainant stated that she had been informed that her daughter was married and that Mohamed Ibrahim had sexual intercourse with her.

Counsel contended that the court misdirected itself in relying in the evidence of PW2 and PW3 as such evidence was not direct. In addition, the perpetrator of the offence was not tried. Counsel also complained that the evidence of the complainant showed that she was about 19 years old though she also stated that she was 15 years. As such, section 124 of the Evidence Act was not applicable as the witness could have made a mistake.

Counsel also argued that the prosecution failed to call a crucial witness the doctor to ascertain the age of the complainant as well as penetration. Counsel emphasized that courts had held that all relevant witnesses had to be called by the prosecution.

Counsel also submitted that the charge sheet was fatally defective as it was in complete variance with the evidence tendered. Initially the appellant was charged with abetting defilement which was later amended to benefiting from child prostitution. Counsel stated that the ingredients of the charge were first proof of a child, secondly a benefit, third prostitution, then penetration and close relations, as well as taking advantage. Though prosecution alleged that the appellant befriended the complainant and made her second wife to her husband, there was no mention or evidence of either prostitution or benefit. Counsel submitted further that the evidence on record did not support the charge. Counsel argued that this court had a duty to re-examine the evidence and, in his view, the evidence did not support the charge.

In response the prosecuting counsel Mr. Orwa opposed the appeal. Counsel emphasized that the appeal related to the existing charge and not the previous charge. With regard to the age of the complainant, counsel submitted that PW1 informed the court that she was 15 years of age. This position was confirmed by PW2 the mother who stated that the complainant was born in 1996. PW3 also informed the court that the complainant was aged 15 and PW4 produced refugee registration document which showed that the complainant was born in 1996 which meant she was 15 at the time of the incident. Counsel submitted also that the appellant admitted that the complainant was 15 years old and confirmed that she was a minor. In counsel's view the trial court correctly believed PW1. Counsel submitted that the age of the appellant contained in the charge sheet had been proved beyond reasonable doubt.

Counsel submitted also that the investigating officer was the right person to produce exhibits, and that the prosecution was not bound to bring makers of documents such a P3 forms.

Counsel submitted further that from the record PW1, PW2, PW3 and the appellant were all refugees. The appellant did not raise any objection to production of the document from the refugee camp, and in addition, during defence the appellant admitted that her husband went into hiding. She also admitted that 3 other men were involved in the incident. She further confirmed the marriage between her husband and the complainant. In counsel's view therefore the magistrate correctly relied on the evidence on record and convicted the appellant. The conviction was thus not based on hearsay evidence.

With regard to the argument on defective charge, counsel submitted that the appellant knew the charge she faced and participated fully in the proceedings by cross examining witnesses in line with section 137 of the Criminal Procedure Code. Counsel urged this court to cure any minor defects or irregularity that might be found in the charge sheet or the proceedings under section 382 of the Criminal Procedure Code. Counsel submitted that it was not necessary to prove defilement in this kind of offence of benefiting from prostitution. Counsel submitted also that a doctor would not prove benefiting from prostitution. In any case the court could convict for the charge proved. Counsel submitted also that oral evidence varied from case to case. Counsel urged this court to dismiss the appeal.

In response, Mr. Nyaga stated that the doctor would have confirmed penetration as well as age of the complainant as the charge was specific on age 15. Counsel submitted that the doubt created on the age was fatal to the conviction. With regard to section 354 of the Criminal Procedure Code counsel submitted that this court cannot substitute or amend the charge. The appellant defended herself on a specific charge. Such substitution will prejudice her.

With regard to the maker of the document being called, counsel argued that that was a point of law. The appellant was a lay person and unrepresented and was not informed that she could call the maker.

Counsel emphasized that the appellant denied the charge.

During the trial the prosecution called four witnesses. PW1 was the complainant. She stated that she was aged 15 and was in class two at [Particulars Withheld] Primary School. She attended special school because she was blind. She stated that from July 2013 Zamzam the appellant went to her home a number of times and they became friends. She told her that her age mates were married and that she should think about it. She convinced her that her husband was the right man to marry her and that she would want her to be her co-wife. One day, she came and offered to introduce her to her husband but she declined.

On 2nd of October 2013 as she was being taken to school by J B, the said guide took her to the house of Zamzam who told her that that was her wedding day and called a sheikh who recited a verse of Quran and told her that it was her wedding day. She went to school and later went to the home of Zamzam. She was put in the house of Ibrahim Warsame the husband of the appellant who told her that she was his wife and wanted to bear children with her. He undressed her, made her lie down and penetrated his penis.

Thereafter, a man called J came and took her home because she was crying. She however did not inform her mother immediately. On the 21st January 2014 at around 11am Zamzam came to their house and told her that her husband was around and wanted to greet her. On arrival man repeated the same request that he wanted to have children with her but she shouted for help and they went away. Later a sister of J came and asked her if she was married and informed her that the information in the locality was that she was married to the husband of Zamzam and her mother got to know about that story and reported the incident to the police. She stated that she knew the voice of Zamzam as a soft voice and had known her for 2 years as a neighbour. In cross examination she insisted that the appellant arranged for her husband to defile her. She stated that the appellant told her that Islam allowed a man to marry up to four wives.

PW2 was HJA. It was his evidence that he came from Kambios Refugee Camp and that the complainant was her child aged 15 years attending special school in standard 2. That on 24th of January 2014 she came home from the market and a friend by the name Sofia Ibrahim informed him that she heard that his daughter was married and he got shocked. He was told that his daughter was married by Mohamed Ibrahim and when he confronted him he confirmed that he married his daughter. According to him Mohamed Ibrahim was the appellant's husband who admitted that he had slept with his daughter. He then asked the appellant whether it was true her husband had married his daughter and she told him that his daughter had gone to look for her husband. Mohamed Ibrahim also stated that he had sexual intercourse with his daughter on three different occasions. He reported the incident to the police.

When inquired from his daughter the complainant, she stated that Zamzam the appellant went and influenced her to be married because she was getting old. It was his evidence that the appellant was a close friend and they used to share a lot and would come frequently to their house and take away the complainant. He stated that his daughter had become pregnant and was thus holding a baby in the court. On reporting the incident to the police, they were referred to the hospital and found that the daughter was not pregnant. He stated that the husband of the appellant ran away to Somalia. He stated also that his daughter was born in 1996.

In cross examination he stated that the appellant influenced his daughter to be married by her husband. He stated that neighbours were shocked to learn what the appellant had done.

PW3 was Sofia Ibrahim Ege. It was her evidence that on 19th January 2013 at 7p.m she received information that her child Hawa Abdirahim that the complainant informed her that she was taken to a house of the appellant and defiled by the appellant's husband Mohamed Ibrahim. She told the complainant's mother to confirm the information from Zamzam the appellant. She also went to Mohamed Ibrahim who told her that it was true he had sexual intercourse with the complainant. He stated that he would marry the complainant and have children with her and did not want anyone to interfere with that intention. The matter was then reported to the police station and the appellant threatened her and she reported the incident to the police.

In cross examination she stated that the appellant organized for the complainant to be defiled. She stated that the complainant was 15 years of age and blind.

PW4 was PC Chispinus Juma a police officer. He was the investigating officer. He stated that on 24th January 2014 he received a report that in October 2013 the complainant was approached by Zamzam who requested her to marry her husband. She was pressured and was blind. The appellant persuaded and took her to his house where her husband Mohamed was seated and after a talk defiled her. The appellant was thus arrested.

In cross examination he stated that he was not present when the offence was committed. He acted on the complainant's report. He stated that it was not true that J went back to Somalia. He stated that the complainant had not gone to Somalia.

When put on her defence, the appellant stated on oath that her husband and a lady aged 15 years, had given her a lot of problems. She denied the charges. She stated that she would not engage in such activities with a minor. She said that the charges were fabricated against her. In cross examination she stated she was married with six children and that her husband disappeared after she was charged. She stated that three other men were involved including a man who conducted the marriage and all had disappeared. She stated that her husband escaped before she was arrested.

DW2 was Mohamud Elmoge Adan. He stated that he heard that the appellant was involved in alleged sexual relationship between a minor and a man. He stated that they were neighbours and did not witness any such act. He did not know of any marriage in the home of the appellant. He was not cross examined.

DW3 was Deka Mohamed. It was her evidence that allegations against the appellant were known to her and that she did not witness any marriage conducted in the appellants house. She stated that under Islam and Christianity a wife was not allowed to conduct a marriage of another girl for her husband.

From the above evidence the learned magistrate convicted and sentenced the appellant. There from arose the present appeal.

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

I have evaluated the evidence on record afresh. I have considered the grounds of appeal and submissions of counsel for the appellant and the prosecuting counsel.

The charge sheet talks of benefiting from child prostitution contrary to section 15 (d) of the Sexual Offences Act. Though counsel for the appellant has submitted on the previous charge which was substituted, that charge having been substituted is not subject of the conviction and trial and therefore is not subject of appeal.

The section under which the appellant was charged states that any person who takes advantage of his familiarity over, or his relationship to a child, to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than 10 years.

In effect therefore though the charge is related to prostitution, the prosecution is not required to prove prostitution in the common sense of offering sex for material gain. The prosecution is however required to prove that the victim was a child. It is also required to prove a relationship and influence over the child.

From the evidence on record it is clear that the appellant had a social relationship with the complainant. They were neighbours. She was older than the complainant being a married woman with six children.

The question is was the age of the complainant proved by the prosecution? The complainant was said to be a standard 2 pupil in a special school. However no evidence was tendered from the school authorities on her age or on her attending class 2. No birth certificate was produced in court. No age assessment was done. What was relied upon by the prosecution was the evidence of the mother and the father as well as a document from United Nations High Commission for Refugees which was not produced by the maker. However the appellant stated in her defence which was sworn that the complainant was aged 15. In my view though no birth certificate or age assessment report was produced and the document from United Nations High Commission for Refugees was not produced by the maker, the age of the complainant was established beyond reasonable doubt. The oral evidence was so consistent from both the prosecution and the defence that I agree with the learned magistrate's finding.

Did the appellant influence the complainant to have sexual intercourse with her husband? The prosecution says so. The appellant denied this on oath and in fact stated that the complainant and her husband had given her a lot of problems.

The complainant's husband was said to have disappeared to Somalia. The Sheikh who was said to have conducted a marriage was not called to testify. Other than the complainant nobody was aware of the alleged persuasion by the appellant to make the complainant a wife of her husband. The complainant herself did not bother to disclose the information to her parents. It was third parties who blew the whistle.

It was imperative for the prosecution to prove that the appellant did persuade or influence the complainant to have sexual intercourse with her husband. In my view with the evidence on record, the prosecution did not prove this element against the appellant beyond reasonable doubt. It should be noted that the appellant tendered clear sworn testimony on oath. She also called two witnesses who were not even cross examined by the prosecution. In my view therefore the prosecution did not prove that the appellant persuaded or influenced the complainant to have sexual intercourse with her man. As such the offence was not proved.

I do not think that this court, on appeal, can substitute another offence for that on which the appellant was convicted. There was no alternative charge facing the appellant therefore the appellant was not aware of any other offence for which she had to defend herself. In any event this court can only substitute conviction for a minor and cognate offence.

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

**Dated and delivered at Garissa this 7th day of October, 2015**

**GEORGE DULU**

**JUDGE**