REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL 116 OF 2011

(FORMERLY NAIROBI HIGH COURT CRIMINAL APPEAL NO. 140 OF 2011)

ABDIKADIR ISSACK MOHAMED .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 148 of 2011 in the Principal Magistrate's Court at Wajir - Linus Kassan (Ag. SRM) on 21st April, 2011)

JUDGEMENT

The Appellant, Abdikadir Isaac Mohamed was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. It had been alleged that on 15th March, 2011 at [particulars withheld] in Wajir South District of Wajir County the Appellant caused his penis to penetrate the vagina of K M a child aged 6 years.

The Appellant was sentenced to serve 100 years imprisonment. He has filed this appeal against conviction.

Through an amended petition of appeal dated 27th November, 2012 the Appellant seeks to upset the conviction on the following grounds:-

1. **The Learned Magistrate erred in law and in fact in holding that the prosecution had proved their case beyond reasonable doubt against the Appellant.**
2. **The Learned Magistrate erred in law in ignoring a cardinal principle in law and procedure that the burden of proof lies on the prosecution and that they must prove each and every single ingredient of the charge beyond reasonable doubt.**
3. **The Learned Magistrate erred in law and in fact by failing to appreciate that the prosecution did not prove essential ingredients of the offence of defilement.**
4. **The Learned Magistrate erred in law and in fact in basing the Appellant's conviction on evidence, which fell far short of the standard required of proof of the offence of defilement contrary to section 8(1) as read together with Section 8(2) of the Sexual Offences Act.**
5. **The Learned Magistrate erred in law and in fact by failing to treat expert evidence with caution.**
6. **The Learned Magistrate erred in fact in failing to make a finding that the benefit of doubt aforesaid was to be given to the Appellant as a result erred by failing to make a finding that the prosecution had a duty to prove the offences and that the onus to prove remained on the prosecution throughout the trial.**

7. **The Learned Magistrate erred in his general approach to the whole case.**

When the appeal came up for hearing, Mr. Kigen for the Appellant condensed the seven grounds of appeal to three. His first argument was that there was no satisfactory prove of age. He submitted that the only evidence on record about the age of the complainant was that of the complainant and the clinical officer. He stated that there was need to scientifically establish the age of a victim of a sexual offence under the Sexual Offences Act and failure to do so should result in an acquittal. In support of this argument he cited the decision of Dulu, J in **SIMEON WANJALA v. REPUBLIC [2012] eKLR** where the learned Judge held that:-

> **"In my view, in such offences where the age is an essential ingredient of the offence, the prosecution has a burden to prove the age of the complainant to the standard required in criminal law, that is beyond reasonable doubt. There was need therefore to have either documentary evidence on the age from the family witnesses, or the doctor has to testify regarding what tests he did, and the basis of arriving at the age that he assessed. A mere statement that "molar not erupted" in my view, is not adequate. The prosecutor had an obligation to enquire from the doctor to explain the basis of his findings. Even if another doctor produces the P3 form, as in this case, the prosecutor should ask him to explain the technical basis of the findings. Failure to do so, leaves a gap. The court will then have to determine technical issues on conjecture and suspicion. That is not desirable in a criminal case. As was stated in the case of Sawe –vs- Republic (2003) KLR 364 suspicion, however strong cannot be a basis for inferring guilt, which must be proved by evidence beyond reasonable doubt. In my view, the evidence of proof of age where it is an ingredient of the offence, has to be beyond reasonable doubt.**
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> **Therefore, the prosecution, by failing to establish from the doctor the scientific basis of the age assessment of the complainant, failed to prove an essential element of the offence. The benefit of that failure on the part of the prosecution, must be given to the appellant. I give that benefit to the appellant.**
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> **In the result, 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."**

On this issue, Mr. Mulama for the state did agree that age is indeed an essential ingredient of the offence for which the Appellant was convicted. Citing the decision of the Court of Appeal in **ALFAYO GOMBE OKELLO v REPUBLIC [2010] eKLR** he, however, submitted that failure to prove the exact age of a child is not fatal to the prosecution case.

Secondly, the Appellant's counsel argued that the language used in the proceedings is not clear. He stated that there was an indication that the language was "English/Somali" or Somali/English" but this was not good enough. He referred the Court to the decision of Makhandia, J (as he then was) in the case of **GODFREY GITONGA v. REPUBLIC [2008] eKLR**. He argued that in that case the learned Judge held that the indication in the Court record that the language used was Kikuyu/Kiswahili was not sufficient to show that the trial had been conducted in a language understood by the accused person.

In reply to this argument, Mr. Mulama asserted that the fact that the Appellant participated in the proceedings shows that he understood what was happening. He contended that the Court record is clear that the languages used were English and Somali and that a clerk by the name Abdikher was in Court.

Thirdly, it was argued for the Appellant that the learned magistrate did not treat the evidence of the expert witness with caution. Mr. Kigen submitted that although the trial Court relied on the evidence of the clinical officer, the Court did not satisfy itself that the witness was indeed a qualified clinical officer.

Mr. Kigen then proceeded to attack the credibility of the evidence adduced. He told the Court that the child had in her evidence indicated that she had been pricked with a stick but later changed to say that she had been defiled. He submitted that these contradictions ought to have been resolved in favour of the

Appellant. In support of this argument he cited the decision of A.G.A Etyang, J in **THOMAS OLUOCH OKUMU v REPUBLIC, Nairobi High Court Criminal Appeal No. 589 of 2001** where the learned Judge after observing that the complainant had given two different accounts of what took place stated that:-

> **"In my considered view, however, both these accounts cannot be correct at the same time. A doubt was thus created by the complainant's own testimony in court, which doubt ought to have been given to the appellant. Unfortunately the trial magistrate believed the second account without giving sufficient reasons. In my view the trial magistrate was duly bound to reject both accounts as untenable. The conviction of the applicant based on that evidence was therefore unsafe."**

Counsel for the state responded that the evidence on record is clear that the child told her father that the Appellant had inserted his manhood in her genitalia. He argued that the account of being pricked with a stick was what the Appellant had told the complainant to say.

I will start by considering the language used in the trial. The language used is not one of the grounds of appeal but this is a very important constitutional protection and I will proceed to address it. Looking at the proceedings of the lower Court it is clear that the languages used were English, Kiswahili and Somali. The learned trial magistrate clearly indicates the language used by each witness and the interpretation. The Appellant who was not defended during the trial conducted incisive cross- examination of the witnesses. It would not be correct to say that he did not understand the proceedings. He fully participated in the trial.

The position I have taken was approved by the Court of Appeal in the recent decision of **GEORGE MBUGUA THIONGO v REPUBLIC in Criminal Appeal 302 of 2007** when it stated that:-

> **"22. For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."**

The decision of Makhandia, J (as he then was) in the case of **Godfrey Gitonga,** supra, is therefore not applicable in the circumstances of this case. In that case the Appellant was a Meru but the languages used were Kiswahili and Kikuyu. This particular ground of appeal fails.

I will then proceed to consider whether the trial magistrate applied wrong legal principles as concerns the evidence of the PW1 Kemel Abdirego. PW1 was indeed an expert witness and it was important that he establishes his professional competence in his testimony. A look at the record clearly shows that he was a clinical officer. This to me was sufficient information to establish his qualification. If the Appellant was in doubt of his qualification, he ought to have cross-examined the witness on this issue. The qualification and expertise of PW1 cannot be questioned at this stage.

The last issue for consideration in this appeal is whether the prosecution case was proved beyond reasonable doubt. This is a first appeal and this Court has a duty to reconsider the evidence that was placed before the trial Court, evaluate the same and draw it own conclusions. The Court must however give allowance for the fact that it did not see or hear the witnesses – see **OGETO v REPUBLIC [2004] 2 KLR 14.**

The advocate for the Appellant submitted that one of the ingredients of the offence with which the Appellant was charged, namely the age of the complainant was not established. That age is a key

ingredient of this offence is indeed true as was held by the Court of Appeal at Kisumu in **ALFAYO GOMBE OKELLO,** supra, when it observed that:-

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt."**

In his evidence PW1 indicated the age of the complainant to be 6 years. In the P3 form the age of the child is captured as 6 years. I do not seem to find any statement by the complainant (PW2) as to her age. PW3 Administration Police Constable Joel Mwangi told the Court that Mohamed Hassan who is the father of the complainant informed him that **"the accused had defiled his 6 year old girl."** The father of the complainant who testified as PW6 never mentioned the age of the girl. The issue of the age of the girl was not taken up by the Appellant during the trial. In his judgment the learned trial magistrate mentioned in passing that the complainant was a child of tender years.

The prosecution was nevertheless obliged to prove each and every element of the charge beyond reasonable doubt. It is unfortunate that the prosecutor did not examine both the complainant and her father in a manner as to bring out the age of the complainant. However, from the evidence of PW1 and PW3 I am satisfied that the age of the child was indeed proved to be six years. This Court must not forget the circumstances under which criminal trials are conducted. In some parts of this country, children are born at home and there are no clinic cards or birth certificates and saying that there is need to produce documentary evidence can result in injustice to victims of sexual offences. Where documentary evidence is not available, an investigating officer should present a child victim to a medical officer for age assessment.

Considering the evidence adduced in this case, I do not agree with the Appellant that the age of the child was not established. The words of the Court of Appeal in **ALFAYO GOMBE OKELLO,** supra, are appropriate in the circumstances of this case:-

> **"Secondly, there was no failure of justice occasioned by the irregularity. The substantive charge was one of defilement and by definition in law it could only be carnal knowledge with a female below the age of majority. Whether the female was " below the age of sixteen" as stated in the particulars or between "twelve years and fifteen years" as stated in the relevant section of the law has no reflection on the conviction so long as it is proved beyond reasonable doubt that there was penetration. The appellant had no illusion about the offence facing him and the defence he had to offer and he participated fully in the trial in a language understood by him. There was no prejudice or failure of justice."**

One of the ingredients of the offence with which the Appellant was charged is that the child defiled should be aged eleven years or less. Six years is way below eleven years and it cannot be said that the trial magistrate ought to have had doubts on the age of the child. I am therefore not persuaded by the decision of this Court (Dulu, J) in **SIMEON WANJALA v REPUBLIC [2012] eKLR** as cited by counsel for the Appellant.

Another issue to consider is whether the prosecution proved its case beyond reasonable doubt. The complainant told the Court that the Appellant was their 'duksi' teacher and she knew him very well. On the material day she remained behind after the other children had left because the Appellant had told her she did not know how to read. The Appellant put her on mat, covered her face with a blanket and removed her trouser. He then put a stick in his vagina before he **"thrust his thing"** as he held her mouth tight. She testified that **"I think he used a piece of firewood to put it in my vagina. He then used his penis – the thing he used to put into my vagina."** He then warned her not to tell anybody about what had happened and if asked she should say she was pricked by a stick. The next day her mother asked her why she was sleeping and she told her she had a stomachache. On the third day she was taken to hospital by her parents. She told the Court that her mother had examined her private parts and found she had been defiled. After she left the hospital is when she told her father what had happened.

Her father (PW6) corroborates this evidence. He testified that when the nurse told him that his daughter had been defiled he was surprised and he asked the doctor to examine her again. That is when he took his daughter to a nearby shed and asked her to tell him what had happened. It was then that the complainant told him that the 'duski' teacher had defiled her. She vividly recounted to him her ordeal.

The clinical officer (PW1) confirmed that the complainant had indeed been penetrated. He produced a P3 form in support of his findings. He testified that he also examined the Appellant and found that he had a sexually transmitted disease. He had also found the Appellant infected with the same disease.

The magistrate after analyzing the evidence of the prosecution witnesses and after considering the defence case concluded that the Appellant had indeed defiled the complainant. I do not find any reason to reach a different conclusion. The evidence of the complainant was corroborated by that of her father and that of the clinical officer. The magistrate correctly found that the defence case was not credible and the same was made up by the Appellant in an attempt to escape from the consequences of the crime he had committed.

It was submitted for the Appellant that there was contradiction in the evidence of the complainant as to whether a penis or a stick was used to penetrate her. The magistrate found that the Appellant used both his penis and a stick to penetrate the complainant. That is also the impression I get from the evidence of the complainant. In any case, the complainant testified that the Appellant told her to say that a stick had pricked her were she to be asked about the injuries. There is therefore no contradiction in the evidence of the complainant. Looking at the evidence on record, I have no doubt that the Appellant penetrated the complainant with his penis.

No issue was taken up on the sentence. It is noted that the Appellant was sentenced to one hundred years imprisonment. This indeed is probably an imprisonment for life but that is not the sentence provided by the law. The sentence provided by the law for the offence committed by the Appellant is life imprisonment. I therefore substitute the sentence of 100 years imprisonment with one of imprisonment for life.

The end result is that the appeal fails. The appeal is therefore dismissed. Orders will issue accordingly.

Prepared, Dated and signed this 27th November 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered on 3rd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT