



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 168 OF 2013**

**Appeal from the conviction and sentence by the Chief Magistrate at Garissa (Miss Hannah Ndung'u, CM) in the Garissa Chief Magistrate's Criminal Case No. 356 of 2013**

**ABDIHAKIM OMAR ALI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Background**

Abdihakim Omar Ali, the appellant, was charged before the Chief Magistrate's Court Garissa with defilement contrary to section 8(1)(2) of the Sexual Offences Act. It was alleged that on 25<sup>th</sup> March 2013 at Kambios Refugee Camp in Fafi District within Garissa County intentionally caused his penis to penetrate the vagina of **F.M.I** a child aged 8 years.

The appellant was charged with an alternative count of committing an indecent act with a child contrary to section 11 of the Sexual Offences Act. The particulars of the alternative charge are that on the same date and place as in the main charge he intentionally touched the vagina of the **F.M.I** a child aged 8 years with his penis.

After taking into account the evidence of four prosecution witnesses and the defence of the appellant, the trial magistrate found the offence of defilement proved. She convicted and sentenced the appellant to life imprisonment.

The appellant is aggrieved by the conviction and sentence and has come to this court on appeal. The appellant is represented by Mr. C.P Onono, Advocate while the respondent is represented by Mr. Collins Orwa, State Counsel.

**Facts**

Briefly, the facts of this case are that **N.A.A**, PW2 and mother of **F.M.I**, PW1 and the complainant, left the appellant sleeping and the complainant in their house at Kambios Refugee Camp. She went to her neighbour's home to pick her young child the neighbour had been holding for her. The appellant was her husband and the complainant her daughter and step-daughter of the appellant.

She returned to find the complainant crying. The little girl informed the mother that the appellant has locked her inside the house and had defiled her. PW2 checked her daughter's genitalia and noticed bruises. She reported the matter to the police who issued her with a P3 Form. She also took the child to

hospital where she was examined and the P3 Form completed. The appellant was arrested and charged with this offence.

### **Petition of appeal**

By a petition of appeal of appeal filed on 19<sup>th</sup> December 2013, out of time but with leave of the court, the appellant has through his counsel raised four grounds of appeal as follows:

- i. Medical testimony was inadequate, presumptive and inconclusive and could not properly support a conviction of defilement.
- ii. The learned Chief Magistrate erred by using matters not supported by evidence of the complainant to draw conclusions detrimental to the appellant.
- iii. The learned Chief Magistrate erred by not giving any or any adequate attention to the sworn statement of the appellant in his defence.
- iv. That generally the conviction was against the weight of the available evidence.

### **Appellant's submissions**

Learned counsel made oral submissions during the hearing of this appeal. He submitted that the complainant and her mother were not credible witnesses; that the complainant did not testify to sodomy or repeated defilement yet her mother is said to have told the doctor that defilement and sodomy had been going on for a long time.

Learned counsel further submitted that the trial magistrate found the medical evidence corroborated by the evidence of the mother when the mother had not been at the scene; that what is alleged to have happened to the complainant is horrendous and she could not have forgotten and the possibility of a frame up against the appellant is high; that there is a possibility of another assailant other than the appellant; that no forensic material was obtained from the complainant and no comparative material was obtained from the appellant and therefore this leaves a window of doubt.

### **Respondent's submissions**

The respondent opposed the appeal. Learned state counsel submitted that in a defilement case the issues for determination are whether there was penetration of the complainant; whether that penetration is by the appellant and whether the complainant is a child. He submitted that "genital organs" and "penetration" are defined under section 2 of the Sexual Offences Act; that evidence that the complainant was defiled has not been controverted and medical evidence corroborated complainant's evidence.

It was further submitted that corroboration of evidence of a single witness who is a victim of a sexual offence is no longer a requirement by dint of Section 124 of the Evidence Act and that the trial court was convinced by the evidence of the complainant. Counsel relied on **Benjamin Mbugua Gitau v. Republic [2011] eKLR** to support his submissions on medical evidence. He submitted the appellant's defence is mere denial and that the appellant's defence of alibi has been dislodged by the prosecution evidence. Learned Counsel asked the court to dismiss the appeal for want of merit.

### **Determination**

The duty placed on this court when sitting on first appeal to examine and evaluate all evidence afresh is alive to my mind. I have read the evidence and what jumps out of the pages is the error committed by the trial court in allowing cross-examination of PW1. The record shows that the court conducted a *voir dire* examination on the complainant and formed the opinion that she did not understand the nature of oath. The court directed that she gives unsworn evidence. However, after her testimony, the court allowed the appellant to cross-examine her which is unprocedural. This error, in my view, is however curable under Section 382 of the Criminal Procedure Code. This error of the trial court does not prejudice the appellant nor does it cause miscarriage of justice. I will and do hereby proceed to cure it under the above section.

Another error that seemed to have escaped the attention of the trial court and the prosecution is the manner the section of the law creating the offence is cited in the charge sheet. Instead of the usual way of framing charges, the charge shows "section 8(1)(2) of the Sexual Offences Act". Again, this error is not prejudicial to the appellant. The charge and the information are in conformity with Sections 134 and 137 of the Criminal Procedure Code and most importantly, the appellant understood what he was charged with and actively participated in the trial. No prejudice or miscarriage of justice has been occasioned by this error. Again, Section 382 of the Criminal Procedure Code comes into our aid. I will and do hereby cure the error under that Section.

The evidence as to what happened is the evidence of a single witness, a child of tender years. Generally, under Section 124 of the Evidence Act, evidence of children requires corroboration. Corroborating evidence is taken to be other material evidence in support of the evidence implicating the accused. The proviso to that section makes it clear that in sexual offences evidence of child victims of the alleged sexual offence can be relied on to convict an accused person so long as the trial court believes such evidence and records the reasons why the court is satisfied that the victim is telling the truth. Automatically, the proviso to Section 124 of the Evidence Act removes the requirement of corroboration in sexual offences where the victim is the witness.

In the case before me, the appellant was known to the complainant. Evidence shows that he was her step-father. Evidence shows that he was left in the house with the complainant. PW2 said the appellant was left sleeping when she left to pick her child from a neighbour. PW2 said the complainant was also left in the house. I have considered the appellant's defence against this evidence. He gave brief evidence that PW2 was framing him for having married a younger wife; that he did not commit this offence and that he was a community worker with Refugee Child Rights and could not do such a thing. He then complained that he was not taken for medical check-up.

His evidence that it is not true that he was left with two children in the house on the day in question; that he had gone to work having left the house at 7.30am and was working with on Miss Muthoni was not forthcoming when he gave evidence in chief. It came belatedly during his cross-examination. This court has given this evidence amounting to alibi defence due consideration. Taken against the evidence by the prosecution, I find this evidence incredible.

As far as the prosecution evidence goes, it is only the evidence on the identity of the assailant that is based almost entirely on the evidence of the complainant. However, having considered that the complainant knew the appellant and the evidence by PW2 that she had left the appellant at home sleeping, I find that I have no reason to doubt this evidence. I have considered submission that it could not be true that the child had been repeatedly defiled and this does not come out in evidence. The doctor did not clarify whether the hymen was torn during this defilement or an earlier one but this court is concerned on the recent defilement that forms basis for this appeal. There was ample medical evidence by way of tender vulva and red anal opening to prove defilement took place. For the purposes of the Sexual Offences Act, penetration of the anus is defilement and anus is a genital organ.

Just as this court has done, the trial court likewise gave this evidence due consideration and recorded reasons why it believed the evidence of the complainant. I too, am alive to the dangers of relying on the sole evidence of a single witness, more so a child witness. Having so cautioned myself I proceed to find that the medical examination by Dr. Were Andrew corroborates that of mother and child that the complainant had not only been defiled but sodomized as well.

The doctor examined the complainant on 26<sup>th</sup> March 2013. He said the hymen had been torn and the vulva painful on touch. The doctor also found the anal opening tender and red in colour showing obvious signs of sodomy.

I have carefully analyzed the evidence on both sides and find that I agree with the trial court that there is sufficient evidence to prove beyond reasonable doubt that the appellant committed this offence. I have given his grounds of appeal due consideration. I find I am not able to agree with him that the medical evidence was inadequate or presumptive and inconclusive to support a conviction. On the contrary,

medical evidence confirms defilement. Ground one of the appeal has no merit.

The appellant has not submitted what matters not supported by evidence of the complainant did the trial court use as argued in ground two of the appeal. In respect of ground three, the record on page seven of the typed judgement, the trial court had considered the defence by the appellant. The trial magistrate stated as follows:

**“I have also looked at the defence by the accused person. It does not shake the prosecution case in anyway.”**

Ground three of the appeal has not merit.

Finally on ground four, the trial court found sufficient evidence to base a conviction on. I have also considered all the evidence and arrive at the same conclusion that the evidence on record proves beyond reasonable doubt that the appellant committed defilement. The appeal therefore is not merited and therefore I find no reason to interfere with the findings, conviction and sentence of the lower court. The appeal by the appellant is hereby dismissed. It is so ordered.

**Dated, signed and delivered this 10<sup>th</sup> July 2014.**

**S.N.MUTUKU**

**JUDGE**