



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 48 OF 2016

MOHAMED HUSSEIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Mandera Magistrate Criminal Case No. 11 of 2016 by Hon. P. N. Areri (SRM))

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Mandera with attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that on 6th January 2016 in Mandera East Sub-County within Mandera County intentionally attempted to cause his penis to penetrate the vagina of AD (name withheld) a girl child aged 4 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the same day and place intentionally touched the vagina of AD (name withheld) a girl aged 4 years with his penis.

3. He was charged also with a second substantive count of being unlawfully present in Kenya contrary to section 53(1) (j) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence being that on the same day and place being an Ethiopian citizen was found being unlawfully present in Kenya without a valid permit or passport from the relevant authority allowing him to remain in Kenya.

4. He denied all the charges. After a full trial, he was acquitted of offence of attempted defilement. He was however convicted of the offence of committing an indecent act and was sentenced to serve 10 years imprisonment. He was also convicted of being unlawfully present in Kenya. He was however discharged under section 35 of the Penal Code (Cap. 63). The trial court ordered that he be repatriated to his home country of Ethiopia after serving the prison sentence.

5. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial appeal in July 2016. Before the appeal was heard however, and with the permission of the court, he filed a substituted petition of appeal as well as written submissions.

6. His grounds of appeal are as follows:-

- 1. The magistrate erred in allowing PW1 MD to stand as an intermediary while she had ulterior motive to fix him.**
- 2. The trial magistrate erred in convicting him while the evidence by the prosecution witnesses was contradictory and inconsistent.**
- 3. The trial magistrate erred in amending the charges without giving the accused person an opportunity to plead afresh to the charges.**
- 4. The learned magistrate erred in convicting him without considering that PW1 willingly removed her inner wear, and not the appellant.**
- 5. The trial magistrate failed to consider the demeanor of witnesses throughout the case.**
- 6. There was an existing vendetta between the appellant and both PW1 and PW2.**

7. At the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered, and opted not to make oral submissions.

8. Mr. Okemwa the learned Principal Prosecuting Counsel stated that this being a first appeal, the court was required to re-evaluate the evidence afresh. Counsel submitted that the conviction for the offence of indecent act should be upheld. Counsel also stated that though the appellant was discharged in sentencing for the conviction of being unlawfully present in Kenya; the State did not have an issue with that order so long as the appellant was repatriated to Ethiopia after serving sentence.

9. In response to the Principal Prosecuting Counsel's submissions, the appellant said that he was in possession of an Ethiopian Identity Card and that he was thus an Ethiopian national.

10. This is a first appeal. As a first appellate court, I am required to re-examine all the evidence on record and come to my own conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanor. See the case of **Okeno vs Republic [1972] EA 32**.

11. I have re-evaluated the evidence on record. The appellant was acquitted of Count 1 for attempted defilement but convicted on the alternative charge of indecent act. He was also convicted on the offence of being in Kenya illegally.

12. The complainant was a young girl of 4 years and she did not testify directly, but instead PW1 MD her sister aged 21 years was appointed as an intermediary under section 31 of the Sexual Offences Act. The section provides as follows –

“31 (1) A court in criminal proceedings involving the alleged commission of a sexual offence, may declare, other than the accused, who is to give evidence in those proceedings a vulnerable witness.....

a.

b.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the opinion of the court he or she is likely to be vulnerable on account of

(a).....

(b).....

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may –

(a) convey the general purport of any questions to the relevant witness.

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for recess.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.”

13. From the record of the trial court, MD testified on her own without getting any information from the complainant, to convey the same to court. In my understanding, an intermediary in a court case is a person who assists another person to testify. In this particular instance, MD should have been getting whispers from the young victim and then communicating the same to the court, if she was an intermediary. Instead, she gave evidence of what she could remember happened as she said she was near the scene of incident, which meant that she was not acting as an intermediary but a substantive witness. The evidence of PW1 therefore was not evidence of an intermediary of the minor victim. This means that the complainant herself did not give any evidence, either directly or through an intermediary.

14. The evidence of PW1 in my view however can stand on its own without the tag that she was an intermediary of the minor victim. In this context, the evidence connecting the appellant to the incident at the scene was that of PW1, the sister of the complainant as well as that of PW2, HM the mother of the complainant. Both stated that they saw traces of sperm or semen fluid on the pants of the complainant. They both also said that they did not know the appellant.

15. However, the investigating officer PW4 Cpl. Julius Kigamba stated that the appellant was employed as a cleaner by PW2, which evidence was supported by the appellant's sworn testimony, who also added that he was implicated by the mother of the complainant because he had worked for her previously and was due for payment of Kshs.3,000/=, and also that on that material day he had worked again for the mother of the complainant by cleaning the house for 500/= but when he demanded for payment, he was implicated in committing the sexual offence herein.

16. In my view, the variance between the evidence of PW1 and PW2 on the one hand as against that of PW3 the Investigating Officer with regard to the prior knowledge of the appellant by PW1 and PW2 was a material contradiction which watered down the prosecution case. The magistrate did not take this material discrepancy in the prosecution evidence into account.

17. The medical evidence also tendered in court did not confirm the presence of spermatozoa or semen, as no laboratory testing was done on the alleged male fluid. The magistrate made a correct finding on this, but convicted the appellant for indecent act because of bruises found in the genital parts of the complainant. Since the evidence on record does not show that the appellant attempted to penetrate the complainant, in my view, such bruises, if they were found could not have been caused by the appellant.

18. On the totality of the evidence therefore, I find that the prosecution did not prove beyond reasonable doubt any of the alleged sexual offences alleged against the appellant. I will therefore quash the conviction for indecent act and set aside the sentence imposed.

19. With regard to the offence of being in Kenya illegally, the appellant has not indicated that he had any lawful authorization or permit to be in Kenya. The fact that he had been in Kenya for a period of 6 years did not mean that he was in Kenya legally. Even on appeal, he confirmed that he was an Ethiopian and did not give any explanation as to whether he had permission to be in Kenya. I thus uphold the conviction and the order on sentence made by the trial court.

20. Lastly, I note that in the file there is a document in the name of Adan Alio. I am not sure if it belongs to the appellant. The prosecutor should find out to whom it belongs because it does not appear to belong to the appellant. If the document belongs to him, it should be given to him and a photocopy of the same be retained in the file.

21. To conclude, I quash the conviction of the appellant for the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act and set aside the prison sentence imposed. I uphold the conviction of the appellant for being unlawfully present in Kenya and the orders therein made by the trial court.

22. The consequence of my decision is that, the appellant will now be released from prison custody but will be repatriated to his home country of Ethiopia.

Dated and delivered at Garissa this 20th day of February 2019.

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George Dulu

JUDGE