



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 45 OF 2018**

**ABDI ISMAIL MOULID.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From conviction and sentence in Garissa Chief Magistrate**

**Criminal Case No. 1301 of 2015 by Hon. Cosmas Maundu (CM)**

**JUDGMENT**

1. The accused person was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars being that on the month of October to 15<sup>th</sup> December 2015 in Tana River County, intentionally and unlawfully caused his penis to penetrate the vagina of FH a child aged 13 years.
3. In the alternative the accused is charged of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.
4. The particulars being that on the month of October to 15<sup>th</sup> December 2015 within Tana River County, intentionally touched the vagina of FH a child aged 13 years.
5. He pleaded not guilty and the matter went into full trial.
6. The accused was convicted on office of committing an indecent act with a child and was sentenced to serve 10 years imprisonment.
7. Being aggrieved by the aforesaid decision the appellant filed an appeal and set out 6 grounds of appeal namely;-

**(1) That the trial court misdirected itself on facts by finding the offence of committing an indecent act with a child was proved based on the assumption there was penetration.**

**(2) That the trial court erred in law and facts by failing to record reasons for believing a single witness contrary to section 124 of the Evidence Act.**

**(3) That the trial court erred in law and in facts by failing to warn itself of the dangers of relying on a single witness.**

**(4) That the trial court erred in law and in facts by failing to find that ingredients of the offence of committing indecent act with a child were not proved.**

**(5) That the trial court erred in facts and law by failing to appreciate that it did not have the benefit of taking the complainant's evidence and as such did not see the witness's demeanour which could have assisted in determining her truthfulness.**

**(6) That the trial court erred in law by failing to consider the defence of the appellant that was plausible and that impeached the prosecution's case.**

8. The parties agreed to canvass appeal via submissions. The appellant filed the same and highlighted while the respondent canvassed the appeal.

#### **APPELLANT'S SUBMISSIONS:**

9. The appellant submits that the offence of indecent act was not proved beyond reasonable doubt. Reason being, for the offence of committing an indecent act with a child to occur, evidence must be led to show that the perpetrator used any part of his body or an object under his control to touch the genitalia, buttocks or breast of the complainant. See section 2(1) of Sexual Offences Act No. 3 of 2006.

10. He contends that, from the record, it is clear that the complaint was about actual penetration. Nowhere in the record is there a complaint that PW1's breasts, buttocks or vagina were touched. There was no basis for making a finding that there was an indecent act committed.

11. He relies on **A.C. Mrima J** holding in **Criminal Appeal No. 3 of 2019**. He held as follows:

**“As to whether there was any contact between any body part of the appellant with the genital organ, breast or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the appellant touched her genital organ, breast or buttocks. The complainant talked of the appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not lead to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt.”**

12. He further argues that, the trial court erred in law in not recording the reasons why it believed the complainant contrary to the provisions of section 124. Reason being that, the court did not have the opportunity to take the evidence of the complainant as she testified before Hon. Wachira.

13. When Hon. C. Maundu took over, he ordered that the trial starts afresh, later when it emerged that the prosecution was not going to avail the complainant, he ordered that her previous testimony be adopted. He did not have the chance to see her demeanour in order to make an inference on her truthfulness.

13. The court relied on what was already recorded thus, the trial court was at a disadvantage, as it did not observe the demeanour of the complainant to gauge whether she was telling the truth or not.

#### **DUTY OF FIRST APPELLATE COURT:**

14. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify. (See **Okeno vs Republic [1973] EA**.)

#### **PROSECUTION'S CASE:**

15. The complainant told court that she never attended school and that she was brought up by his grandfather. She alleged that her father came for her from her grandfather's place and took her to his home in Bangale area. At around 1.00 pm while at her father's place a taxi came with the accused person who was accompanied by other men. When she asked her aunt what the taxi had come to do there, she allegedly informed her that the taxi was for her wedding. She had not been informed of any wedding and she was not yet ready for marriage and therefore she ran into a nearby manyatta.

16. That her aunt one MD and her husband one AD followed her to that manyatta and took her back to her father's house. She met a lady in the house who started decorating her with hyna.

17. At around 11.00 pm she was taken to the house of her "would be husband" who is the accused person herein. In the house she found some girls who watched over her not to run away. After some time those girls left. She remained behind with the accused person.

18. That the accused person was wearing a kikoi. She alleged that the accused person removed her clothes and started touching her. She alleged that she tried to resist and push the accused person away but the accused person overpowered her. She alleged that the accused person took a rope and tied the ankle of each leg and fastened the rope on the posts that made the house. He also tied her hands separately and fastened the rope on the poles of the house. It was a traditional house. She was lying down facing upwards. After tying her up he removed his clothes and penetrated his penis inside her vagina. She alleged that the accused person penetrated her using a lot of force and she experienced a lot of pain. She screamed for help but no one came to her rescue. She bled a lot from her vagina. When the accused person finished, he untied her. He gave back her clothes.

19. After dressing up she lied to the accused person that she wanted to go out to answer a call of nature. When she went out she did not return to the house. She walked through the bushes looking for a place to take refuge but in vain. She walked past Bangale until she got exhausted and she slept in the bush. She was sleeping when was woken by two men. Those men had followed her footprints. Those men captured her and took her back to the accused's house.

20. When she arrived at accused's house she was beaten up by the accused person, her father and her maternal uncle for running away. She

started crying. It was around 4.00 pm. She was still crying when her aunt one Mace came. Her aunt tried to comfort her telling her to stop crying since she had arrived. At around 11.00 pm she tricked her aunt that she wanted to go and relief herself in the bushes. Her aunt agreed and escorted her to a nearby bush. She left her aunt waiting for her and ran to the chief's office Bangale.

21. That she reported to the chief that she was married off to a man she did not want. Her father and uncle came for her from the chief's office. The chief told her father not to force her to marry the accused person. He (chief) instructed his father to take her to her younger uncle. She stayed with her young uncle for some time. However her freedom did not last for long. As soon as her uncle went on a safari, her father and mother came for her. They beat her up and took her to the house of the accused person.

22. She stayed with the accused person for a short period than she run away. She went back to the accused person for a short period than she run away. She went back to the chief's office and reported that her parents took her back to the house of the accused person. The chief referred her to Bangale police station where she reported the matter. Police arrested both the accused person and her father. She was taken to hospital where she was examined and her P3 form was filled. Later she was taken to Garissa Rescue Centre.

23. PW2 PC Daniel Mutinda testified that on 14/12/2015 he was at Bangale police station when the complainant came and reported that he was defiled by a person know to her. On 15/12/2015 he proceeded to Yakirt trading centre along Garissa – Nairobi road with Corporal Odanga where they arrested the accused person. The accused person was identified to them by the father of the complainant.

24. PW3 Corporal David Odanga testified that on 14/12/2015 in the morning hours he was at Bangale police station when the complainant came and reported that her father one EH forced her to marry one Abdi Ismail Maulid (accused). He was requested to investigate the matter by the incharge.

25. That the complainant narrated to him how she underwent trauma at the hands of the accused person between the month of May 2015 when she was married off and the month of October when she came to report to the police. She told him that accused person used to tie up her hands, beat her up and force her into having sex with him.

26. That he took the complainant to Garissa County Referral Hospital where she was examined and her P3 form filled. She also had her age assessed. She was 14 years according to the age assessment report dated 6<sup>th</sup> May, 2016 which was produced in court.

27. On 15/12/2015 he arrested the accused person at Yakirt trading centre. He alleged that the accused person was identified to him by the complainant.

28. During re-examination he told court that he charged the complainant's father with an offence relating to subjecting a child to harmful cultural rites and that the said case was still pending before court by the time he testified in court.

29. PW4 Moses Koech is a clinical officer based at Garissa County Referral Hospital. He said that he examined the complainant on 16/12/2015 and filled in her P3 form. On examining her he observed that she had wounds on her visits. Interestingly he told court that he did not examine the complainant's genitalia. According to him the complainant told him that he was living with the accused person as husband and wife and therefore there was no need to look at genitalia.

30. When the accused person was put on his defence, he elected to give sworn evidence. He did not call witnesses.

31. He testified that on 15/12/2015 at around 9.00 am he was in his shop at Yakirt trading centre along Bangale – Mwingi road when two police officers came. They told him that he was required at Bangale police station. When he arrived at Bangale police station the OCS instructed police officers to take his fingerprints. After his fingerprints were taken he was escorted to Garissa Police Station.

#### **ISSUES, ANALYSIS AND DETERMINATION:**

32. After going through the evidence and submissions on record, I find the issues are; ***whether the ingredients of offence of indecent act was proved beyond reasonable doubt?***

33. Section 11 (1) of the Sexual Offences Act states that:-

**“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.”**

34. Section 2 (1) of the said Act defines an 'indecent act' as follows:-

**“Indecent act means an unlawful intentional act which causes:-**

**Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;**

**Exposure or display of any pornographic material to any person against his or her will.”**

35. The trial court held that, **“turning now to the alternative charge of indecent act, I find that there is overwhelming evidence against the accused person. The complainant told court that he spent considerably long time with the accused person and that the accused**

person used to penetrate his penis in her vagina. There is no way accused would have penetrated her without his penis touching her vagina. It should be noted that the complainant was forcibly married off to the accused person by her father. Therefore the accused person lived with the complainant as “his wife”.”

36. PW1 failure to allow the medical officer to examine her vagina to determine whether she was penetrated rendered the principle charge of defilement to collapse. However the trial court believed that, the complainant told court that she spent considerably long time with the accused person and that the accused person used to penetrate his penis in her vagina. Thus the court concluded that, there was no way accused would have penetrated her without his penis touching her vagina.

37. This contradicts court finding that there was no prove of penetration as the vagina/pw1 genital organ was not examined by the medical officer.

38. Nowhere in the record did complaint state that her breasts, buttocks or vagina were touched by the appellant. In *Criminal Appeal No. 3 of 2019 HC Migori Hon. A.C Mrima J* held as follows:

**“As to whether there was any contact between any body part of the appellant with the genital organ, breast or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the appellant touched her genital organ, breast or buttocks. The complainant talked of the appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not lead to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt.”**

39. The court find s that appellant was convicted on the evidence of the complainant only. The medical officer disclosed that he did not examine the genitals of the complainant and thus could not make a finding on examination of the genitalia.

40. PW1 testified before Hon. Wachira CM. When Hon. C. Maundu CM took over, he ordered that the trial starts afresh, later when it emerged that the prosecution was not going to avail the complainant, he ordered that her previous testimony be adopted.

41. He did not have the chance to see her demeanour in order to make an inference on her truthfulness. He relied on what was already recorded. In the premises, the trial court was at a disadvantage, it could not use the demeanour of the complainant to gauge whether she was telling the truth nor could it rely on any corroboration as there was none.

42. Section 124 of the Evidence Act provides that:-

**“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him; provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

43. The court therefore finds the conviction to be un-safe and thus holds that the appeal has merit. The court thus orders that;

***i. Appel is allowed, the conviction is quashed, the sentence is set aside and the appellant is set at liberty forthwith unless he is lawfully held.***

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 6<sup>TH</sup> DAY OF AUGUST, 2019.

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C. KARIUKI

JUDGE