



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 13 OF 2020

ADEY FARAH BASHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Mandera Principal Magistrate's Court

Sexual Offences Case No. 29 of 2019 delivered on 24/2/2020 by Hon. P.W. Wasike (SRM)

JUDGMENT

1. The Appellant; **Adey Farah Bashir** was charged alongside **Abdikadir Mohamed Osman** not before court. It is important to mention by way of passing the appellant's co accused and the offence he was charged with as it will inform part of this judgement. The Appellant's co-accused was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act (The Act) with an alternative count of the offence of committing an indecent act with a child contrary to Section 11(1) of the Act.

2. The Appellant on her part was charged with the offence of child prostitution contrary to Section 15(b) of the Act. She also faced a second charge; knowingly permitting her house to be used for the commission of the offence of defilement contrary to Section 15 (f) of the Act. She was found guilty and convicted of both offences and sentenced to 10 years imprisonment.

3. For the record the co-accused was acquitted of the main charge for insufficient evidence but found guilty of indecent assault and jailed for 10 years. The trial court was of the view that the offence of defilement against the co-accused was not proven. The learned magistrate stated;

“... on whether the victim was defiled the medical evidence tendered by PW2 ...exhibit 1 and 2 do not support the charge of defilement”

“.....and convict him (1st accused person) on the less charge of committing an indecent assault with a minor contrary to Section 11(1) of the Sexual Offences Act.”

4. As regards the 2nd accused who is the Appellant, the court found her guilty and convicted her for procuring the minor for purposes of defilement by the 1st accused and for knowingly permitting the use of her house for the commission of an act of defilement.

5. Aggrieved by the judgement the Appellant preferred this appeal on the 19th of March, 2020 on the following grounds. The same may be summarized as follows;

- **The trial court failed to consider the facts and in convicting the Appellant of the offence.**
- **The decision of the court amounted to great injustice.**
- **The victim did not mention the Appellant.**
- **The court misdirected itself by accepting circumstantial evidence.**
- **The sentence was excessive.**

6. This being the first appellate court it has to consider the evidence afresh, examine and analyse the same in order to arrive at its own independent decision in line with the case of **Okeno vs Republic [1972] EA at 32** where the court stated;

“An appellant court on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic [1957] EA. 230) and to the appellate court’s own decision on the evidence. The first appellate court must satisfy itself and weigh conflicting evidence and draw its own conclusions (Shantilal M. Rulwala vs Republic [1957] EA. 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In so doing, it should make allowance for the fact that the trial has the advantage of hearing and seeking the witnesses.”

7. On its part **Section 124 of the Evidence Act** provides;

“Notwithstanding the provision of Section 15 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 sexual offence, the only evidence is that of an 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.”

8. The alleged victim was a child of 12 years. Secondly there were no eye witnesses to any of the alleged offences as those who testified relied on information received from the child. Indeed, in his findings the trial court was convinced that there was no proof of defilement so that the 1st accused was acquitted of the said offence.

9. This court finds the evidence of the victim was shaky. The offences against the accused were serious and indeed attracted a heavy penalty and as observed by the trial court the said offences are rampant in this region, this fact however does not lower the necessary threshold required in order for a court to return a verdict of guilt against an accused..

10. Notable concerns are in part of the victim’s evidence and that of her witnesses which do not corroborate each other and do not appear credible. For instance; in the victim’s testimony she said that as she was being defiled the appellant was seated outside her house. How did the victim know this? As her earlier evidence was that the appellant had tied her legs and mouth with a piece of cloth.

Further in her statement she said that the defilement took two minutes from 8 am yet elsewhere she says she returned home at noon She also said that her neighbours Amara and Shukri came to her house and saw me and asked her why she walked dragging my feet as if she were feeling pain and she explained the matter to them. She said further that the day following another neighbour Modika took her to hospital.

11. The above statement is not consistent with the evidence of other witnesses who purported to rely on the victims evidence.

12. **PW3** in her evidence said that the victim went missing at 9 pm. And they learnt from an old woman that the victim was at the Appellant’s house. The said witness further to said;

“The following morning, I went to the home of Naima Adan Ismail. I found her in the father’s house. She was sick looking. I asked her where she was the previous night and she told me Adey had taken her to her house. She told me she was defiled at Adey’s house. Myself with Shukri took Naima to police station and later we were referred to hospital.”

13. **PW4** on his part stated that minor was induced with Ksh.100 and that Adeny tied her with a rope.

14. The evidence on record therefore leaves a number of questioned an unanswered. When did the defilement if at all take place? Was it at 8 a.m. or was it at night?

Who took the girl to hospital? Was it an old woman or PW2?

Was she defiled or not?

15. In this court’s view the glaring contradictions in the prosecution evidence. And the fact that the trial court found no evidence to sustain the 1st count against the appellant’s co accused; the first court of defilement having flopped in any event the case against the appellant is weak.

16. Based on the above the court is of the view that the glaring contradictions and lack of sufficient evidence ought to go to the benefit of the appellant. It was the duty of the prosecution to prove its case to the required standard.

17. Notable also is that in relying on the uncorroborated evidence of the minor in convicting the appellant the trial court failed to give reasons for believing in the uncorroborated evidence and relying on the same as required by law.

18. For the reasons stated above this court finds it unsafe to rely on the prosecution evidence and gives the benefit to the appellant who consequently is acquitted of both offences. She is set free unless otherwise lawfully held.

19. The appellant is reminded that her release today is based on technicalities. She may not be lucky next time. She must keep peace, be a

role model and having been a victim of early marriage herself which was an upfront on her right as a girl child she ought to be a defender of the rights of girl child. She is a mother of girls herself. A lot is expected of her in curbing the menace against the girl child more so in this region.

DATED AND DELIVERED AT GARISSA THIS 4TH DAY OF FEBRUARY, 2021.

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ALI ARONI

JUDGE