



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 27 OF 2019

ABDULLAHI SAHAL ISSACK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of Honourable Cosmas Maundu, Chief Magistrate at Garissa, in Chief Magistrate's Court Criminal Case No. 14 of 2018)

JUDGEMENT

1. This is an appeal lodged by **Abdullahi Sahal Issack** who had been charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. The accused denied both the main and the alternative count and the matter went to full trial with the prosecution calling 4 witnesses. Upon hearing the case the court acquitted the appellant of the main count due to lack of evidence but convicted the accused of the alternative count having found that the appellant had committed an act of indecent assault with the child. He was sentenced to 10 years imprisonment.

3. Being dissatisfied with the conviction and sentence the appellant preferred this appeal. The grounds of appeal may be summarized as follows:

- **Evidence of the prosecution witnesses was contradictory.**
- **There was no evidence of sodomy as alleged from clinical examination of the alleged victim.**
- **The alleged crime was a fabrication.**

4. This is the first appellate court. It has the duty to consider, examine & analyze the evidence afresh so as to arrive at its own independent opinion bearing in mind that the trial court heard and saw the witnesses first hand. See the case of **Okeno v R [1972] EA.**

5. The prosecution's case is that the complainant a child of 10 years lived with his mother and siblings next door to the appellant. On the material day the 28th of April 2018, the complainant and the appellant were in the appellant's house from 9 p.m. watching video on the complainant's mother's phone when the complainant fell asleep. He woke up at about 4 a.m. to find himself with no pants and the appellant on top of him as he was facing downwards, the appellant had put his penis in his anus. He screamed and the Appellant let go. The complainant convinced the appellant to open the door for him to go to the toilet, instead he went and informed his mother who the following day took him to hospital and reported the matter to the police which led to the appellant's arrest.

According to PW2 when she saw the son at 4 a.m. having looked for him she was with a neighbor. The son was naked down and with oily buttocks. On interrogating the son, the boy did not say anything to her. She called a neighbor who the son opened up to.

6. On his part, when found to have a case to answer after the close of the prosecution case, the appellant informed the court that PW2 had an old grudge with him arising from an incident where her cows destroyed his grandmother's crops. He denied the offence.

7. The onus of proving a case beyond all reasonable doubt falls squarely on the prosecution. The accused has absolutely no duty of proving his innocence.

8. The trial court in acquitting the Appellant of the offence of defilement had this to say:

“16. On the issue of penetration, we have the P3 form which indicates that there were no injuries to the anus except a tiny abrasion attributed to hard stool. The clinical officer (PW3) who produced the P3 form was categorical that he saw no evidence of sodomy.

17. Without penetration the offence of defilement cannot stand.”

9. As he convicted the appellant on the alternative count, this is what the trial magistrate said:

“19. The complainant said that when he woke up, he had no pants. He said that he found the accused person on top of him and he had inserted his penis in his anus. It is the pain that woke him up.

.....The accused person applied oil on the complainant’s buttock this was to lubricate the complainant’s anus in order to ease penetration. Although according to the clinical officer the accused did not manage to penetrate.....”(emphasis provided).

10. The above underlined paragraphs of the trial court judgement cannot be traced in the evidence of PW1 or even the clinical officer. In his evidence the clinical officer simply said he saw no evidence of sodomy. PW1 did not say that pain woke him up. Indeed, the clinical officer’s report ruled out any penetration.

11. Further the evidence of PW1, PW2 and PW4 was contradictory in the account before and after the alleged crime. PW1 said he was watching videos with the appellant when he fell asleep. He woke up and found the appellant on top of him, he told the appellant that he wanted to go to the toilet but went home and knocked at his mother’s house and informed her. This was at 4 a.m. On the other hand, PW2 the complainant’s mother said at 4 a.m. she noticed her son was not at home. She knocked at neighbors’ including the appellant’s who did not open. Then she saw the complainant as she was talking to a neighbor, Halima. The boy had a T-shirt and no pants. His buttocks were oily. She asked what happened. He did not answer. PW2 called a neighbor one Sahara who spoke to PW1 and he said the accused sodomized him.

On his part PW4 a police officer stated that he interrogated the complainant who told him that the appellant sent the complainant for his mother’s phone. He later locked the door, undressed the complainant and sodomized him. That the boy escaped at 4 a.m. when the appellant felt asleep. That PW2 told him that she observed the boy walking with difficulties, checked on him and saw fluid from the anus.

12. This court finds the above evidence materially contradictory, to an extent that the same cannot be ignored. Which version of the happenings before and after the alleged incident is true? However, since the court based on the evidence of PW3 ruled out sodomy this court will not say more on the evidence but to mention that the said evidence casts doubt on the credibility of the prosecution’s evidence in its entirety such the same cannot be a basis of a conviction of even the lesser offence.

13. Section 2(2) of the Sexual Offences Act defines “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, breasts or buttocks of another, but does not include an act that cause penetration.

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

14. The trial court in arriving at its opinion that there was indecent act stated:

“.....Although according to the clinical officer the accused person did not manage to penetrate the complainant. I have no doubt that he touched the complainant’s anus with his penis in an attempt to penetrate him. Therefore, the offence of indecent act has been proved beyond reasonable doubt.”

15. It is not automatic that on failing to prove the offence of defilement or rape then the next thing is to convict on indecent assault even in the absence of evidence that the accused unlawfully and intentionally caused contact with his body, the genital organ, breast or buttocks of another.

There was no evidence from the complainant that the Appellant touched his genitalia or his buttocks or even his body and since the trial court found no evidence of penetration it is not for the court to theorize in the absence of such evidence.

16. Based on the above analysis I do not find the conviction of the Appellant by the trial court on the alternative count based on contradictory evidence and in the absence of evidence of the offence as stated above to be safe.

17. The court accordingly, quashes the conviction and sets aside the sentence.

The appellant is set free unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 1ST DAY OF JULY, 2021.

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ALI-ARONI

JUDGE