REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 4 OF 2021

ADAN EDIN ISSACK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of P.W. Wasike – Senior Resident Magistrate Mandera in a judgement that was delivered on the 9th of February, 2021 in Mandera SPM Sexual Offences Case No. 25 of 2019)

JUDGEMENT

1. This is an appeal arising from the Judgement of Hon. P. W. Wasike, Senior Resident Magistrate Mandera in Sexual Offence Case No. 25 of 2019 which Judgement was delivered on 9th of February 2021.

2. The Appellant **Adan Edin Issack** was aggrieved by the entire judgement thereby filing this appeal on 17 grounds as follows;

1. The learned trial magistrate erred both in fact and in law by convicting the Appellant when the prosecution had not proved their case against the Appellant beyond reasonable doubt.

2. The learned magistrate erred both in fact and in law by failing to resolve the apparent doubts in the prosecution case in favour of the Appellant by convicting on a charge Appellant was not charged with.

3. The learned trial magistrate erred both in fact and in law when he disregarded the solid defence by the Appellant while relying on very weak reasons to convict the Appellant.

4. The trial magistrate erred in convicting the Appellant a harsh sentence without remission in a case which was not watertight and had no stand.

5. The learned trial magistrate erred both in fact and in law by failing to scrutinize and evaluate the prosecution's evidence thereby arriving at an erroneous decision.

6. The learned trial magistrate erred both in fact and in law by failing to hold that burden of proof at all times rested with the prosecution and could not shift to the Appellant.

7. The learned trial magistrate failed to consider the prosecution's evidence that exonerated the Appellant herein against the offence.

8. The learned trial magistrate confused and misapplied the evidence in favour of acquittal of the Appellant to convict him.

9. The learned trial magistrate erred both in fact and law in failing to find that the prosecution's evidence was contradictory in material facts.

10. The learned trial magistrate erred in law and in fact when he made a partial evaluation of the evidence and finding in favour of the prosecution instead of awarding the benefit of doubt to the defence.

11. The learned trial magistrate erred both in fact and in law in failing to find that no tangible evidence was formed or presented to the court linking the Appellant to the commission of the offence.

12. The learned trial magistrate erred both in fact and in law by failing to find that the failure to call crucial witnesses fatally weakened the prosecution's case.

13. The learned trial magistrate relied on hearsay evidence, speculation, probabilities and possibilities to convict the Appellant.

14. That the trial magistrate failed in both facts and law by convicting and sentencing the Appellant in a case that had no sufficient identification or recognition.

15. That the trial court misdirected itself in law by rejecting alibi defence which sufficiently created a reasonable considerable amount of doubt as to the prosecution's case.

16. The learned trial magistrate erred both in fact and in law when he failed to find that the prosecution did not prove the ingredients of the offence of defilement.

17. The learned trial magistrate ignored the Appellant mitigation and the pre-sentence report done by Probation Office that was in favour of the Appellant.

The Appellant seeks for the conviction to be set aside and the sentence quashed, in the alternative for the sentence to be varied.

3. The Appellant had been charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act. (The Act)

The particulars being that on the 24th of September 2019 at around 1100 hours at [Particulars Withheld] Area of Mandera Central Sub-County, Mandera County intentionally caused his penis to penetrate the vagina of ZIA a female aged 14 years.

4. He also faced an alternative count of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. Particulars being that on the 24th day of September 2019 at 1100 hours at [Particulars Withheld] Area in Mandera Central Sub-County intentionally touched the vagina of ZIA a child aged 14 years with his penis.

5. The prosecution case briefly is that on the 24th September 2019 at 1100 hours the Appellant accosted the complainant who was herding her uncle's goats, seduced her and when there was resistance, he assaulted her, subdued her and went ahead to defile her.

6. In its judgement the trial court found that the evidence before court proved a lesser offence of attempted defilement and convicted the Appellant for the said offence and sentenced him to 10 years imprisonment.

7. The court summarizes the grounds of appeal as follows;

a. Whether or not the prosecution proved the offence of defilement.

b. If (a) is negative whether the alternative count of committing an Indecent Act with a child was proved.

c. Whether the court erred in considering the offence of attempted defilement and whether the punishment that was meted out was harsh and excessive.

8. The key ingredient of the offence of defilement includes, establishing the age of the victim, proof of penetration and of course the identity of the perpetrator. All these ingredients must be proved by the prosecution beyond all reasonable doubt.

9. The victim **PW1** informed the court that she was 14 years. PW2 an aunt to PW1 also confirmed the age at 14 years. PW4 a clinical officer at Wargadud Health Centre did an age analysis and placed the age at 15 years. The court will not attach much weight in the difference as age assessment has a plus or minus error of margin and will therefore place the age of the victim at 14 years.

10. Further PW1 told the court that the Appellant pursued her, beat her on the back and on her thighs using a stick. He removed his cloth, then removed her clothes and panty, he made her lie facing up, went on top of her and inserted his penis in her vagina. She made noise but there was no assistance.

11. PW2 on her part stated that PW1 went home crying saying she had been defiled. Her clothes were dusty. She called neighbours who examined PW1's body and they saw injuries, including some injury on the private part and her back.

PW4 **Boniface Omwollo** had this to say upon examination; -

"Physical examination: Ok except where injuries were.

Local exam: bruises on upper, back and hands.

Vaginal exam: clean – no labia majora she had been circumcised. Labia minora was in good state

No blood nor swelling vagina was slightly open i.e., hymen was absent. It was not recently broken. This could be due to circumcision or sexual contact. I saw whitish discharge.

This was vaginal condiasis.

No sperm

The bruises could be due to struggle between the lady and assailant."

12. From PW4 it is clear that no penetration took place. He however confirmed the injuries sustained attributing the same to probable struggle between the victim and the assailant. This indeed corroborates what the victim said regarding how she sustained the injuries. The Appellant beat her in order to subdue her which he succeeded.

The court also considered that the victim has described her encounter with different words, she stated in her own words; -

"He made me lie down facing up. He was on top of me. I made noise but no one came to assist……. I got injured when he beat my back and thighs with a stick……. He did the act on me.

I noticed some liquid in my place of urinating."

13. Elsewhere in her evidence PW1 used the word '*penetration', and he defiled me*." All these were used interchangeably. Shouldn't the court take Judicial notice of the victim's age? She was only a child of 14 years. Is she expected to know what happens exactly when one engages in sex? He inserted his penis in her private parts she said, the court believes her, as will be demonstrated later in the judgement. But did he penetrate? Medical examination shown above negates the same, the victim is not very clear on this. Circumstances are such that penetration was not proved beyond all reasonable doubt, the offence of defilement must fail.

14. The alternative count of committing an indecent act with a child requires proof that there was unlawful act of conflict between any part of the body including breasts, buttocks and the vagina with the genital organs of another which does not include the act of penetration.

15. Ingredients of the offence include;-

a. Proof that the victim is a child.

b. That there was unlawful contact with the body part of the victim either, buttocks, breasts or vagina without penetration.

16. To start, having believed that the victim was assaulted and subdued as there is no doubt that she sustained injuries, the court is prepared to consider the proviso to **Section 124 of the Evidence Act**.

"Provided that where a crime 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."

17. Obviously like in many cases of this nature there were no eye witnesses. The court finds the evidence of the victim, that she was beaten, subdued and the appellant lay on top of her and put his penis in private part to be cogent, and truthful. Notable is that there is corroborated evidence on the assault, further it is believable that she was subdued, made to lie facing up and the Appellant going on top of her and thereafter placed his penis in her vagina. He needed not to have penetrated which then classifies the Appellant's action as unlawful indecent act.

18. This court faults the finding of the trial court that the offence of attempted defilement took place. Ingredients of Attempted defilement include; -

a. Establishing that the victim was a child.

b. Proof that there was intent to penetrate the private parts of the victim.

In his judgement the trial magistrate quoted the case of **Abraham Otieno v Republic [2011] eKLR** where the judge considered the ingredients of offence of attempted rape and stated

"For an offence of attempted rape to be deemed to have been committed under this section, the prosecution must prove the culprit acted in such a manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped on his tracks and or in the nick of time…."

19. In the instance case an analogy may be drawn from the judge's words in the above cited case. The court finds that nothing stopped the Appellant from defiling the victim. He had an opportunity to penetrate but there was no proof that he did or attempted such that there was no interruption of any kind that came in between the intention and the act. However, from the victim and PW4 there is evidence to consider the alternative count.

20. Based on the above findings the court sets aside the conviction of attempted defilement and in its place convicts the Appellant of the alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The Appeal succeeds to this extent.

21. The punishment provided for the offence of indecent act with a child under Section 11 (1) of the Act is a jail term of not less than 10 years. The court therefore retains the sentence of 10 years imprisonment.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 11TH DAY OF NOVEMBER, 2021

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ALI-ARONI

JUDGE