



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 44 OF 2016

ADAN ABDULLAHI HUSSEIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal against conviction and sentence in Mandera Senior Principal Magistrate Criminal Case No. 4 of 2016 by Hon. P. N. Areri (SRM))

JUDGEMENT

1. The appellant was charged in Magistrate's Court at Mandera with a number of counts. Count 1 was attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 2nd January 2016 at Udlore Location in Mandera Central District within Mandera County intentionally attempted to cause his penis to penetrate the vagina of S.J.I (name withheld) a child aged 17 years.
2. Count 2 was for assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the same day and place assaulted S.J.I (name withheld) occasioning her actual bodily harm.
3. Count 3 was for entering Kenya without a passport or permit contrary to section 34 (1) as read with section 53 (1) (j) (2) of the Kenyan Citizenship and immigration Act No. 12 of 2011. The particulars of the offence were that on the same day and place being Ethiopian citizen was found having entered in Kenya without passport or permit.
4. When the appellant appeared in court, he admitted Count 3 for being in Kenya illegally. He was convicted of the offence and fined Kshs.400,000/= and in default to serve 5 years imprisonment. He however pleaded not guilty to Count 1 and 2 and a trial was held.
5. Three witnesses testified on behalf of the prosecution in respect of Count 1 and 2. At the close of the prosecution evidence, the trial court acquitted the appellant on Count 1 of attempted defilement in accordance with section 210 of the Criminal Procedure Code. He was however put on his defence with regard to Count 2 for assault causing bodily harm.
6. In his defence the appellant elected to tender sworn testimony and did not call any witnesses. He denied assaulting anybody. He was cross-examined and maintained his denial but agreed that he was a herd boy at Elwak.
7. On the evidence on record, the magistrate convicted him of the offence of assault causing bodily harm and sentenced him to serve 5 years imprisonment.
8. The appellant has now come to this court on several grounds of appeal. He has also filed written submissions.
9. During the hearing of the appeal, the appellant relied on his written submissions and elected not to make oral submissions.
10. The learned Principal Prosecuting Counsel Mr. Okemwa supported the conviction on the charge of being in Kenya illegally. Counsel however raised a concern that the default prison sentence of 5 years imprisonment was illegal as the maximum default sentence was 3 years imprisonment. Counsel also felt that the fine of Kshs.400,000/= for an offender who had pleaded guilty was on the higher side as the maximum sentence was a fine of Kshs.500,000/=.
11. Counsel stated also that the magistrate though was correct in convicting the appellant for assault causing actual bodily harm the sentence of 5 years imprisonment imposed by the trial court was on the higher side as it was the maximum sentence for the offence.
12. I have perused the record and considered the submissions on both sides. I have also perused the judgement.

13. The appellant pleaded guilty to the offence of being in Kenya illegally. The maximum sentence of the offence is a fine of Kshs.500,000/= and a default prison sentence of 3 years. The default sentence of 5 years imprisonment handed down by the magistrate was therefore illegal. I also agree with the learned Prosecuting Counsel that the fine of Kshs.400,000/= was excessive for a person who had pleaded guilty to the offence. I appreciate that the magistrate had the discretion as a trial court to determine the most appropriate sentence. I also appreciate that the offence is very common in border places such as Mandera and is a security risk. In my view however, a fine of Kshs.300,00/= in this case where the appellant pleaded guilty without wasting court's time was more appropriate. The default sentence was also unlawful as the maximum sentence for the offence is 3 years imprisonment.

14. The plea of guilty was however properly taken. I will uphold the conviction for Count 3. I set aside the sentence and substitute therefore a fine of Kshs.300,000/= and in default to serve 2 years imprisonment. As the magistrate did not make a repatriation order, I order that the appellant be repatriated to Ethiopia once he either pays the fine or serve the sentence.

15. With regard to the offence of assault causing actual bodily harm, in my view, the evidence on record was adequate to sustain the conviction. The incident occurred in broad daylight at 3 pm and the appellant was clearly seen and identified by the complainant. The evidence from the Clinical Officer of Lafey Sub-County Hospital PW3 Ali Hassan Abdi was clear that the complainant sustained injuries and blood was oozing from bruises.

16. However, the maximum sentence in my view was also not called for. I thus uphold the conviction on Count 2. I however set aside the sentence of 5 years imprisonment for assault causing actual bodily harm and substitute therefore a sentence of 3 years imprisonment from the date of which he was sentenced by the trial court.

17. To conclude, I uphold the conviction for the offence of entering Kenya without a passport or permit. I however set aside the sentence imposed and instead order that the appellant will pay a fine of Kshs.300,000/= or in default to serve 2 years imprisonment.

18. With respect to the offence of assault causing actual bodily harm, I also uphold the conviction. I however set aside the sentence and order that instead the appellant will serve 3 years imprisonment from the date on which he was sentenced by the trial court. After serving the sentence, or on release on paying the fine, the appellant will be repatriated to his home country of Ethiopia.

Dated and delivered at Garissa this 7th day of November, 2018.

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George Dulu

JUDGE