



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL APPEAL NO.35 OF 2015

AHMED IBRAHIM ISSACK APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No.137 of 2015 of the Senior Resident Magistrate's Court at Moyale by Hon. Gathogo Sogomo – Senior Resident Magistrate)

JUDGMENT

The appellant, **AHMED IBRAHIM ISSACK**, was convicted for the offence of attempted defilement contrary to section 9(1) (2) (sic) of the Sexual Offences Act No.3 of 2006 and for the offence of entering Kenya without a valid pass or permit contrary to section 34 (1) as read with section 53(1) J (2) (sic) of the Kenya Citizen and Immigration act No.3 of 2011.

The particulars of the offences were that on 6th May 2015 within Mandera County, intentionally attempted to cause his penis to penetrate the vagina of **HMM**, a child aged 16 years. On the same day he was found to be in Kenya unlawfully.

He was sentenced to serve fifteen years imprisonment with hard labour in count one and six years imprisonment in count two. The sentence was ordered to run concurrently. He has appealed against both conviction and sentence.

The appellant was in person. He raised the following two grounds of appeal:

- 1.That the learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.
2. That the learned trial magistrate erred in law and in fact by sentencing him to 15 years imprisonment.

The state opposed the appeal through Mr. Chirchir, the learned counsel.

The facts of the prosecution case were briefly as follows:

While both the appellant and the complainant were looking after camels, the appellant started flirting with the complainant by singing love songs directed at her. When he went beyond singing and started to touch her, she threatened to report him. He went away but when he returned, he knocked her down and attempted to defile her but for her spirited struggle.

At the time of his arrest, it was established he was an Ethiopian national who was in Kenya illegally.

The appellant in his defence contended that when the complainant called him a thief, he pushed her and she fell down and was injured on the elbow. This is when she started to allege that he wanted to rape her.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32**.

I have severally previously observed that the first duty of the trial court is to ensure that the charges are correctly drafted so as to avoid instances where the trial may be vitiated for being prejudicial to an accused person. In the instant case the first and the second counts were erroneously drafted. The offence in count one ought to have been:

contrary to section 9(1) as read with section 9 (2) of the Sexual Offences Act.

The charge in count two ought to have been:

contrary to section 34 (1) as read with section 53(1) (j) and section 53(2) of the Kenya Citizen and Immigration act No.3 of 2011.

Upon my perusal of the record of the entire proceedings, I have formed an opinion that the appellant understood the charges against him and he fully participated in the trial. He was therefore not prejudiced. The defects are therefore curable under section 382 of the Criminal Procedure Code.

What evidence was available to the trial court in respect of the charge in the first count? **HMM** (P.W 1) testified that on 6th May 2015 she was looking after camels. At about 11a.m, the appellant who was also looking after camels nearby went to where she was and started to sing a love song to her. when he touched her on the shoulder, she brushed his hand off and threatened to report him. The appellant left and went to where his camels were. Shortly thereafter he returned and grabbed her from behind and knocked her down. The appellant appeared to overpower her and he removed his pair of shorts. When he attempted to remove her dress she resisted and it was torn in the process. The appellant was not able to penetrate her for she resisted. He therefore ejaculated around her genitalia and on the ground. The appellant ran away. She went and reported to her father. She denied that she fell down while fighting with him. She also denied to have fabricated the claim to have him removed from her uncle's employment.

M M (P.W 2) is the complainant's father. He testified that at about 11 a.m, he saw her running from where she was herding camels. She was crying and her face was swollen. She had a wound on the toe and on the shoulder. Her dress was torn revealing torn undergarments. She informed him that the appellant had attempted to rape her.

The clinical officer (P.W 1) established that the complainant sustained an abrasion on the left upper arm and a laceration on the left big toe.

P.C Daniel Owuor (P.W 4) testified that the appellant was arrested by members of public as he attempted to flee.

The appellant on his part contended that the complainant alleged that he had stolen her mobile phone. Out of anger he pushed her to the ground. she was injured slightly on the elbow.

The version of the appellant did not offer any explanation as to why the complainant sustained injuries on other areas and why there was no positive finding by the clinical officer on the elbow.

He did not challenge the complainant with these facts. The fact that he was arrested while fleeing tells it all; he felt guilty not of the push but of the offence of attempted defilement. The learned trial magistrate

addressed his mind to the facts at his disposal before rejecting the appellant's defence. He was therefore convicted on the basis of strong evidence against him in count 1.

P.C Daniel Owuor (P.W 4) testified that when the appellant was arrested, he established he was an Ethiopian national without any documents allowing him to be in Kenya. The appellant said he was a resident of Madawalamo in Ethiopia and that at the time of his arrest, he was a herdsman in Tabaka in Kenya. The appellant did not claim to have been in the country legally. This offence was likewise proved.

The only sentence the appellant challenged is in count 1. Section 9(2) of the Sexual offences Act provides as follows:

A person who commits an offence of attempted defilement with a child is

liable upon conviction to imprisonment for a term of not less than ten years.

The section does not provide for hard labour. At the time he was sentenced, the appellant was 22 years of age. He was also a first offender. He ought to have benefitted from the minimum sentence. I therefore reduce the sentence in count 1 to 10 years imprisonment. To this extent therefore does the appeal succeed.

DATED at Marsabit this 8th day of March, 2017

KIARIE WAWERU KIARIE

JUDGE