



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 21 OF 2020

RASHID ALI MOHAMED (Alias TURKANA).....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the entire judgement of Hon. A. K.

Makoross (PM) in the Sexual Offences Case No. 18 of 2017,

in Wajir Magistrate's Court delivered on 24th day of June 2020)

JUDGEMENT

1. Section 10 of the Sexual Offences Act states that any person who commits the offence of rape or defilement in association with another or others, or any person who, with common intention, is in company of another or others who commit the offence of rape or defilement is guilty of gang rape and is liable to imprisonment of a term of not less than 15 years but which may be enhanced to life imprisonment.

2. The Appellant herein Rashid Ali Mohamed was found guilty of the offence of gang rape alongside one other person in Wajir Criminal Case No. 28 of 2017 wherein he had been charged alongside 4 others. Three of his co-accused were acquitted for lack of sufficient evidence. The accused and one other having been found guilty were sentenced to 30 years imprisonment each.

3. It is against the above backdrop that the Appellant appealed to this court on grounds that may be summarized as follows:

- **The prosecution case was not proved to the required standard.**
- **The prosecution's evidence was contradictory.**
- **The trial court shifted the burden of proof.**
- **The trial court took into account irrelevant, and extraneous considerations thus reaching at an erroneous conclusion.**
- **The court did not give an explanation why the defence evidence was disregarded.**

4. In his written submissions the Appellant stated that his arrest was based on hearsay and bias. Secondly he was subjected to an unfair trial as the counsel on record only appeared for the 5th accused yet he purported to appear for all of them thus the appellant was not accorded an opportunity to examine or defend himself.

5. Further in purporting to appear for him, the said counsel incriminated him as he failed to cross examine on an allegation that the Appellant had named his accomplice in a confession.

6. The Appellant further argued that the report from the Government Chemist was presented to court a year after samples were sent to the said chemist, and that the exhibit memo had amendments with an intent to compromise the results.

7. Further there were contradictions between the evidence of the complainant who said that she only knew 2 of the assailants by name yet PW2 stated that the complainant knew names of all the 5 assailants.

8. The Appellant also raised the issue of positive identification stating that the alleged offence took place in darkness, and the allegation was that the incident happened very fast and therefore it was not practical for the complainant to positively identify her assailants. Further

moonlight was not sufficient and the evidence that the complainant was able to identify the 1st and 2nd accused person must be treated with caution.

9. In opposing the appeal, the State argued that in her graphic description of the incident the complainant stated that she was able to identify the Appellant who was her neighbour and known to her. Further that PW2 fortified the evidence of the complainant who knew the 1st and 2nd accused.

10. On the issue of the defence counsel it is the State's submission that though counsel first appeared for the 5th accused at the beginning, he subsequently represented all 5 accused persons and all along Appellant did not raise any objection.

11. The state also urged that the issue of a confession did not arise in that the evidence of the complainant incriminated the Appellant.

12. This being the first appellate court it has the duty to look into the evidence afresh examine and analyse the same in order to arrive at an independent decision bearing in mind that the trial court had the benefit of seeing and hearing the witnesses first hand. See **Okeno vs Republic [1972] at 32.**

13. **PW1** the complainant informed the court that while having her supper outside her father's house she was accosted by five men who threatened to kill her, smeared her with a liquid substance that rendered her unconscious. That thereafter she woke up after two hours and found blood oozing from her private parts, she was naked, her dress (dira) having been torn by the assailants and her panty missing. She was taken to chief, the police and later the hospital where it was confirmed that she had been raped.

14. In evidence though the clinical officer did not find any injuries in the vagina she detected spermatozoa. A high vaginal swap was done.

At both the chief and the police station and eventually the court PW1 was able to give the name of the Appellant as one of the assailants and a person well known to her by his name. She said she also knew one other assailant but did not know his name. she also indicated that she could identify the others from the encounter as she saw them before she went unconscious.

15. On his part **PW2** informed the court that he got information of the incident from a colleague upon which he spoke to PW1 who informed him that she knew two of her assailants and she named two of them.

16. The only discrepancy between the evidence of PW1 and PW2 is that PW1 said she knew the name of Rashid though she knew one other assailant though she did not know his name. This in my view is a minor contradiction that does not go to the core of the matter before court.

17. Further I must agree with the State that the judgement was not based on any confession. PW2 alleged that they arrested the other assailants based on information received from the complainant and that is as far as it went. No evidence of a confession was brought forth.

18. Though PW1 is the sole eye witness the report from the Government Chemist incriminated the Appellant and one other person thus corroborating the evidence of the complainant.

19. I have had a critical look at the exhibit memo and the report. Under the heading exhibit identification markings there are exhibits marked "K" and **01, 02, 03, 04 & 05**. Indeed, there is an insertion of names however I do not find the added names whose author was not specified as being in any way prejudicial. The added names could only go along way to eradicate confusion if any.

20. The results/report identify the exhibits by the identification marks and names so that fear of any confusion should be erased.

21. The report is also clear that item "K" marched the exhibits generated from blood samples of **Mohamed Hussein** and **Rashid Ali Mohamed**.

22. As for the delay it is not clear what the complaint by the Appellant was as delay perse cannot be a reason for the court to disregard the report.

23. As for the defence, having considered the same I find the same was a mere denial by the Appellant and it did not dislodge the otherwise strong and cogent evidence of the prosecution.

24. It is the view of this court therefore that the prosecution proved its case against the Appellant beyond all reasonable doubt and thus the conviction and sentence were both safe.

25. Consequently, I dismiss the appeal.

DELIVERED AND SIGNED AT GARISSA THIS 25th DAY OF FEBRUARY, 2021.

.....

ALI ARONI

JUDGE