REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 74 OF 2017

ABDI MOHAMED ABDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged with the offence of rape contrary to Section 3(1)(a) & (b) of the Sexual Offences Act No. 3 of 2006 in the Chief Magistrate's Court at Garissa in Criminal Case No. 377 of 2016.

2. The particulars of the offence were that the appellant on the 8th of April 2016 at Dangare Location, Balambala Sub-County within Garissa County, intentionally and unlawfully had carnal knowledge of BO without her consent.

3. The appellant also faced a second charge; assault causing actual bodily harm contrary to Section 251 of the Penal Code.

4. The particulars of the second offence are that the appellant at the same place and time unlawfully assaulted BO causing her bodily harm.

5. At the end of the trial the appellant was found guilty of both counts, convicted and sentenced to 10 and 1 year respectively. The sentences were to run concurrently.

6. The appellant was dissatisfied with the Judgement and he moved this court on an appeal based on grounds that:

- **The trial magistrate erred by relying on evidence of the witnesses.**
- **The charges against the appellant were not proved beyond reasonable doubt.**
- **The evidence by the prosecution was contradictory, incredible and full of lies and the same led to a severe sentence.**
- **The medical evidence was dubious, did not support the charge and no DNA test was conducted.**
- **The trial court based the Judgement on personal opinion without considering the evidence.**
- **Mitigation was not considered.**

7. The appeal proceeded by way of written submissions as follows:

APPELLANT'S SUBMISSIONS

Details of witnesses was not indicated on the charge sheet.

PW2 did not witness the alleged incident, he was simply the appellant's employer.

PW1's 7-year-old son alleged to have witnessed the incident ought to have testified. Equally the daughter mentioned as to have earlier been assaulted by the complainant should have testified.

The charges against the appellant were framed by the complainant's family as neither the chief nor the police were involved in his initial arrest.

PW5 in his evidence indicated that upon examination of PW1, there was no discharge nor was she bleeding, she had normal external genitalia, had no laceration or swelling on the labia, her cervix was inflamed and all laboratory tests turned negative.

RESPONDENT'S SUBMISSIONS

PW1, the complainant gave a good account of how the appellant accosted her as she looked after camels. Further the appellant hit her with the flat side of the panga, she fell down and he forcefully had sex with her; he threatened to kill her and told her that he was a member of the Al-shabaab militant group.

Further, the clinical examination confirmed there was a marking around the lumber region.

Identification was positive as the complainant knew the appellant.

It was further urged that the evidence was proved beyond reasonable doubt, the appellant rightly convicted and the sentenced within the law.

On DNA test, it was submitted that Section 206 of the Act does not make it mandatory for DNA testing.

Lastly the Appellants mitigation was considered by the trial Court.

8. The duty of this court is to consider, examine and analyze the evidence on record in order to arrive at an independent opinion. See **Okeno vs R [1972] E.A.**

9. On record is the evidence of PW1 to PW5. PW1 informed the court that on the material day when she was herding camel in the company of her 7-year-old son when the appellant hit her, she fell and he raped her 3 times. While on the ground she resisted but he pushed her down came between her legs knelt as she fought him, pulled her long dress to her neck, she had no underpants, he laid on her and penetrated his penis in her vagina while holding a panga and threatening to kill her. After the act he stood and told her that he was an Al-shabaab and she could tell her husband that he had raped her as the husband would do nothing.

10. Further she stated that her son witnessed the incident and went to call relatives, as she walked home slowly after the incident, she met the relatives on the way. They carried her home. Due to the ordeal, she suffered on the back and her body.

She stated further, that the appellant ran away and was found on the other side of the river. The appellant was their neighbor and she knew him as he visited her frequently. She saw him well at the time of the attack and was able to identify him. The assailant had been to her house in the morning and wore the same shirt at the time of the incident. She also recognized his voice.

11. PW3 HB the husband to the complainant testified that on the material day, the 8th of April 2016, the appellant attacked his daughter in the morning and she was rescued by another person. His son later in the evening informed him that the appellant had attacked his wife PW1. He informed three other people Adow, Ahmed and Bilal who went to rescue the complainant and found that she had been assaulted and raped. Their sons later arrested the appellant and took him to the chief. They bought drugs for the complainant due to the incident.

12. PW5 Eliud Njoroge Gathage is the clinical officer who examined the complaint and filled the P3 form on 4th May 2015. The complainant gave him a history of her attack at 7 pm. She informed him that upon attack she lost consciousness and on coming around she had discharge from her genitalia and had sustained injuries. He examined her and found redness of cervix. Tests of STDs, FIV and a high vagina swab were done and results of the same were all negative. He concluded that the cervical injuries were as a rest of rape as the same could be secondary to sexual rape. He produced the P3 form as an exhibit.

13. At the close of the prosecution's case the court found the appellant had a case to answer and placed him on his defence. He gave an unsworn statement stating that he was aged 20 years and a Madrassa teacher. He travelled from Wajir to Garissa in January 2016 where he met the complainant's daughter and they had exchanged telephone numbers. Later he travelled to Balambala in February 2016 and learnt from the girl that she was herding in Dangare. She directed him to "escort" area where they met. He learnt from the girl that their home was near the place. He then hid nearby and, in the night, she took him camel milk. In the morning they met as the girl had been tasked to fetch water, he escorted her but did not reach the river, he waited for her.

On return they met at which point he was seen by people who were grazing goats. Later the girl alerted him that he was being looked for. When he heard people, he crossed the river and went to Tana River when three men one being the girl's brother, caught him, bit him up and locked him before the police came for him.

14. The onus of proving a case beyond all reasonable doubt squarely lies with the prosecution. So that if the court has any scintilla of doubt, the doubt ought to go to the benefit of the accused.

15. In **Republic vs Silas Magongo Onzere alias Fredrick Namema (2017) eKLR** the court had this to say on the subject:

> **"It is law in Kenya as entrenched in the Constitution under Article 50 (2) that an accused person is presumed innocent until the contrary is proved. The Evidence Act Cap 80 of the Laws of Kenya at S.107(1) provide thus: whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist."**
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> **As to what constitutes the burden of proof beyond reasonable doubt the case of Miller vs Minister of Pensions [1947] 2 ALL E.R 372 – 373 provides as follows in a massage alluded to by one considered greatest jurists of our times Lord Denning:**

"The degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentense of course it is possible but nothing in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

In our criminal justice system, there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the State in a court of law. The burden of proof of an accused guilt rests on the prosecution throughout the trial save what there is an admission by the accused person."

16. Further our courts have with approval adopted the holding in the all-time case of **Woolington vs D.P.P. [1935] A.C 462** where Viscount Sankey L.C. stated:

"Throughout the web of English Criminal Law and golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge is or where the trial; the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

17. The appellant raised the issue of contradictory evidence by the prosecution witnesses. The court notes that PW1, the complainant informed the court that the appellant knocked her down and raped her 3 times. He then threatened her. She stood after he left to go home, and on the way met her relatives.

On the other hand, twenty-five days later when she reported the matter and was thereafter examined by the clinical officer, PW5 she informed that she had been raped severally to a point where she became unconscious and on getting back, she noted blood stains, fluids and her dress being torn.

The court finds material contradiction in the evidence as narrated to the court, and what she told PW5.

18. Notable also is the fact that the alleged incident was kept away from the police for so long. The complainant failed to give the date when the alleged incident took place, witnesses gave contradictory dates as; PW2 & PW3- 8th April 2018 & PW4 -12th April 2018.

19. The examination by PW5 was on 4th May 2016 that is about 3 weeks after the alleged incident. No explanation as to why it took too long to be examined and treated is explained either.

20. Looking at the evidence of PW5 a doubt is created as to whether indeed there was rape despite the lapse of time. Though PW5 states that the complainant had discharge and injuries on her genitalia, he does not give details. He goes on to state:

"There was redness of cervix. We did routine investigations. They were normal. Routine investigations include urinalysis, STDs, HIV, high vaginal swab and all were negative. I concluded the patient was raped and suffered cervical injuries as a result of rape.

Cervical redness was as a result of sexual activity. Cervical injury was secondary to sexual rape. "(emphasize added)

21. In the court's view the above evidence was in itself contradictory. Secondly, sexual activity within a lapse of 3 weeks may not necessarily be pinned on the alleged rape.

Further, a reading on causes of cervical injury indicates that they can be several, not necessarily sex. Therefore "cervical redness", without any other evidence to support the alleged rape leaves doubt in the court's mind, it is not conclusive.

22. The above is fortified by the fact that the daughter of the complainant was mentioned severally, by both the prosecution witnesses and the appellant. She was a crucial witness to this matter, so was the son to the complainant yet, both were not called as witnesses. And in as much as the prosecution may choose their witness, crucial witnesses ought to be made available.

In the case **Bukenya vs Uganda [1972] E.A 549 at 550** the Court of Appeal stated:

"Thirdly, while the director is not required to call superfluity of witnesses, if evidence which is barely adequate and it appears there were other witnesses available who were not called; the court is entitled, under the general rule of law of evidence to draw an inference that evidence of those witnesses, if called, would have been or would have tended to have been adverse to the prosecution case."

23. The court is aware of the proviso to Section 124 of the Evidence Act; however, the court has not been convinced by the evidence of the complainant; there is material contradiction in her evidence in court and what she told PW5. Further PW5's evidence failed to impress the court.

24. Based on the above analysis the court is inclined to agree with the appellant that the case against him was not proved beyond all reasonable doubt. There are gaps and material contradictions in the prosecution case. The discrepancies in the prosecution case ought to go to the benefit of the appellant.

25. Consequently, the conviction is quashed and the sentence set aside. The appellant is set free unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 30th DAY OF SEPTEMBER, 2021.

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ALI-ARONI

JUDGE