REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. E011 OF 2020

ABDULLAHI NOOR ADHAN......................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the conviction and sentence arising from the judgement delivered

by Principal Magistrate A.K.Mokoross on 15th July 2019 at Wajir Law Courts.)

JUDGEMENT

1. The appellant was charged, convicted and sentenced to Twenty (20) years imprisonment for the offence of **attempted rape contrary to Section 4 of the Sexual Offences Act and assault contrary to Section 251 of the Penal Code**.

2. The particular of the offence of attempted rape were that **Abdullahi Noor Adhan** on the 22nd day of May 2019 at around 3:00 a.m. at Eldas Sub-location within Wajir County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **FOF**.

3. The particulars of the offence of assault were that on the same date, time and place the appellant assaulted **FOF** causing her actual bodily harm.

4. Aggrieved by the Trial Court's Judgement the appellant filed a Memorandum of appeal on 17th July 2020, and which was amended on 20th July 2021 raising five grounds of appeal as follows;

> **a. That the learned Magistrate erred in law and fact by presiding and deciding on a defective charge sheet.**
>
> **b. That the learned Magistrate erred in law and in fact in failing to observe the elements of the said offence were not proved to the requisite threshold of the law.**
>
> **c. That the learned Magistrate erred in law and fact by presiding and deciding on a matter that was full of controversies and contradictions.**
>
> **d. That the learned magistrate erred in law and in fact by failing to observe that the provisions of Section 150 of the Criminal Procedure Code were not complied with.**
>
> **e. That the learned magistrate erred in law and fact by contravening Section 169 (1) and (2) of the Criminal Procedure Code in Sentencing.**

5. The Appeal was canvass by way of written submissions which may be summarized as follows;

Appellant's submissions

The appellant submitted that the only testimony before the court is that of choking and screaming and there was nothing to insinuate an intention to rape. Further there were inconsistencies and contradictions especially as to how the alleged offence occurred and on the identity of the perpetrator. He submitted further that vital witnesses were not called to testify. The Charges facing him were not broken down so as to bring clarity on what he was convicted of in line with Section 169 of the Criminal Procedure Code. Further he urged the court to consider his alibi defence.

In support of his submissions, the Appellant cited the following authorities; **J.O.O. v Republic (2015) eKLR**, **Micheal Mugo Musyoka v**

Republic [2015] eKLR, Juma Ngodia vs Republic (1982-88) (KAR 454), Paul Kanja Gitari v Republic [2016] eKLR, Furo v Uganda (1967) E.A. 632

Respondent's Submission.

On its part the Respondent submitted that the Trial Magistrate did not err in convicting the appellant as there was direct evidence from PW1 and PW2 implicating the Appellant. Further that the sentence was proper since the offence of attempted rape prescribes a sentence of not less than five years which can be enhanced to life imprisonment. And any anomaly in the way the trial court sentenced the Appellant without specifying time duration for the offences he was convicted of i.e. Attempted rape and Assault causing grievous bodily harm the same may be cured under Section 354 3 (b) of the criminal procedure code.

Analysis and Determination

6. This Court, as the first appellate court, is enjoined to examine, analyze and evaluate afresh the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

7. **PW1, FOF** testified that on 21/5/2019 she was at home with her eight-year-old sister. They took supper and proceeded to bed. They did not lock the house and at around 2:00 a.m. she was woken up as the appellant was choking her. The appellant had his knees against her side and lay on her stomach. He strangled her with one hand as the other hand pulled up her *dera* (a long dress from neck to ankle*)*. Her sister screamed attracting the neighbors at which point the Appellant ran out. She followed the appellant as he left and as the neighbors shone their touches, she saw and identified him as she knew him as they grew up together and were neighbors. Further she testified that the neighbors tried to arrest the Appellant but he jumped the fence and ran away. She reported the incident the next day. The police issued her a P3 form and she was attended to at Wajir Hospital. And as a result of the assault she sustained from the attempted rape she miscarried as she was 8 months pregnant.

8. In cross- examination it was her testimony that the appellant had previously gone to her door twice and as she had heard him approaching, she shone a torch on him and he left.

9. **PW2 Ismail Arab Hussein** resides in the same plot with **PW1.** He testified that on the material day he had woken up to eat as he was to fast and while drinking tea, he heard screams from **PW1's** House. He ran towards the said house together with other neighbors, when he saw a person leave **PW1's** house and as the plot has two entrances, they stood at both entries to avoid the person from leaving but the person jumped the fence. He knew the person who escaped as he saw and identified as the Appellant, they were neighbors and related, he saw him with the aid of the touch light. The next day they reported the matter to the chief and the police.

He learnt from **PW1** that the appellant had tried to rape her. In cross-examination he also stated that **PW1** had informed them that two (2) days before the incident the appellant had gone to her house, she shone a touch light on him and the appellant ran away.

10. **PW3 UO** a minor, upon the conduct of *voire dire* examination testified that on the material day, she saw the appellant hold **PW1** by the neck. That she was woken as **PW1** tried to resist. She started screaming, and the appellant ran out of the house, jumped the fence and ran away. She saw the appellant at the time of the incident and identified him in court.

11. **PW4 PC Mureithi Sila** testified that on 22/5/2019 he received a report of an attempted rape from the assistant Chief Omar Maraya, he summoned witnesses on 23/5/2019 and recorded their statements. He found that the complainant was injured and referred her to Eldas County hospital. On 30/52019, together with other police officers, they proceeded to the appellant's house and arrested him.

12. **PW5 George Odhiambo Nyamodi**, a clinical officer at Eldas Sub County Hospital confirmed that he examined **PW1** and filled the P3 form. It was his testimony that the complainant went to their facility on 23/5/2019 complaining of pain. She informed him that she was 24 weeks pregnant. He examined her and found, the neck had a swelling on the left side, the lower abdomen was swollen and tender, the labia had no laceration but there was discharge which was bloody and he referred the complainant to Wajir Referral Hospital for an obstetric ultrasound. The ultrasound report gave a finding of loss of pregnancy at 36/40 weeks with a swollen uterus. The abortion was complete.

He also testified that the complainant had informed him during examination that she had been kicked in the stomach and he formed the opinion that the abortion was as a result of the kicks on the stomach.

13. At the close of the prosecution case, the trial Court found the Appellant had a case to answer and he was placed on his defence. The Appellant denied committing the offences. It was his testimony that had differences with **PW2** over money which **PW2** owed him and it is **PW2** who instigated PW**1** to level charges against him. He asked the court to take cognizance of the fact that he was arrested several days after commission of the alleged offence.

14. **Section 4 of the Sexual Offences Act** provides:

“Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.”

15. Further Section 388 of the Penal Code;

"(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence"

16. **PW1** in her testimony stated that the attacker strangled her with one hand and pulled her dera upwards with the other as he sat on her. The Attacker let go due to the screams of the complainant and her eight-year-old sister. It is the intervening screams that made the person withdraw and take flight. The action of holding the Complainant’s neck so as to subdue her and pulling her clothing up is a clear indication of what the intentions of the attacker was. It could not have been anything short of undressing the complainant and **PW1** having sexual intercourse with her without her consent.

17. The identification of the Appellant in this case was by way of recognition. The factors to be considered with respect to recognition as set out in **R vs Turnbull & Others (1976) 3 ALL ER 549** The court in that case stated as follows:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

18. The complainant followed the attacker as he flew and with the light from the touches of neighbors who had come to her rescue, she saw and recognized her attacker as the Appellant, who was not just her neighbor but a person she grew up with. This evidence was corroborated by **PW2** & **PW3** who were also able to recognize the Appellant as he ran away by the touches that neighbors including **PW2** had. **PW2** went further to state that they were not just neighbors but also relatives. The three witnesses all knew the Appellant too well to have mistaken someone else for him.

19. The defence by the Appellant over a grudge he allegedly had with **PW2** was not raised during cross examination, the same appears to have been an afterthought **PW1** sustained serious injuries from the ordeal she encountered in the hands of her tormentor leading to a pregnancy forced abortion. She had injuries to her neck which she must have sustained as the attacker strangled and chocked her. Though several months pregnant the attacker sat on her stomach and placed his knee on the side of her stomach thus injuring her. And of course, her evidence that the attacker injured her as he subdued her, and pulled her clothe up in an attempt to rape her, apart from this evidence of PW1 being credible and truthful, the injuries were confirmed by the medical reports placed before court and therefore the issue of a cooked-up story between **PW1** & another neighbor **PW2** who owed the Appellant money does not add up, neither does it dislodge the prosecution case. The prosecution case is certainly cogent and believable coupled with the fact that there is evidence of recognition of the Appellant.

20. On the 2nd charge of assault, the medical officer **PW4** produced medical records which corroborated the testimony of **PW1.** The particulars and elements are separate and distinct from the elements of attempted rape. **PW4** examined **PW1**, noted the swollen neck, tender lower abdomen and bloody discharge. He referred **PW1** for an ultra sound scan which indicated loss of pregnancy, the scan and its report thereof led **PW4** to form the opinion that the forced abortion was as a result of the injuries sustained while the Appellant attempted to rape **PW1**. The evidence in support of the charge of assault was to the required standard the injuries were so serious that they led to a loss of pregnancy.

21. The Appellant faulted the judgement.

Section 169 (1) of the Criminal Procedure Act provides as follows:

(1)" Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it"

The trial Court complied with the section of the law such that one cannot fault the judgement. This ground of appeal must therefore fail

22. The Appellant did not address the allegation that the charge sheet was defective in his submission. He appears to have abandoned the same. The charge sheet appears to have met all the necessary requirements and this ground in the absence of an explanation must equally

fail.

23. As for the contradictions & inconsistencies referred to by the appellant, the court finds that they were too minor as to affect the substance of the prosecution case. In any event the witnesses are not expected to give uniform information as the other as to do so will not be possible as each person sees and perceives facts differently.

24. The Court of Appeal in **Erick Onyango Odeng' v. Republic [2014]eKLR** cited with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** wherein it was held; -

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."**

25. As to the number of witnesses the prosecution ought to call **Section 143 of the Evidence Act,** does not prescribe a particular number of witnesses required to prove any particular fact unless any other law provides to the contrary. It is for the prosecution to determine the number of witnesses necessary to satisfy its case. The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. See **Keter V Republic [2007] 1 EA 135**.

26. The issue of passing sentence is always in the discretion of the trial court and the Appellate Court will not interfere unless the sentence is excessive or illegal. See **AYONS MBAAZI vs REPUBLIC [2001] eKLR.**

27. However, the Court notes that the trial magistrate passed a 20-year imprisonment sentence on both counts having convicted the Appellant on the main and second count without qualifying the sentence to be served on account of each count and whether or not the sentences are to run concurrently or consecutively.

Section 4 of the Sexual Offences Act prescribes a five-year imprisonment sentence which can be enhanced to life imprisonment. **Section 251** of the Penal Code prescribes a five-year sentence.

The Court does not view the sentence jointly meted out to be excessive, except for the anomaly noted above. The Appeal therefore succeeds to that extend that there was an error in sentencing jointly this anomaly in itself does is not a reason to set aside the judgment. Under Section 362 of the Criminal Procedure Code the anomaly may be rectified which this court will proceed to do as follows;-

> (i) The appellant is hereby sentenced to twenty years' imprisonment on Count I-attempted rape contrary to section 4 of the Sexual Offences Act and
>
> (ii) Sentenced to five years' imprisonment On Count II- assault contrary to section 251 of the Penal Code.
>
> (iii) The sentences are to run concurrently commencing 15th July 2019.

28. The upshot of this determination is that the appeal herein lacks merit save for the change in the sentencing. The same is dismissed.

DATED SIGNED AND DELIVERED IN GARISSA THIS 16TH DAY OF DECEMBER, 2021

ALI-ARONI

JUDGE