



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 18 OF 2019 AND NO. 20 OF 2019 (CONSOLIDATED)**

**SULEIMAN HAJI ADEN.....1<sup>ST</sup> APPELLANT**

**HUMPHREY NJERU OMSERE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From conviction and sentence in Garissa Chief Magistrate**

**Criminal Case No. 307 of 2016 by Hon. J. J. Masiga (SRM)**

**JUDGMENT**

1. The accused persons herein were charged with four counts. In Count I, the 1<sup>st</sup> accused person was charged with rape contrary to section 3 (1) as read together with section 3 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence being that on diverse dates between 21<sup>st</sup> day of February 2016 and 26<sup>th</sup> day of March 2016, along Nairobi-Dadaab road with the Republic of Kenya, the 1<sup>st</sup> accused person unlawfully and intentionally caused his penis to penetrate the anus of AAA.
3. In Count II, the 2<sup>nd</sup> accused person was charged with rape contrary to section 3 (1) as read with section 3 (3) of the Sexual Offences Act No. 3 of 2006.
4. The particulars of the offence are that on diverse dates between 15<sup>th</sup> and 21<sup>st</sup> day of March, 2016 along Mombasa-Dadaab road within the Republic of Kenya, the 2<sup>nd</sup> accused person unlawfully and intentionally caused his penis to penetrate the anus of AAA.
5. In the alternative, the 1<sup>st</sup> accused person was charged with the offence of indecent act contrary to section 11A of the Sexual Offences Act No. 3 of 2006.
6. The particulars of the offence are that, on diverse dates between 26<sup>th</sup> day of February 2016 and 21<sup>st</sup> day of March 2016, along Nairobi-Mombasa-Dadaab road within the Republic of Kenya, the 1<sup>st</sup> accused person unlawfully and intentionally caused his penis to touch the anus of AAA.
7. In the alternative, the 2<sup>nd</sup> accused person was charged with indecent act contrary to section 11A of the Sexual Offences Act No. 3 of 2006.
8. The particulars of the offence are that on diverse dates between 15<sup>th</sup> and 21<sup>st</sup> day of March, 2016 along Mombasa-Dadaab road within the Republic of Kenya, the 2<sup>nd</sup> accused person unlawfully and intentionally caused his penis to touch the anus of AAA.
9. The appellants pleaded not guilty and matter went into full trial.
10. The appellants were convicted and sentenced to serve 10 years imprisonment each.
11. Being aggrieved by the aforesaid verdict, they lodged separate grounds of appeal:-
12. For appellant No. 1:-

(1) That the trial court erred in law and facts by failing to find that the evidence of PW1 was uncorroborated and as such, it was mere allegation.

(2) That the trial court erred in law and in facts in failing to comply with section 200 of the Criminal Procedure Code by not asking the appellant whether he wished to have the matter start afresh after the trial was taken over by another magistrate.

(3) That the trial court erred in law and in facts by failing to find that PW4, the medical officer raised doubt as to whether PW1 was raped.

(4) That the trial court misdirected itself on facts by failing to find that the evidence of PW1 was doubtful for failing to report the incident immediately despite the numerous opportunities to report.

(5) That the trial court erred in facts and law by failing to find that the prosecution case did not meet the threshold of the proof in criminal law.

13. For appellant No. 2:-

(1) That the learned trial magistrate erred in law and fact to convict the appellant without considering that the prosecution's witnesses failed to prove their case beyond reasonable doubt as provided by in section 109 and 110 of the Evidence Act.

(2) That the pundit trial magistrate erred in law and fact to convict the appellant without considering that there were no eye witness to support the complainant's allegations.

(3) That the complainant's concocted figments remained to be allegations without prove whatsoever.

(4) That the prosecutions witnesses' evidence adduced in court were contradictory and full of inconsistencies hence creating doubts on the allegations tendered before court contrary to section 163 (1) of the Evidence Act.

(5) That the pundit trial magistrate erred in law and fact to convict the appellant without considering that the doctor's report was incredible and dubious failing to disclose the perpetrator hence prejudicing the appellant's fundamental rights contrary to section 154 of the C.P.C.

14. The parties agreed to canvas appeal via submissions which they argued verbally.

15. The Respondent conceded the appeal.

#### **APPELLANT SUBMISSIONS:**

16. The appellants submitted that this is a first appeal. Court is to evaluate evidence and arrive to its own conclusion.

17. The PW1 evidence was uncorroborated. I am aware of section 124 Evidence Act where victim's evidence can be adequate to convict. PW1 complainant was known mental patient.

18. On cross examination PW2 admits PW1 is mental case. The investigation officer admitted PW1 was mental case. What was his state of mind during alleged act and testifying in Court? Is his evidence enough?

19. PW4 said hard stool can cause anal injuries noted. Was penetration proved beyond reasonable doubt?

20. PW1 said rape was while he was in deep sleep. He woke up in pain. They were driving a truck. The journey was Mombasa to Dadaab. There were various road blocks. Made 4 trips with no complaint being lodged. They would go to Mombasa separate and meet again and proceed. It could have happened elsewhere. It was reported on the 4<sup>th</sup> trip.

21. Section 200 PC was not complied with for 2<sup>nd</sup> accused person. He was not asked whether he wished matter to be heard afresh. Only Advocate Onono said he wished to proceed from where the matter had reached. The law requires when a new court takes over part-heard, accused is entitled to be given options under section 200 P.C. same was violated. See the case of Evans Tai Nyaoma vs R 2012 eKLR.

22. The bottom line is the prejudice in not complying with section 200 P.C. The magistrate relied on section 124 yet it never took evidence of PW1.

Section 124 Evidence Act Cap. 80 requires court state reasons for believing sexual offence victim.

23. Only the court that takes the evidence of the victim can record reasons for believe of victim. Attempting to give reason here is misleading. The court did not see or observe demeanour of the witness to ascertain whether witness talked the truth.

24. Section 200 P.C contemplates such scenario such that to be a compliance of section 200 where witness whose demeanour was to be observed to be recalled.

25. Thus it was submitted that the conviction was thus unsafe defence prayed for appeal be allowed.

26. Appellant No. 2 Humphrey Njeru added that, there were over 17 road blocks from Mombasa to Dadaab. The police were even searching motor vehicle and they were alighting on all of them (stated in court the blocks). At no time did the complainant talk of assault.

27. PW1 was taken to hospital while they were already charged. He never stated where the sodomising occurred between in stated different dates. He reported after some time. He was mentally ill. He was a turn-boy, appellant No. 2 mechanic and appellant No. 1 driver. He had said he suspected appellants.

#### **DUTY OF FIRST APPELLATE COURT:**

28. This being a first appeal, the role of this Court as an appellate Court of first instance is well settled, it should re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion.

29. This was held in the case of *Okeno vs. Republic (1977) EALR 32* and in the Court of Appeal case of *Mark Oiruri Mose vs Republic (2013) eKLR* that the Court on first appeal is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter in while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify.

30. Consequently, this Court guided by the aforesaid legal requirement, therefore should delve into the review of the evidence adduced at the lower court with a view of arriving at its own conclusion.

#### **PROSECUTION'S EVIDENCE:**

31. The prosecution called four witnesses in this case. PW1, the complainant in this case AAA testified that on the 24/2/2016 he met the 1<sup>st</sup> accused person. He started working for him as a turn-boy. They started a journey to Mombasa. The 1<sup>st</sup> accused bought water and soda at Salama. After drinking the soda and water, AAA started feeling sleepy immediately after drinking the liquids.

32. On reaching Machakos he fell asleep. When he woke up, he felt pain at the waist and in the anus. The 1<sup>st</sup> accused person took AAA to hospital in Mombasa. AAA testified that they stayed in Mombasa for four days. Whenever he went to the toilet, he could see blood in his stool. They left Mombasa for Dadaab. They delivered goods at Dadaab and returned to Mombasa. They stayed in Mombasa for two days. They met the 2<sup>nd</sup> accused person in Mombasa. The three of them left Mombasa for Dadaab. The 1<sup>st</sup> accused added the 2<sup>nd</sup> accused person because AAA was not feeling well.

33. On reaching Garsen, he was given water again by the 1<sup>st</sup> accused. On reaching Hola AAA fell asleep again. The following day when he woke up at Dadaab, he felt pain in the anus and body. He did not complain since he thought he was sick. While on the way back to Mombasa, he realised that the accused persons had raped him. On the third trip to Dadaab, nothing happened because AAA was alert throughout.

34. On the way back to Mombasa, on reaching Modika, AAA alighted and reported the matter to the police. The police officers asked AAA to continue the journey, but he refused because he feared for his life. He was put in a car after the 1<sup>st</sup> accused person alleged that he was mad. AAA testified that he grabbed the steering wheel of the car.

35. The car stopped. The 1<sup>st</sup> accused person told members of the public that AAA was a member of Al-Shabaab. AAA was assaulted by members of the public. Police officers on patrol rescued him and took him to the police station.

36. In the morning, he was taken to Garissa Hospital where he was examined. It was confirmed that he had been raped. Aden recorded his statement. The two accused persons were arrested and charged.

37. On cross-examination by counsel for the 1<sup>st</sup> accused person, AAA conceded that he had not at any time woken up and found somebody on top of him sodomising him. It was only once that he found his trouser had been removed.

38. PW2 AAN testified that on 24/2/2016, he met the 1<sup>st</sup> accused. He asked the accused to assist his son by teaching him work. The 1<sup>st</sup> accused agreed to go with AAN's son on a trip.

39. On 21/3/2016 at about 11.00 pm, the 1<sup>st</sup> accused called him telling him his son was disturbing them. AAN asked the police officers to take action against him. On 22/3/2016 Noor went to Garissa Police Station and recorded his statement.

40. PW3 No. 79615, Police Constable Julius Chelule testified that on the 21/3/2016 at about 1.30 pm officers who were on patrol under the command of Corporal Aromat came with three people. Two of them were complaining about the third one.

41. The two people complaining were the accused persons. They complained that, the complainant who had been in their company from Dadaab to Mombasa had refused to accompany them at Modika.

42. The complainant on his part alleged that on the way from Nairobi to Mombasa, he fell deep asleep, and on arrival at Mariakani he felt pains in his anus and other body parts. Upon going for long calls he noticed that his stool had blood stains.

43. After three days they left Mombasa for Dadaab aboard the same truck. He fell asleep again and on waking up he felt the same pain again.
44. On the 21/3/2016 the complainant refused to accompany them at Modika. On 22/3/2016 Constable Chelule accompanied the complainant to Garissa Provincial General Hospital. The complainant was examined by Dr. Mosbei. The complainant was 17 years old then.
45. After being supplied with the birth certificate, Corporal Chelule charged the accused person with the present offence. On cross examination Corporal Chelule conceded that the complainant had not made any report to any other police station along the way.
46. PW4 Jeremiah Mosbei, a clinical officer at Garissa Referral Hospital testified that on 22/3/2016, the OCS Garissa sent the complainant to the hospital for examination. The complainant cloths were clean. He alleged that he had been sodomised by two people well known to him.
47. He was drugged with water which made him fall deep asleep. He was then sodomised. The complainant reported that he woke up feeling pain in the anus. He looked depressed though he was in good state of health.
48. On cross examination he had bruises in the anal opening. Mosbei concluded that the complainant was sodomised. He produced the P3 form as exhibit 1 and the treatment card as exhibit 2.

**ISSUES, ANALYSIS AND DETERMINATION:**

49. After going through the evidence and submissions on record, I find the issue is; whether the ingredients of rape were proved beyond reasonable doubt?
50. But before going to the merit, there is procedural issue raised on whether section 200 CPC was complied with, and what is the effect of non-compliance ?
51. Section 200 CPC states that; *Conviction on evidence partly recorded by one magistrate and partly by another;*

***(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—***

***“.....***

***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”***

52. The provisions are mandatory and the prosecution admitted the same fact and conceded appeal on the same ground but urges court to order retrial.

53. On merit , Section 3 of the Sexual Offences Act provides for the offence of Rape in the following terms:

***“(1) A person commits the offence termed rape if--***

***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;***

***(b) the other person does not consent to the penetration; or***

***(c) the consent is obtained by force or by means of threats or intimidation of any kind. As stated above, for the rape to be established the following elements must be demonstrated:-***

- ***The intentional and unlawful penetration of the genital organ of a person by another.***
- ***The absence of consent.***
- ***Where consent is obtained by force or by means of threat or by intimidation of any kind.***

54. Under Section 42 of the Act consent is obtained if the person agrees by choice and has the freedom and capacity to make that choice.

55. Section 43(1) of the Sexual Offences Act outlines what constitutes intentional and unlawful acts. That is to say:-

***“In any coercive circumstance.***

***Under false pretence or by fraudulent means; or***

***In respect of a person who is incapable of appreciating the nature of an act which causes the offence.”***

56. Section 43(4)(e ) further provides that:-

***“The circumstances in which a person is incapable in law in appreciating the nature of an act referred to in Subsection 1 include circumstances where such a person is, at the time of commission of such an act –***

***(e) mentally impaired.***

57. As such if Section 43 is read in isolation its implication is that a person who is mentally challenged cannot consent to appreciate the nature of an act that causes an offence under the act. But again, Section 44 sets out instances where court can make evidential presumptions about consent to reach a finding that the complainant did not consent to a sexual act. The said section provides as follows:-

***“(1) If in proceedings for an offence under this Act, it is that any of the circumstances specified in subsection (2) existed; and that the accused person knew that those circumstances existed.”***

58. The complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and that the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it.

59. (2) The circumstances are that:-

***(a) any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;***

***(b) any person was, at the time of the offence or immediately before it began, causing the complaint to fear that violence was being used, or that immediate violence would be used, against another person;***

***(c) the complainant was, and the accused was not, unlawfully detained at the time of the commission of the act;***

***(d) the complainant was asleep or otherwise unconscious at the time of the commission of the act;***

***(e) because of the complainant’s disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;***

***(f) any person had administered to or caused to be taken by the complainant, without the complainant’s consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the commission of the act.***

60. (3) In subsection (2)(a) and (b), the reference to the time immediately before the act is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.”

61. On ingredients of offence, we start with penetration. PW4 said hard stool can cause anal injuries noted. Was penetration proved beyond reasonable doubt?

62. PW1 said rape was while he was in deep sleep. He woke up in pain. They were driving a truck. The journey was Mombasa to Dadaab. There were various road blocks. Made 4 trips with no complaint being lodged over the sodomising acts taking place in course of these journeys.

63. They would go to Mombasa separate and meet again and proceed. The charge sheet and pw1 testimony do not state specific date and venue of occurrence of the unlawful act complained of .It could have happened elsewhere other than in the motor vehicle. It was reported on the 4th trip. The pw1 did not at any time find anybody sodomising him but just said that he was suspecting the appellants.

64. The PW4 was Clinical officer testified that the lineal cuts in the anal canal(mucosal) could be caused by the constipation due to lack of adequate water .Constipation leads to hard stool which occasions cuts similar to the ones witness observed.

65. No other corroborative evidence was tendered. Of course the aforesaid evidence is not conclusive that there was penetration. The magistrate relied on section 124 yet it never took evidence of PW1. Section 124 Evidence Act Cap 80 Evidence Act requires court state reasons for believing sexual offence victim.

66. Only the court that takes the evidence of the victim can record reasons for believing of victim based on observed demeanor. Attempting to give reason here is misleading. The court did not see or observe demeanour of the witness to ascertain whether witness talked the truth. This is the same victim who was said to be under-going mental ailment treatment.

67. Section 200 P.C contemplates such scenario such that to be a compliance of section 200 where witness whose demeanour was to be observed to be recalled.

68. Section 200 CPC was not complied with for 2nd accused person. He was not asked whether he wished matter to be heard afresh. Only Advocate Onono said he wished to proceed from where the matter had reached.

69. The law requires when a new Magistrate takes over part-heard, accused is entitled to be given options under section 200 P.C. Same was violated. See the case of Evans Tai Nyaoma vs Republic [2012] eKLR. The bottom line is the prejudice in not complying with section 200 P.C.

70. The court thus finds that the prosecution did not prove its case beyond reasonable doubt and thus appeal is meritorious. Thus the court makes the following orders;

***j) Appeal is allowed, the conviction is quashed and sentence set aside and appellants at set at liberty forthwith unless otherwise lawfully held.***

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 6<sup>TH</sup> DAY OF AUGUST, 2019.**

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**C. KARIUKI**

**JUDGE**