REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO 6 OF 2019

MOHAMED HASSAN MOHAMUD..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal against the original conviction and sentence of Hon. Mugendi Nyaga SRM

delivered on 1st February, 2019 in Criminal Case No. 225 of 2017

in the Senior Resident Magistrate's Court at Wajir)

JUDGEMENT

Introduction:

1. The Appellant was convicted and sentenced to serve Fifteen (15) years imprisonment for the offence of rape, contrary to section **1(a) (b) (3) of the Sexual Offences Act Number 3 of 2006**. The particulars of the offence were that on 21st April 2017 at around 11.am at [particulars withheld] Sub location in Tarbaj Sub county within Wajir County he intentionally and unlawfully caused his penis to penetrate the vagina of BK without her consent

2. Additionally, the Appellant also faced an alternative charge of committing an indecent act with an adult contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.

3. Appellant pleaded not guilty to the charge and after full trial was convicted on the first count of rape and sentenced to 15 years imprisonment. Being aggrieved by the trial court judgment, he has appealed against the conviction and sentence. The Appellant's amended grounds of appeal as filed by his Counsel are as follows:

> **1) THAT the learned magistrate erred in law and fact in convicting the appellant on the basis of testimonies that were full of contradictions the said contradictions being as follows:**
>
> > **a) Whereas the complainant testified that she was injured on the back, Pw6, the clinical officer, did not confirm any such injuries.**
> >
> > **b) Whereas the complainant maintained that she was hit on the neck by the appellant, PW6, the clinical officer, did not confirm any injuries on the complainant's neck**
> >
> > **c) PW2 and PW3 testified that they saw visible injuries on the complainant's face and hand while the complainant maintained that the injuries were at her back**
> >
> > **d) Whereas the complainant maintained that she hired the appellant to transport her on his motorcycle, PW2 told the court that the appellant was hired by the complainant's father.**
> >
> > **e) In her evidence in chief, the complainant testified that she only screamed after the rape but on cross examination she indicated that she screamed before, during and after the rape.**
>
> **2) The learned trial magistrate erred in law and fact by convicting the appellant on the basis of evidence of the complainant**

which was not corroborated in material fact.

3) The learned trial magistrate erred in law and fact by convicting the appellant when obvious omissions on the part of the prosecution to call the father of the complainant, the girl who said to have arrived at the scene ahead of PW2 or independent witness from the town center rendered the prosecution case weak and merely speculative.

4) The learned trial magistrate erred in law and fact by convicting the appellant when medical evidence had nothing indicative of violent or forceful penetration.

5) The learned trial magistrate erred in law and fact by convicting the appellant without adequate evidence placing the appellant at the scene and connecting him to the offence.

6) The learned trial magistrate erred in law and fact in failing to advert to the failure by the prosecution to produce the underwear and dress allegedly torn by the appellant which omission gravely weakened the prosecution case.

7) The learned trial magistrate erred in law and fact by convicting the appellant yet the medical evidence was consistent with the fact that the complainant was probably menstruating at the time of her examination by PW6 and that the fresh blood on her labia and thighs were indicative of the natural biological phenomenon as opposed to injuries caused by the intrusive action of a third party.

8) The learned trial magistrate erred in law and fact in failing to afford the appellant the benefit of doubt.

9) The learned trial magistrate was actuated by emotion to the prejudice of the accused comparing the accused to an animal.

10) The learned trial magistrate erred in law and fact by convicting the appellant yet the prosecution had not discharged its duty to prove the case beyond any reasonable doubt.

11) The learned trial magistrate in sentencing the accused failed to consider or adequately consider the mitigation tendered for the appellant and the indication by the prosecution that the appellant was a first offender.

12) The learned trial magistrate meted out a harsh sentence based on his conclusion that the appellant injured the complainant a fact that was not at all supported by the medical and other evidence.

Appellant's Submissions:

4. The appellant through his Counsel filed their written submissions dated 18th June, 2019 and filed on 24th June, 2019 and the respondents on their part made oral submissions. The appeal came up for hearing on 24th June, 2019, where the Appellant Counsel highlighted their submissions and the State Counsel made oral submissions.

5. The appellant Counsel condensed his grounds into five, and the first ground addressed on his feet was that there was no proof of penetration, in this regard Counsel submitted that rape as an offence would not be proved unless unlawful penetration is proved beyond any reasonable doubt. In this respect they submit that the complainant failed to describe exactly what the appellant did to gain entry to her vagina.

6. Further, they submitted that the medical evidence put forth does not establish penetration, arguing that the discovery of blood on the vulva with mild vaginal lacerations witnessed by the doctor on the outer as opposed to inner parts of the complainant's vagina, arguing that the same may have been as a result of menstruation. It is their submission that penetration has not been corroborated by medical evidence and that the presence of fresh blood cannot be a prove of penetration. In this they rely in the Court of Appeal case of **Mwangi vs Republic (2008) IKLR (G&F) 1134** where the court held that the presence of spermatozoa alone in a woman vagina is not a proof of penetrations. Additionally, they relied in the Black Law dictionary on definition of penetration.

7. The second ground addressed by the Appellant Counsel is the argument that the prosecution witnesses' evidence was laced with so many contradictions, inconsistencies, and lies which makes it insufficient to sustain a conviction. The noted alleged contradictions include the following: the contradictions on how the appellant was hired to carry the complainant, injuries suffered by the complainant, the point of screaming by the complainant, the manner of reporting of the incident, failure to call some of the witnesses who were dispatched to the scene, the time the incident took place, failure to produce torn underwear and stained camisole and what was the complainant upto when the alleged rape incident happened. In support of this the appellant relies on the following authorities of **Ruibi vs Republic (2016) E.A 452** and **Pandya vs Republic (1957) E.A 336** where the courts found that a plethora of contradictions would not sustain a conviction.

8. The third ground advanced by the appellant Counsel was that the complainant evidence was not corroborated, this they rely on the allegation that the complainant evidence is inconsistent and contradictory. In support of this argument they rely on the following: the non-production of the alleged torn clothes worn by the complainant, that the physical injuries allegedly suffered by the complainant were not supported by the medical evidence adduced, the contradiction regarding the time of the incident and what the complainant was up to at the time of the incident. And based on the above inconsistencies they submit that the evidence ought to have been collaborated, and more importantly the court ought to have considered the failure to produce the torn clothes. In this they rely in the case of **Ruibi vs Republic (supra).**

9. The fourth ground advanced by the Appellant Counsel is the failure to call important witnesses, which they argue rendered the Prosecution case weak and doubtful. The persons allegedly not called include the girl who first arrived at the scene as alleged by PW2, complainant's father who allegedly ferried the complainant home and hired the appellant, elders who allegedly dispatched PW3 to the scene

and any independent witness who witnessed the interactions between the complainant and the appellant. They argue that the said evidence would have not supported the Prosecution case. In this they rely in the case of **Bukenya and Others vs Uganda (1972) E.A 549** urging the court to draw an inference that such evidence would be adverse to the prosecution case.

10. The Fifth issue addressed by the appellant in their submission is in respect to recognition of the appellant as the perpetrator. In this they argue that the evidence of the complainant was not corroborated as no witness was called nor the motorbike produced. Additionally, PW2 who alleged to have seen the appellant escape in a motorbike did not give the description of the appellant. In sum they allege that the trial magistrate failed to inquire into evidence or factors that would have supported positive identification. In this they rely in the case of **R vs Turnbull (1977) QB224** where the court held that mistakes in recognition of close friends and relatives are sometimes made.

11. Finally, the Appellant Counsel submitted that the trial magistrate was emotional rather than being objective. In this they referred the court to Paragraph 11 of the Judgement where the learned magistrate described the appellant action as that of an animal. In this rely in the case of **Okeno vs Republic (1972) EA 32.**

Respondent's submissions:

12. State Counsel Mr. Mlati opposed the appeal and supported the conviction and sentence submitting that the ingredients of rape being penetration and want of consent were proved. The appellant had forceful carnal knowledge as supported by the evidence of PW6 the Clinical Officer and PW2 who heeding the complainant call for help saw the appellant take off from the scene and found the complainant naked.

13. On failure to call all the witnesses who went to the scene, he submitted that they called some of the witness of who went to the scene and that they did not have to call all the witnesses.

14. The duty of this court as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as was held in **Okeno v Republic (1972) E.A. 32** where the court held:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 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 findings and conclusions; 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 V Sunday Post 1978) E.A. 424."**

The Evidence:

15. The prosecution called seven witnesses to prove its case. **PW 1, BK** the complainant testified that she was 19 years old and a resident of [particulars withheld] trading center and married. She told court that on 21/4/2017 at around 10.00am while at [particulars withheld] trading center paid the appellant who was a motorcycle rider Kshs. 200 to drop her home. It was her evidence that when they neared home at a place called Haijaley the appellant asked her to alight and on alighting the appellant followed her and hit her on the neck from behind, she fell on the ground and the appellant proceeded and tore her clothes and undergarments and raped her. She screamed and two people and the appellant took off in his motorbike. The incident was reported to the police and the following day she was taken to hospital for examination and treatment. She told court that she knows the appellant and they have never had any sexual relationship and hired him because she trusted him.

16. **PW2 AA** testified that on 21/4/2017 he had sent PW1 to [particulars withheld] Shopping Center to buy sugar, and that at around 10.00am he heard screams of someone shouting for help, where she rushed to the scene and found PW1 on the ground and saw the appellant escaping on a motorbike. He stated that he knew the appellant well having lived with him at some point. In his opinion the appellant and PW 1 were not in a relationship as PW1 is married and that her husband was a pastoralist in Mandera. Further, it was his evidence that it was PW1 father who hired the motorcycle for her.

17. **PW3 Dahir Abdirahman Hussein**, testified that he is the chairman [particulars withheld] Shopping Center and also an elder and that on 21/04/2017 he received report relating to the incident from PW1 and PW2 that there was a rape incident involving PW1. He visited the scene where he saw that there was a struggle and spoke to the PW1 who told him what had transpired. He stated that he saw that PW1 had suffered injuries and was sickly. He stated that he knows the appellant.

18. **PW4 Silaj Mohammed Abdirahman** testified that he was in the company of the elders including PW3 and visited scene where the confirmed that there was a struggled and visited girl who was sickly and confirmed to them the rape incident.

19. **PW5 Sgt Idle Abdille** testified that he an Administration Police officer attached to Gunana AP Camp and that the incident was reported to them and the accused was arrested and brought to them by the elders.

20. **PW6 Patrick Kimathi Muringi** testified that he is a clinical officer at Takaba Sub County Referral Hospital and that he is the one who filled the complainant's P3 form. He told court that he examined the complainant a 19 year old female, where she was told that she had been raped by a person known to her. She had yellow kamisale which had a lot of blood stains. He saw fresh blood on the vulva with no labial tears, with mild vaginal lacerations and blood on her thighs. The hymen was broken and that the approximate age of his injuries was a day old and in his opinion the complainant had sustained soft tissue injuries secondary to rape.

21. **PW4, Crispen Nyaga Ivara** the investigating officer, stated that PW1 reported on 22/4/2017 that he had been raped by the appellant, whom she had hiked a lift from to go and look for her fathers' cows and committed the offence before reaching their destination. He gave her

a P3 form and arranged the prosecution of the appellant.

22. The Appellant gave sworn statement in his defence, where he gave a blanket denial that he never committed the offence, and that the same is politically motivated. Additionally, he blames the court for not allowing an out of court settlement proposed by the complainant. He denied knowing both PW1 and PW2 stating that he met them for the first time in court.

Issues and Analysis:

23. This Court in determining this appeal ought to satisfy itself that the ingredients of the offence of rape were proved and as so required in law; beyond any reasonable doubt. The key ingredients of the offence under **section (3)** of the **Sexual Offences Act, 2006** are:-the prosecution must prove the following (1) The accused intentionally and unlawfully commits an act which causes penetration into his or her genital organs (2) The other person does not consent to penetration; or 3) The consent is obtained by force or by means of threats or intimidation of any kind. Consequently, I'm going to consider the appellant case in view of the above.

Whether the appellant intentionally and unlawfully committed an act which caused penetration into the complainant genital organs:

24. From the evidence outlined above, it is clear that the appellant had sexual intercourse with PW1. The testimony of PW1 was clear that she knew the appellant prior to the incident and that she was a fee-paying rider on his motorcycle, a fact not denied by the appellant. The PW1 evidence that along the way the appellant turned against her and raped her has also no been displaced by the appellant. PW1 confirmed to the court that she was raped by the appellant. The evidence of PW1 was corroborated by the medical evidence tendered by PW6 which proved that sexual intercourse took place. The injuries referred are synonymous to penetration. I therefore find and hold that penetration was proved

Whether the Complainant consented to penetration or **was it obtained by force or by means of threats or intimidation of any kind.**

25. In this regard, the issue is whether the prosecution tendered evidence proving that the alleged penetration by the appellant was without the complainant consent. The relevant section of the law regarding this is **sections 42** and **43(1)** of the ***Sexual Offences Act**, **2006*** which provides:

> **"42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.**
>
> **43.(1) An act is intentional and unlawful if it is committed—**
>
> **(a) in any coercive circumstance;**
>
> **(b) under false pretenses or by fraudulent means; or**
>
> **(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.**
>
> **(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—**
>
> **(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;**
>
> **(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or**
>
> **(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act**

26. Considering the circumstances of the appellant case, I have no doubt in my mind that the happenings herein was without the consent of the complainant. The appellant used force to penetrate the complainant and therefore this limb of the offence was proved to the required standard.

27. The Court of Appeal in **Geofrey Kionji vs R Criminal Appeal No. 270 of 2010** held that that even absent medical evidence linking an accused to the defilement, the Court may still:

> **"if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, cap 80 laws of Kenya, a Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim and records the reasons for such belief."**

28. It is trite in cases of rape that the crucial question is whether the sex was consensual, in this instant case the complainant testimony in my view was clear and stands uncontradicted as no evidence to the contrary was adduced by the appellant in his defence for the court to raise doubts. Additionally, the evidence of the Doctor collaborates the complainant testimony and therefore it is my finding that the appellant committed the rape offence, as consent was not granted.

Identity of the appellant:

29. The appellant has challenged the complainant evidence of recognition arguing that the same has not been sufficiently corroborated. Considering this ground of appeal vis-à-vis the evidence on record, it is my view that the same has no basis as the complainant evidence has been corroborate by PW2 who testified that he saw the appellant and recognized him as someone he knew having stayed with him sometime back. The appellant never contested this testimony and therefore in my view his identification was clear and unchallenged.

30. Finally, I find no reason to depart from the learned trial magistrate finding and conviction of the appellant on the charge of rape. I am satisfied that the evidence on record sufficiently proves the charge of rape.

Sentence:

31. In this case the record attests that the court did not give the sentence because it was the minimum sentence in law. The court stated that it had considered the mitigation by the Appellant in arriving at the sentence. That being the case this Court, being an appellate Court, must act within the settled legal principles in appeals against sentence.

32. In the case **of Wanjema vs Republic (1971) EA 493** the court laid down court the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

33. Considering the nature of the offence and the manner it was undertaken by the Appellant and the Appellant's mitigations, it is my considered view that the 15 years sentence of 15 years is harsh and excessive in the circumstances. I find that a sentence of 10 years would suffice. The appeal on sentence succeeds to that extent. Thus the court makes the following orders:-

> **i) The appeal on conviction is dismissed and conviction is upheld.**
>
> **ii) The appeal on sentence is allowed to the extent that the sentence to serve 15 years imprisonment is substituted with a period of 10 years to run from the date of arrest 22/4/2017.**

DATED, SIGNED AND DELIVERED AT GARISSA THIS 25TH DAY OF SEPTEMBER, 2019.

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C. KARIUKI

JUDGE