



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. 105 OF 2015
MOHAMMED OMAR DELDE.....APPELLANT
VERSUS
REPUBLIC.....RE.SPONDENT

(From the Conviction and Sentence in Garissa

CM Criminal Case No. 779 of 2013

by M. Wachira – CM)

JUDGMENT

1. The appellant was charged in the magistrate's court at Garissa with Rape Contrary to Section 3 (1) as read with Section 3(3) of The Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 8th June, 2013 in Tana River County of the Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of **A. A. M** (name withheld) by use of force.
2. In the alternative, he was charged with indecent act with an adult contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally touched the buttocks/ breast and vagina of **A. A. M** (name withheld) with his penis against her will.
3. He denied both charges. After full trial, he was convicted of the main offence of rape, and sentenced to 10 years imprisonment. He has now appealed to this court.
4. He filed his initial appeal on 10th November, 2015. Before his appeal was heard however, he filed an amended petition of appeal, as well as written submissions. The grounds of appeal in his amended petition are as follows:-

(i) The learned trial magistrate erred in law and fact to convict him without considering that his fundamental rights were violated by the complainant and the prosecution.

(ii) The learned trial magistrate erred in law and fact in sentencing him in contravention of the Children Act.

(iii) The learned trial magistrate erred in law and fact to convict him without considering that there was no positive identification of the assailant.

(iv) The trial magistrate erred in law and fact in convicting him without considering that the alleged penetration was not proved to have been caused by a male genital organ.

(v) No D. N.A test was done to ascertain the truth.

(vi) There was an existing vendetta between him and the complainant's father which was confirmed by PW3, and the trial magistrate ignored the same.

(vii) The trial magistrate erred in law and fact when he failed to consider that there was no evidence of forceful sexual intercourse.

5. At the hearing of the appeal, the appellant relied on his written submissions and elected not to make oral submission. I have perused and considered his written submissions.
6. Mr. Okemwa the learned Principal Prosecuting Counsel supported the conviction, and sentence and stated that there was however a lapse between the date of the incident and the date of report to the police. In addition the Doctor did not confirm the penetration. Counsel relied on a case of: **Republic -vs- Oyier (1985) KLR 353.**
7. This being a first appeal, I am required to re-evaluate all the evidence on record, and come to my own conclusions and inferences. See the case of; **Okeno -vs- Republic (1972) EA 32.**
8. I have perused all the evidence on record. I have perused the Judgment. I have considered the submissions of the appellant as well as those of the Principal Prosecuting Counsel.
9. The case of; **Republic -vs- Oyier** (Supra) relied upon by the Prosecuting Counsel is a decision of The Court of Appeal which attempted to clarify what constitutes lack of consent in rape cases. It was stated therein that when threats creating fear such as threats of death and duress are used, then one cannot say that there was consent to sexual intercourse.
10. In the present case, the complainant PW1 stated that the incident occurred at noon on 8th of June, 2013. She knew the appellant well. The incident occurred in the bush where she was herding cattle belonging to her father (PW2) A M I. According to her, the appellant suddenly appeared pushed her down and raped her and then went away.
11. The complainant immediately reported the incident to the father PW2, and elders attempted to intervene to settle the matter amicably. From the evidence on record, a report was made to PW4 P.C. Cleophas Kiptoo of Bangale Police Station on the 12th day of June, 2013, four days after the incident. Medical examination was done on the 13th of June, 2013 five days after incident by P3 form.
12. The appellant in his defence said that he was arrested by the Police in the bush, while herding his animals.
13. Indeed the evidence regarding the incident is only that of a single witness the complainant. She was seen by the magistrate when she testified in court. The evidence is that she knew the appellant before, and that after the incident, she made a report to the father PW2. As is customary in this area, some efforts were made through elders to reconcile the parties, but it did not work and a report was made to the Police a few days later.
14. The exception to Section 124 of The Evidence Act (Cap 80) specifically states that the evidence of a single victim witness in a sexual offence can sustain a conviction, provided his or her evidence is believable and is believed.
15. Considering the circumstances of this case, that the incident occurred during broad day light and the complainant PW1 reported to the father PW2 immediately thereafter, mentioning the name of the appellant, I find that her evidence was believable and that the magistrate was correct in believing her. The delay in reporting the incident to the police is also understandable in view of the prevailing circumstances of the attempt to reconcile the parties.
16. The doctor PW3 examined the complainant five (5) days later, and as such there was no way he would have found evidence of violent sexual activity after those five days. Even without medical evidence of violent penetration, in my view the offence of rape can be proved.
17. In my view, the appellant was positively identified by the complainant as the culprit. It is also my view that indeed the appellant engaged in sexual activity with the complainant without her consent. I will thus uphold the conviction of the trial court.
18. The sentence of imprisonment is a lawful sentence and I will also uphold the same.
19. I find that the appeal has no merits. I dismiss the appeal and uphold both the conviction and the sentence of the trial court. Appellant may appeal according to law.

Dated, signed and delivered at Garissa this 20th day of April, 2018

GEORGE DULU

JUDGE