



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 52 OF 2017**

**HUSSEIN MOHAMMED BATHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the Conviction and Sentence in Garissa CM Criminal Case No. 1046 of 2016 by M. Wachira –CM)**

**JUDGMENT**

1. The Appellant was charged in the Magistrate's court at Garissa with rape Contrary to section 3 (1) (a) as read with Section 3 (3) of the Sexual offence Act No. 3 of 2006. The particulars of the offence were that on 8<sup>th</sup> August, 2013 at [particulars withheld] area within Garissa Township Garissa County unlawfully and intentionally forced his penis to penetrate the genital organ namely vagina H A D (name withheld)

2. In the alternative he was charged with indecent act Contrary to Section 11 (a) of the Sexual Offences Act. The particulars of the offence were that on the same day, and place intentionally and unlawfully touched the vagina of H A D.

3. He denied both charges. After full trial he was convicted of the main count of Rape and sentenced to serve 10 years imprisonment. He has now come to this court on appeal.

4. He filed his appeal through counsel C.P. Onono & Company, raising six grounds. Before the appeal was heard however, the appellant changed advocates and was represented during the appeal by Mr. Farouk Advocate.

5. In his submissions Mr. Farouk attacked the evidence of the complainant PW1 (H A D) as a witness who was not truthful in the way she described how she was held by the appellant, whom she said was holding a knife and simultaneously removed her clothes, and held her neck, in the same incident.

Counsel also felt that it is impossible for the complainant to merely inform PW2 Mr. Abdalla slightly after the incident that she wanted him to take her to the Police station, without informing him the reason if indeed she was raped by the appellant.

6. Counsel also felt that the complainant was a liar because she incriminated everybody including the police who assisted her.

7. Counsel further felt that the prosecution evidence was not believable as the alleged torn dress and biker of the complainant were not produced in court. In addition the complainant the complainant gave evidence on mobile call communication, which was not believable as she said she destroyed the telephone line.

8. Counsel complained that though the appellant relied on alibi defence the magistrate did not address the issue.

9. Counsel concluded by stating that the finding by the doctor of reddening of the private parts of the complainant should not have been taken by the magistrate as proof of rape, because such reddening could have been caused by various other factors.

10. In opposition to the appeal Mr. Okemwa Principal Prosecuting Counsel, submitted that proof of the elements of rape was not as stringent as that of defilement. Counsel submitted also that Section 3 and 43 of The Sexual Offences Act clearly brought out the definition of penetration.

11. With regard to corroboration, counsel relied on Section 124 of The Evidence Act (Cap 80) and stated that corroboration was not a requirement in Sexual offences. Counsel lastly reasoned that the reason why, the biker of the complainant and her dress were not produced in court were clearly stated before the trial magistrate.

12. This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record, and come to my own conclusions, and inferences. I am required to bear in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanor, and give due allowance to that fact See Okeno –vs- Republic (1972) EA 32.

13. I have perused the proceedings, including the charge sheet and the evidence on record. I have also considered the Judgment.

14. Several ground of appeal were raised and arguments put in court on both sides. In my view the first issue is whether the charge is defective. Section 3 of the Sexual Offences Act provides as follows:-

**“3 (i) A Person commits the offence termed rape if:**

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

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

**(c) the consent is obtained by force or by means of threat or intimidation of any kind.**

**(i) In this Section the term” intentionally or unlawfully” as the meaning assigned to Section 43 of this Act.**

**(ii) .....**

15. Section 43 of the Act describes the circumstances in which an act can be said to be intentional and unlawful.

16. The appellant herein was charged with rape contrary to Section 3 of the Sexual Offences Act. The particulars of the offence being as follows:-

**“( On the 8<sup>th</sup> day of August, 2013 the [particulars withheld] area within Garissa Township, Garissa County unlawfully and unintentionally forced his penis to penetrate genital organ named vagina of**

**H A D)**

17. It is noteworthy that the words “without consent” do not appear anywhere in the charge sheet. In my view those words been an integral part of the offence of rape should have appeared in the charge sheet. And if consent, was obtained by force, or misrepresentation it should also be clear from the charge sheet.

The fact that the charge sheet does not indicate that consent of the complainant was not given, in my view makes the charge fatally defective, and the appeal can succeed on that account.

18. If I am wrong on the above, the appeal will still succeed. This is because firstly, the medical evidence on sexual intercourse is highly suspect. The P3 form appears to have contained information from treatment notes whose maker was not called to testify. Nor basis was made before the trial court to produce the same, under the exceptions to hearsay evidence in the Evidence Act ( Cap 80), In my view, where the incriminating evidence is from medical treatment notes, the maker of those notes is a Primary and crucial witness who should be called to Court to testify, failure to which proof of the alleged fact will not have been established by the prosecution.

In addition, though there is an entry in the report that spermatozoa was found in the private parts of the complainant, nor attempt was made to obtain semen from the appellant, for DNA comparison purposes. That leaves a big gap in the prosecution case.

19. From the totality of the evidence on record, the picture that comes out is that the complainant was made pregnant by the appellant, after she had divorced her husband. The appellant appears to have rejected to marry her. Both the complainant and the appellant referred to insults between them and also sweet talk between them. The complainant gave evidence that the appellant used to call her and insult her, by calling her a prostitute, then shortly tone down and tell her that he loved her. The appellant on the other hand, said that the complainant used to call him on phone and insult him on several occasions.

20. From the complainant’s evidence, on the day in question, there was communication between the two in the afternoon through the mobile telephone. The complainant then left her shop and went to the place where the shop of the mother of the appellant was situated, where she said the appellant pulled into a room and raped her.

21. It is also in the evidence of both the complainant, and the appellant, that elders tried to intervene to resolve the matter, but it did not work.

22. In my view, this appears to be a love affair gone sour, and later it was turned into a criminal case after a report was made to the Police. In those circumstances, it cannot be said that the appellant had sexual intercourse with the complainant on that day. It also cannot be said that if indeed he had sexual intercourse with her that day, it was not without her consent.

23. The doubt created by the above long winded story, in my view has to be given to the appellant, which I hereby do.

26. I agree with appellant's counsel Mr. Farouk that an accused person does not have the burden to prove an alibi. However, in my view the appellant was present in the vicinity of the alleged incident on that day and time.

27. Consequently, I allow the appeal, quash the conviction set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**Dated, signed and delivered at Garissa this 18<sup>th</sup> day of April, 2018**

**George Dulu**

**JUDGE**