



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 24 OF 2016

SAID ABASS ALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 302 of 2015 by Hon. M. W. Wachira (CM))

JUDGEMENT

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 Offences Act No. 3 of 2006. The particulars of the offence were that on 17th March 2015 at [Particulars withheld] Refugee Camp in Dadaab District of Garissa County, intentionally and unlawfully caused his penis to penetrate the vagina of A. I. J. (name withheld) aged 64 years by use of force.
2. In the alternative, he was charged with committing an indecent act with an adult 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 A. I. J. against her will.
3. He was charged with a second count of assault causing actually bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the same day and place assaulted A. I. J. thereby occasioning her actual bodily harm.
4. He was also charged with count 3 for stealing from a person contrary to section 279 (a) of the Penal Code. The particulars of the offence were that on the same day and place stole a mobile phone valued at Ksh.3000/= the property of A. I. J.
5. He denied all the charges and after a full trial was convicted on the three main counts of rape, assault, and stealing and sentenced 10 years imprisonment for rape, 3 years imprisonment for assault causing actual bodily harm, and 7 years imprisonment for stealing from a person, such sentences to run concurrently.
6. He has now come to this court on appeal on 5 grounds as follows:-
 - (1) **That the trial magistrate erred in law and fact in convicting him without considering that the prosecution failed to prove their case beyond reasonable doubt under section 109 and 110 of the Evidence Act.**
 - (2) **The trial magistrate erred in law and fact in convicting him without considering that the prosecution witnesses' evidence was contradictory and inconsistent contrary to section 163 of the Evidence Act.**
 - (3) **The learned trial magistrate erred in law and fact in convicting him without considering that the complainant fabricated the offence against him due to an existing vendetta.**
 - (4) **The sentences imposed were harsh and excessive considering the circumstances of the offence.**
 - (5) **The trial magistrate erred in law and fact in convicting him without considering that the investigating officer did not investigate the case to the required standard.**
7. The appellant also filed written submissions which he relied upon. He added orally in court on the hearing date, that he was kept in custody for a long time before he was charged in court. He said further that his future plans had now been spoilt and wanted to be discharged.
8. Mr. Okemwa the learned Principal Prosecuting Counsel in response asked this court to consider that the evidence on identification of the

appellant was not very clear. In addition, counsel submitted, the arrest was questionable. Counsel emphasized that though assault was proved, the complainant was not specific on the identity of the person who had committed the offence.

9. This is a first appeal, and as a first appellate court, I am required to re-examine all the evidence on record and come to my own independent conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanour. See the case of **Okeno vs Republic [1972] EA 32**.

10. I have re-evaluated the evidence on record. I have considered the submissions of the appellant both written and oral and the submissions of the Principal Prosecuting Counsel. The incident as alleged to have occurred in a broad daylight and the prosecution called four (4) witnesses to prove their case. The appellant tendered a sworn defence and was not cross-examined.

11. All the three offences were alleged to have been committed against the same person who testified as PW1. It was her evidence that she was herding goats in the bush when a man approached her and attacked her with feasts and hit her on the face and head, pulled her “hijab” and raped her. She stated that the person also took from her handbag her mobile phone, though the handbag also contained money.

12. The appellant was arrested five (5) days later on 22nd March 2015. He was then charged with the three offences and convicted.

13. In my view, the major issue relates to the identification of the appellant as the culprit. From the evidence on record, the complainant PW1 did not say that she recognized or identified the attacker. She merely stated as follows:-

“On 17th March 2015 I was in the bush herding goats. While following after the goats I saw a man approach me. He attacked me with his feasts and hit me on the face and head several times. I suffered injuries. He then pulled my “hijab” and wrapped my face. He knocked me down and I fell on my back as he continued to hit me and then removed my inner clothes including my underpants. He climbed on me and forced his penis to penetrate into my vagina. I screamed for help from the time he attacked me until the time he stopped raping me. He continued to hit me on the head with feasts as he raped me. I became unconscious. I regained consciousness later he was gone.”

14. From the above description, of the incident, it is clear that the complainant PW1 did not or could not have identified the attacker. She did not describe to anybody his height, complexion or any description like clothes he wore. Therefore in my view, the identity of the appellant is highly suspect. The appellant was thus not arrested on the basis of a description given by the complainant.

15. In addition to the above, the person or persons who arrested the appellant did not testify in court. The appellant was arrested by members of the public and handed over to police constable Purity Gatunyi who did not testify in court to clarify the circumstances of the arrest. The person who actually testified about the appellant’s arrest was Nadhif Hassan PW2, who did not state how the appellant was identified as the culprit. He stated as follows-

“On 22nd March 2015 I was called by my uncle and informed that they found the person who assaulted and raped our auntie. I met my uncle in the house. There were other persons who were also looking for a man who had raped their relative. We all went to a GTZ farm and found the accused in the dock. He saw us and ran away. We chased him and arrested him. We asked him if he raped our auntie and he admitted he raped her.”

16. The evidence on the identity of the appellant is hearsay, as the uncle who gave the witness information did not testify. The above description also does not give crucial information, as it does not say who identified the appellant as the culprit and based on what description. It also suggests that some people were looking for another rape suspect, which adds to the probability of mistaken identity. In my view, the fact that the appellant ran away must have been because he was scared for his life. Even if the appellant admitted raping the auntie as PW2 says, that is not admissible evidence and in any event, the appellant must have “admitted” due to fear for his life.

17. With the above considerations in mind, it cannot be said that the prosecution connected the appellant with any of the offences charged. The prosecution did not prove that the appellant was positively identified as the culprit. The prosecution did not thus prove their case against the appellant for any of the offences charged. The Learned Magistrate was thus wrong in convicting him.

18. I thus allow the appeal, quash the convictions, and set aside the sentences imposed. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Garissa this 27th day of September, 2018

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George Dulu

JUDGE