

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 28 OF 2016

(From original conviction and sentence in Criminal Case No. 60 of 2014 of the Chief Magistrate's Court at Garissa – B.J Ndeda - SPM).

ABDIRASHID ISMAEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted by the chief magistrate's court at Garissa of rape contrary to section 3 (1) (a) (b) of the Sexual Offences Act and attempted rape contrary to section 4 of the same Act. He committed rape on 11th January 2014 at [particulars withheld] by penetrating the vagina of HKH without her consent. He also attempted to rape on the same day and place another woman HMH. In the alternative to the main counts he was charged with indecent acts.

He was recorded to have pleaded guilty to the two main charges of rape and attempted rape and the alternative charges of indecent acts, were therefore not dealt with. After the facts were summarized by the prosecutor he accepted the same. He was convicted and sentence to life imprisonment on the offence of rape.

Because he was sentenced to life imprisonment on that count he was discharged under section 35 (1) of the Penal Code of the other offence of attempted rape. He was thus not sentenced for the offence of attempted rape.

He was dissatisfied with the decision of the trial court and filed the present appeal. He stated in his grounds of appeal that he was remorseful, that the P3 form was for the offence of assault not rape and that the charge sheet was defective. That the sentence imposed was excessively harsh. He also filed written submissions which he relied upon. In his submission he stated that though he pleaded guilty the magistrate should have adhered to principles of justice which the trial court did not do.

Learned Prosecuting counsel Mr. Okemwa submitted that the appellant faced two main counts of rape and attempted rape. He was also charged in the alternative with two counts of indecent act. He however pleaded guilty to the charges of rape and attempted rape after the complainant had already testified in court and was given an opportunity to cross examine her. Counsel submitted that there were no defects on the charge. Counsel submitted however that the record did not show that the court actually convicted the appellant. Counsel also said that the sentence imposed by the court was illegal as the law provided a minimum of 10 years.

I have perused the entire record. Indeed after the facts were read and explained to the appellant and he said that the facts were correct, the court did not record that it had convicted the appellant. The court went ahead to ask him to mitigate and sentenced him accordingly. There was also no indication that the prosecutor was given an opportunity to state whether the appellant was a repeat offender.

The failure of the trial court to record a conviction, and the failure of the court to allow the prosecutor to say whether the appellant was a repeat offender was a mistake. In my view however, the totality of the record is to the effect that the appellant was actually convicted before sentencing though the magistrate did not specifically record a conviction. The appellant has also not complained about this default. I am of

the view that the mistake of the magistrate did not prejudice the appellant and was curable under section 382 of the Criminal Procedure Code.

The appellant has said that the charge is defective. I have perused the charge sheet and find no defect in the charge. The P3 form had no defects either that would persuade this court to say that the charge was defective. The injuries found on the complainant in the rape charge were clearly as a result of the excessive force used by the appellant when raping her. I dismiss that complaint.

With regard to sentence, I agree with the prosecuting counsel that the minimum sentence for the offence of rape is 10 years imprisonment. The law also allows the sentence to be aggravated to life imprisonment.

The appellant, from the facts on records used a lot of force in executing his mission. The facts clearly disclose a cruel act by the appellant and that must have been the reason why the trial court imprisoned the appellant for life. However in my view since the prosecution did not say that the appellant was a repeat offender and since the appellant pleaded for leniency, that sentence of life imprisonment was not justified. The appellant should have been handed down a sentence above the minimums sentence but not as high as life imprisonment.

I appreciate that sentencing is the discretion of the trial court, but in my view the learned magistrate was too harsh since the appellant pleaded guilty and did not waste more of the courts time after the first witness testified. I will set aside the sentence imposed and sentence him to serve 15 years imprisonment for the offence of rape.

Consequently I uphold the conviction. I set aside the sentence of life imprisonment for the offence of rape and order that the appellant will instead serve 15 years imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 13th day of October 2016.

GEORGE DULU

JUDGE