REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRA NO.13 OF 2013

(Originating from Hon. Mr. J. M. Kituku, in Garsen SRM CR. NO.235 OF 2011)

HUSSEIN BONAYA HARO..........................APPELLANT

VRS

REPUBLIC........................RESPONDENT

JUDGMENT

The appellant was charged with the offence of rape contrary to section 3 (1) (a), (b) and 3 (3) of the Sexual Offences Act. The particulars of the offence were that the appellant on the 25/12/2011 in Garsen Town of Tana Delta District within Tana River County, intentionally and unlawfully caused his penis to penetrate the vagina of JKH without her consent.

The appellant was convicted and sentence to serve ten (10) years imprisonment. The grounds of appeal are that the appellant was framed by PW1 due to the bad blood between them, that the evidence was contradictory, that essential witnesses were not called, that no D.N.A. report was produced connecting him to the offence and that his sworn defence was wrongfully dismissed. The appellant filed written submissions and entirely relied on them. I have gone through the submissions and all what is stated is mitigating plea for the appellant to be discharged. The appellant contends that he is remorseful, he is a first offender and that his mother and brothers entirely rely on him. He has undergone counselling in prison and has totally changed.

Mr. Nyongesa, prosecution counsel, opposed the appeal. Counsel submitted that the appeal is mainly on sentence. The 10 years imprisonment period is the minimum sentence.

The record of the trial court shows that **PW1 JKH** was the complainant. She worked as a waiter at 3 in 1 club. On 24/12/2011 she worked up to midnight and went to sleep at a staff room behind the club. Her colleagues were still on duty and she left the door open. At about 5.00 a.m she found a man on top of her having removed her trouser. She struggled with him and she was overpowered. It was dark and the bulb in the room was not working. The man raped her. She screamed and her Manager, PW2 heard her screams. He came to the room and found the appellant on top of her. The appellant was pulled outside and was arrested by a police officer who was within the club. She was taken to Garsen Police Station and later treated at Garsen Police Station and later treated at Ngao Hospital. She did not know the appellant.

PW3, Shadrack Ade Jacko is a clinical officer who was based at Ngao Hospital. He examined PW1 and the appellant on 25/12/2011 and filled their respective P3 forms. He noted vaginal discharge of spermatozoa on PW1 and concluded that she had been penetrated. He also noticed fluids resembling sperms from the appellant. **PW2 Japheth Mugambi Miriti** was the manager at 3 in 1 Bar and Restaurant. He testified that PW1 was one of the staff. On 24/12/2011 at about 4.00 a.m he was going to the store when he heard screams. He went to where PW1 was sleeping and found the appellant on top of PW1. They were struggling. He removed the appellant and took him outside while half naked. PW4, a police officer was at the club and he arrested the appellant.

PW4 A. P. Corporal Patrick Murathe was based at the Sailoni A. P. Camp. On the night of 24th – 25th December, 2011 at around 4.00 a.m. he was at the club. PW2 informed him that he had found a man inside a room occupied by staff. He went there and arrested the appellant. He found PW1 zipping

her trouser while crying saying the appellant had raped her. He arrested the appellant and handed him over to the police. **PW5 Corporal Erastus Njonjo** was based at the Garsen Police Station. On 25/12/2011 at 8.00 a.m, he was tasked to investigate the case. The appellant had been taken to the station by PW4. He visited the scene, investigated the case and charged the appellant with the offence.

In his sworn defence, the appellant stated that he was at 3 in 1 club that day. He took miraa and bear and agreed with PW1 to have sex. They agreed at Ksh.500 and they were to have sex for a short time and not the whole night. PW1 showed him the room and he went in and they had sex. He was arrested while outside the room. He even bought beer for PW1.

The main issue at hand is whether the prosecution proved its case beyond reasonable doubt. It is the evidence of PW1 that she had not consented to have sex with the appellant. She only found the appellant on top of her and it was dark. Her screams alerted PW3 who went to the room and found the appellant on top of PW1. The defence evidence is that the two had agreed to have sex. The sequence of events show that PW1 worked up to midnight. She took three beers and went sleep. The rape incident occurred at around 4.00 a.m. about four hours after she had retired in her room. The reason why she did not lock the door is that her colleagues were still working and that is why she left the door open.

The trial magistrate in her judgment expounded on the issue of consent under sections 43 and 44 of the Sexual Offences Act. The trial magistrate correctly interpreted the two sections and concluded that there was no consent. Given the evidence on record, I do equally hold that there was no consent. That is why PW2 found the two struggling. Although the appellant raised the issue of having consented with PW1 during cross-examination, there is strong evidence to the contrary. It appears the appellant knew the premises very well and took advantage of the fact that the door was open. There was no consent.

With regard to the issue of sentence, section 3 (3) of the Sexual Offences Act provides that 10 years imprisonment is the minimum sentence. The sentence can be enhanced to life imprisonment. The sentence cannot be reduced and is lawful.

In the end, I do find that the trial court made the correct decision. The appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 25th day of June, 2015.

SAID J. CHITEMBWE

JUDGE