



REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL NO. 10 OF 2014

AHMED BIRIK HUSSEIN.....APPELLANT

V E R S U S

REPUBLIC.....STATE

(from original conviction and sentence CR. CASE NO. 110 OF 2013 at Wajir)

JUDGMENT

The appellant was initially charged in the subordinate court with rape contrary to section 3(1) (a) (b) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 1st April 2013 at [particulars withheld] village in Wajir District within Wajir County intentionally and unlawfully caused his penis to penetrate the anus of A H without his consent. He pleaded not guilty to the offence. The charge was later amended to committing unnatural act. After a full trial he was convicted of the offence and sentenced to serve 10 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has filed the present appeal. He filed his initial grounds of appeal on 25th February 2014. At the hearing of the appeal however, he filed amended grounds of appeal which he relied upon. He also filed written submissions. His grounds of appeal are as follows:-

1. The trial magistrate erred in law and facts to convict him without considering that the information and statement in support of the charge sheet was defective.
2. The trial magistrate erred in law and facts to convict him without considering that his fundamental rights were violated by amendments made after the close of the prosecution case.
3. There were no tangible evidence to support the prosecution case.
4. The trial magistrate failed in not considering that there was mass contradiction in the prosecution case.
5. The Trial magistrate failed to note that PW3 was a hired witness who was not mentioned anywhere in the complainants evidence causing great injustice by instigating false evidence.
6. The learned trial magistrate erred in law and facts to convict him without considering that the investigation was shoddy.
7. The P3 form produced rebutted the evidence of the complainant that there was penetration.
8. The sentence imposed was harsh and excessive and contrary to the requirements of Section 162 Penal Code.

At the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered.

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the appellant

cross examined all witnesses and as such he knew the charge against him and he participated fully in the trial. Counsel submitted also that Section 211 of the Criminal Procedure Code was fully complied with and that the charge sheet was amended properly. Counsel relied on Section 162 of Penal Code and stated that the appellant did not object to the amendments of the charge which was read to him and he denied the same. He also chose not to recall any witnesses. Counsel further submitted that there was no contradiction in the prosecution case. That the prosecution evidence was over whelming. Counsel further submitted that there was no evidence that PW3 was a hired witness. He also submitted that there was no evidence of existence of a grudge. In counsel's view however, since the doctor did not confirm penetration the offence should have been an attempt. He submitted lastly that the sentence was that provided by the law.

In response to the prosecuting counsel submissions, the appellant stated that the doctor did not examine him. That the doctor also confirmed that there was nothing unusual on the complainant. He stated that the existing grudge was over land which was grabbed from him.

At the trial the prosecution called 4 witnesses, PW1 A H was the complainant. He stated that he was a teacher. That the appellant came to him and asked for casual work and he showed him a farm to till. That they used to sleep in the same house which had two beds. The appellant had the habit of chewing miraa in bed. That on the 30th April 2013, the complainant went out to conduct prayers for one O A G. When he came back he found the complainant chewing miraa and he entered the house and slept at 2.00 am. He later discovered that the appellant was on top of him and he felt the appellant's penis on his buttocks. He got surprised and pushed the appellant's penis away. He discovered that the appellant had forced his penis through the complainant's kikoi and ejaculated. The complainant then went to call a neighbor. Before he went out he noticed that the trouser zip of the appellant was opened. According to him, H and R were the first people to arrive. They decided to take the appellant to the police and the appellant said that he had dreamt that 3 women had approached him and requested for tobacco. The complainant was then taken to hospital and treated.

PW2 was Clinical Officer George Thiongo. It was his evidence that the complainant came to him on 1st April 2013 and claimed to have been sodomised. He examined his anal region and found it reddish but with no visible injuries. He gave him antibiotics and drugs to prevent HIV. It was his evidence that it could not be confirmed whether there was penetration of a penis. He produced the P3 form as an exhibit.

PW3 was A H a casual worker. He stated that on 1st of April 2013 he was at home at 2.00 am, when he came to know that the appellant had committed an offence against PW1. He stated that he noted sperms on the cloth of PW1. They went and reported the matter to the Chief. According to him the appellant stated that 2 women had gone to him. He stated that they arrested the appellant when he was naked.

PW4 was PC Mwenye Wesonga of Wajir Police Station. It was his evidence that on 1st April 2013 at 5.00 am he was at the police station when members of public came with a sodomy suspect. The complainant was also there. He received and booked the report and took them to Wajir District Hospital. He recorded witness statements. According to him the appellant stated that it was the work of the devil which forced him to commit the offence. He thus charged him and retained a Somali Kikoi of the complainant which he produced in court as an exhibit.

After the close of the prosecution case, the prosecutor applied under Section 18(a) and 300 of Criminal Procedure Code and Section 162 Penal Code to amend the charge sheet to read unnatural offence. The appellant was recorded as stating that he had not objection. The amended charge was then read again to the appellant and he pleaded not guilty. He also chose not to recall any of the witnesses. He stated that he would call two witnesses but later stated that his witnesses had died.

In his defence the appellant gave sworn testimony. He stated that the complainant and his witnesses were brothers and that there was an existing grudge. He stated that they used to work together with the complainant in a farm. He was cross examined and stated that he used miraa from 1992. He stated that he did not know the complainant's name but admitted that they used to work together on the land. He stated that he stayed in that farm for only three days. He admitted that on 30th March 2013 he was at

[particulars withheld] in the complainant's brothers land doing some job with the complainant. He stated that he used to sleep outside the house while the complainant slept in the house. He also stated that the complainant had his Kshs 6,000/=.

Faced with the above evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The court thus convicted and sentenced him. Therefrom arose the present appeal.

This is a first appeal. As a first appellate court, I'm a duty bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences. I have to take in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See the case of **Okeno -vs- Republic (1972) EA 32.**

I have re-evaluated the evidence on record. The appellant claims that the charge was defective. I have perused the charge sheet. It clearly states that the offence was committed on 1st April 2013. It initially stated that the offence was rape, but was later amended after the close of the prosecution case to unnatural offence.

Having considered the contents of the charge and the record, I find no defect on the charge. I observe however that the complainant refers to a date of 30th April 2013, while all the evidence on record and charge sheet refers to 1st April 2013. In my view however that was a slip of the pen. All the evidence shows that the incident occurred on 1st of April 2013 at night. There was thus no miscarriage of justice on the variance of dates.

The charge was amended after the closure of the prosecution case. That was true. However the appellant was asked about the amendments and he stated he did not have any objection. The amended charge was also read to him and he denied the same. He also elected his not to recall witnesses. In those circumstances I find no prejudice occasioned to the appellant by the amendments of the charge.

The appellant also complained that his fundamentals rights were violated by the amendments of the charge. The amendments of the charge was grounded on the provisions of the law as the evidence disclosed a different offence. It was done in accordance with the requirements of the Criminal Procedure Code and the Penal Code. The amendments par se was not a violation of the appellant's constitutional rights. I dismiss that complaint.

The appellant has complained that there were massive contradiction and inconsistencies in the prosecution case. My perusal of the evidence on record does not reveal any such contradictions or inconsistencies. I thus dismiss that ground.

The appellant has complained that the evidence of the prosecution did not prove the offence for which he was convicted. That the P3 form did not establish any penetration. The learned prosecuting counsel Mr. Orwa also stated in the submissions that the evidence on record merely established an attempt to commit the offence.

I have considered all the evidence on record. The Clinical Officer PW3 stated that he noted reddening of the anus but could not say whether such was caused by the penetration of the penis. From the evidence of the complainant, the appellant forced his penis through the anus over his Kikoi. In my view the reddening of the anus was consistent with what was stated by the complainant. In my view therefore penetration was proved. I thus find no basis for the argument that this was a mere attempt.

The appellant has complained of an existing grudge and that the prosecution witnesses were brothers. I observe that in cross examination the appellant neither raised the issue of existence of a grudge nor the relationship of the witnesses. He raised the issue of an existing grudge during his defence. In my view that was an afterthought. The appellant was clearly at the scene where the incident occurred. He admitted that he used to work in the farm. He also admitted that he used to sleep in the same homestead with the complainant, though according to him he slept outside the house while the

complainant slept in the house. The evidence on record clearly places him at the scene and there is no suggestion that there could have been a land dispute. He was merely an employee. I dismiss that ground.

On the sentence, the sentence imposed was that provided for by the law. I find no mistake on the part of the magistrate with regard to sentencing.

To conclude, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and Delivered at Garissa this 15th June 2015.

GEORGE DULU

JUDGE