REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 104 OF 2012

(From the conviction and sentence in Cr. Case No. 358 of 2012 in SRM's Court at Wajir- L. Kassan - SRM)

SUROW OMAR ALALE .... APPELLANT

V E R S U S

REPUBLIC ....…............................... RESPONDENT

JUDGMENT

The appellant was charged 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 18th August 2012 in Wajir District within Wajir County intentionally and unlawfully caused his penis to penetrate the vagina of S.K.H without her consent.

He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve ten (10) years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial petition of appeal on 8th November 2012.

On 10th June 2015 however, he filed an amended petition of appeal and written submissions.

The main grounds of appeal are that there was no proof that the complainant was mentally retarded. Secondly there was also no proof that the complainant did not consent. Thirdly it was wrong for the trial court to allow someone to testify on behalf of the complainant. Fourthly, the sentence was excessive.

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 argued that the prosecution proved all the ingredients of the offence or rape, and that eye witnesses that is PWI, 2&3 saw the appellant in the very act or rape in the toilet and that the doctor found traces of spermatozoa in the vagina of the complainant. Counsel emphasized that there was no evidence of an existing grudge as alleged by the appellant. Counsel submitted further that the language used was Kiswahili translated to Kisomali which the appellant understood as the record showed that he cross-examined the witnesses.

Counsel submitted further that in his defence the appellant did not touch on the allegations leveled against him, and instead merely talked about his arrest.

At the trial, prosecution called five (5) witnesses. The appellant tendered an unsworn defence. I have perused the prosecution evidence and the defence of the appellant.

This being a first appeal, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences – see the case of ***Okeno –vs- Republic (1972) EA 32.***

From the evidence on record, it is clear that the complainant did not tender evidence. Instead PW2 Rahma Mohamed a 27 year old woman who was left with the complainant by the mother, testified about the incident. It was alleged by the witness that the complainant was mentally retarder, possibly the reason why she did not come to court to testify.

In my view, the complainant should have testified as the alleged offence was committed against her, unless there was tangible evidence medical tendered in court that she was incapacitated and incapable of comprehending situations. A mere allegation of mental retardation was not a sufficient reason for her not to have testified. This mistake by the prosecution meant that the trial court could not safely convict the appellant for the offence of rape.

The offence charged was an offence of rape. Consent is a very important element of the offence, together with penetration. Three witnesses PWI Dalabo Osman Sora, PW2 Rahama Mohamed, and PW3 Mohamud Ibrahim saw the

appellant having sexual intercourse with the complainant in a toilet while the complainant was bending. It was in broad day light. I have no doubt in my mind that the appellant was seen by these three people in the sexual act. The Clinical

Officer PW5 Mohamed Mohamud also found traces of spermatozoa in the vagina of the complainant. That evidence proved the sexual act by the appellant with the complainant.

However, only the complainant explain whether she consented to the sexual act since consent vitiates the offence of rape. She was an adult of 36 years as per the entry in the P3 form – therefore she had capacity to give consent. Her being mentally retarded is not a bar to the ability to give consent as mental retardation is of many types and of varying degree of seriousness. In any case there are some lucid moments even for people who are mentally sick. There was no medical evidence that the complainant was mentally incapacitated and could not understand her surroundings.

The burden was on the prosecution to prove that indeed the complainant did not give consent. Since there was no medical evidence that she was incapable of giving consent, and since she was seen having bent down while the appellant was having sexual intercourse with her, and did not scream or move away, in my view it cannot be said that she did not give consent to the sexual encounter. I thus find that the prosecution did not prove that the complainant did not consent to sexual intercourse. On that account also, the appeal has to succeed. The conviction and sentence cannot thus be sustained.

To conclude I find merits in the appeal. I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty

forthwith unless otherwise lawfully held.

Dated and Delivered at Garissa this 23rd September 2015.

GEORGE DULU

JUDGE