



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**HCCR APPEAL NO. 51 OF 2013**

**SIDOW MOHAMED ALI ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The appellant, Sidow Mohamed Ali, appeared before the Senior Resident Magistrate at Lodwar charged with rape contrary to section 3 (1) read with section 3 (3) of the sexual offences Act in that on the 23rd January, 2012 at [particulars withheld] Turkana West District, he engaged in sexual intercourse with R M S, without her consent.

There was an alternative count of indecent act with the said woman but after a full trial, the appellant was convicted on the main count of rape and sentenced to serve twelve (12) years imprisonment. He was however aggrieved by the conviction and sentence and preferred this appeal on the basis of the grounds in his petition of appeal filed herein on 26th April, 2013. He appeared in person at the hearing of the appeal and relied on his written submissions.

The learned prosecution counsel, Mr Kimanzi, appeared for the state respondent and opposed the appeal by stating that the appellant was identified by PW2 as there was electricity at the scene and that he used force to sexually assault the complainant who did not consent to the act.

The learned prosecution counsel contended that the evidence against the appellant was strong and that his defence was dismissed. Therefore, this appeal ought to be dismissed.

In his oral rejoinder to the respondent's submissions, the appellant indicated that no exhibit was produced and that he was not examined by a doctor. He complained that the complainant implicated him after she failed to pay his debt and that her evidence was contradictory. Further, he was a married person with three wives and was a madrassa teacher. He reiterated that he did not commit the offence and was implicated by the complainant and her boy friend.

This court, having considered the submissions by both sides has a duty to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

Accordingly, the prosecution case was that on the named date at about 8.40 p.m., the complainant R M S (PW2), was in her house with her children. The house had electricity and she was breast feeding her younger child when the appellant appeared at the scene armed with a knife which he placed on her neck and warned her against screaming. He then held her by the neck and forcefully had sexual intercourse without her consent, Thereafter he made an attempt to leave the house but

she held him tightly and screamed for help. Neighbours arrived at the scene and when they insisted that he should be taken to the police, he jumped over a fence and escaped. She reported the matter to the police and was referred to hospital where she was examined by **Dr. Videl Awor (PW1)** who compiled the necessary P3 form (P.Ex.1).

Adam Barrow Yassar (PW3), was among those who responded to the complainant's distress screams. He arrived at the scene and found the appellant being held by some people with the complainant alleging that he had raped her. The appellant however, jumped over a wall and disappeared. He (PW3) assisted to take the complainant to the hospital. P.C Yusuf Shune (PW4), investigated the case and thereafter preferred the present charge against the appellant who had already been arrested.

The appellant denied the charge and defended himself by stating that he was a businessman cum madrassa teacher and a married man with three wives. He arrived in Kakuma from Nairobi on the 18th January, 2012 and on the 20th January, 2012, he asked his assistant Adan Borrow to hand over the collection realized while he was away for almost

two months. His assistant handed over the collection for one month only and this brought a disagreement between them which ended in the assistant bringing in two police officers who questioned him (appellant) about the complainant who alleged that she had been raped by him. He denied the allegation but was still arrested and arraigned in court. He contended that he was fabricated by his assistant who is related to the complainant whom he had previously not known.

From all the foregoing evidence it is apparent that the fact of rape was not disputed. Indeed, the complainant (PW2) as corroborated by the doctor (PW1) was able to establish that a person had sexual intercourse with her in a forceful manner and without her consent. The basic issue that presented itself for determination was therefore whether the appellant was the person responsible for the offence. The defence raised was a denial and an indication that the appellant was maliciously implicated by Adan Borrow who was his assistant in a madrassa class. Adan Borrow testified for the prosecution as PW3 and from his evidence there was no indication that he had ever worked with the appellant as an assistant. There was no suggestion even from the cross examination of Adan Borrow by the appellant that the two had a working relationship apart from being Somali refugees based at the [particulars withheld].

With regard to the offence, Adan Borrow clearly indicated that he knew nothing about it since he was not present when the complainant was raped. He was however firm that he was attracted to the scene by the complainant's screams and when he went there he found the appellant having been caught by some people for allegedly raping the complainant. He (Adan Borrow) was told by the complainant that the appellant had raped her.

Indeed, the complainant was alone with her children when the offence occurred. She clearly stated that the appellant was the person who raped her and that she was able to see him due to the presence of electricity light in her house. Her evidence was believed by the learned trial magistrate who saw and heard the witnesses and was therefore in a better position than this court to make findings of facts based on credibility.

It is against that background that this court must also find that the complainant was credible in her evidence which clearly established that the appellant was the person who raped her. The defence raised by the appellant was thus invalidated and rendered as an afterthought particularly when viewed against the evidence given by Adan Borrow (PW3).

For all the foregoing reasons, this court deems it appropriate to uphold the appellant's conviction by the learned trial magistrate which conviction was safe and proper.

The sentence meted out against the appellant was lawful and does not warrant interference by this court.

In sum, this appeal is dismissed for want of merit.

**J. R. KARANJA,**

**JUDGE**

(Delivered and signed this 21st day of January, 2014