



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 20 OF 2013

**Appeal from original conviction and sentence at Principal Magistrate's Court at Mandera in
Criminal Case No 5 of 2012 (R. Odenyo)**

ABDIRIZAK SAID YUSSUF.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

[1] Abdirizak Said Yussuf (the appellant) brought this appeal out of time but with leave of this court. The appellant was convicted on two counts, count for rape contrary to section 3 (1) (a) of the Sexual Offences Act and count two for assault causing actual bodily harm contrary to section 251 of the Penal Code. He was sentenced to fifteen years and four years respectively both to run concurrently. The victim of both rape and assault is one HM. The appellant faced alternative count of committing an indecent act with an adult contrary to section 11 (A) of the Sexual Offences Act in respect of count one. He also faced a third count of being unlawfully present in Kenya to which he pleaded guilty and was convicted and sentenced to one year imprisonment. The trial magistrate forgot that sentence when making his orders for the sentences of count one and two to run concurrently.

Grounds of appeal

[2] In his grounds of appeal, the appellant is challenging the time he spent at the police custody before being formally charged. He claims his rights were violated. He is challenging his identification as the person who attacked the complainant; his mode of arrest; lack of evidence of crucial witnesses; lack of proof beyond reasonable doubt and rejection of his defence by the trial court.

Facts

[3] HMA(PW1) was raped while she was herding family goats at Arabia in Mandera. She did not remember the date but she put the time of the rape as about midday. She testified that she was alone in the fields when she spotted the appellant walking towards her; that when he reached where she was he drew a knife and stabbed her on the left hand. He then knocked her down, lifted her clothes and raped her. He stood up and left thereafter. She said that she was at an isolated place and no one heard her screaming. The matter was reported at Mandera Police Station and PW1 was referred to Mandera District Hospital for treatment. The appellant was arrested some days later and handed over to the police. He was charged with this offence.

[4] Five witnesses testified on behalf of the prosecution in the lower court. In addition to PW1, there is the evidence of her father MAA (PW2). He testified that he returned home on a date he did not know at about 3.00pm and got information that his daughter had been raped. PW1 described the stranger who had raped her as having a beard and a moustache. PW2 took PW1 to hospital. Further evidence by PW2 is that ten days after the rape the appellant went to PW2's home and sought a place to sleep. PW2 welcomed him and gave him a place for the night. PW1 beckoned her father PW2 and told him that the stranger he had welcomed is the man who had raped her. PW2 in company of others including PW1 took the appellant to Mandera Police Station and handed him over to the police.

[5] The evidence of No. 65604 PC Amos Manyu (PW3) is that PW2 accompanied by PW1 went to Mandera Police Station 29th December 2011 and reported to him that PW1 had been raped on 14th December 2011 while herding goats and that therapist had also stabbed her on the hand. They also reported that the suspect had been arrested and was in police cells. PW3 issued PW1 with a P3 Form and escorted her to Mandera District Hospital for examination. A knife alleged to have been used to stab PW1 was also handed over to PW3. The evidence of Emmanuel Matinda (PW4) is that he examined PW1 on 30th December 2011. He stated that the report he received from PW1 is that she had been raped and assaulted two weeks earlier. PW4 confirmed injuries on the left forearm which he said was stitched. There was no evidence of rape according to PW4.

[6] The last witness for the prosecution is Adan Abdi Adan (PW5) a Police Reservist Officer. He testified that the appellant was taken to him by members of public who included PW1 and PW2. He puts the date as 14th December 2012. PW5 does not state whether he was informed about the reason for the arrest of the appellant. This date is wrong. I have checked the handwritten notes of the trial magistrate and the date reads the same. PW5 must have meant 14th December 2011 which would agree with the evidence on record. PW5 testified that the appellant was escorted to the Administration Police Camp.

[7] The appellant stated that he was walking to the Refugee Camp (does not state which one) to look for his wife. He seems to have been sneaking into the country because he stated that when he was told he needed an identity card to go the camp he decided to walk there. He claims that he sought accommodation from a Mzee at Arabia who asked him if he knew on prominent elder in his tribe known as I; that the Mzee was joined by other people all who wanted to know whether he knew that elder claiming that their daughter had been raped by one I who was of the same clan with the appellant and who had disappeared. They took him to the police because he was from the same clan with that man.

Submissions

[8] The appellant submitted that he was kept in police custody while investigations were going on; that the witnesses contradicted themselves with PW2 saying he was arrested ten days after the alleged rape and PW1 saying he went to her home after he was arrested; that the dates in the police records show that the alleged rape was on 14th December 2011 but he was arrested on 17th December 2011; that he was not identified and there is no medical evidence implicating him; that the trial magistrate did not consider the evidence of the doctor; that the trial magistrate did not record his defence; that he was not allowed to call witnesses; that the proceedings were conducted in chambers and not in open court.

[9] Learned State Counsel opposed the appeal. He submitted that it is now settled that any one claiming violation of constitutional rights can claim compensation in a civil case and that this court has no such jurisdiction in this case; that there was ample time for the complainant to observe the appellant as he walked towards her and the conditions for favourable identification were conducive; that the complainant also described the physical appearance of the appellant and these features were noted by the trial magistrate; that this recognition was beyond reproach; that the appellant has not identified the essential witnesses which he claims were not summoned to testify; that there was corroboration of PW1's evidence by the medical evidence that confirmed injury on her arm and the alleged knife was tendered as an exhibit; that the prosecution proved the case beyond reasonable doubt. Counsel asked the court to uphold the findings of the lower court and dismiss the appeal.

Issues and determination

[10] The issues raised by the appellant are discussed and determined in the following paragraphs. That the appellant's constitutional rights were violated for being detained in police custody as the matter was being investigated. PW1 does not know the date the alleged rape took place. Neither does her father PW2 other than stating that the suspect who raped his daughter came to his home ten days after the alleged rape. PW5 testified that the appellant was taken to him on 14th December 2011. The appellant was escorted to the Administration Police Camp the following morning (15th December 2011). PW3 testified that PW2 and PW1 went to Manderu Police Station on 29th December 2011 and reported a case of rape which they claimed had occurred on 14th December 2011. It is not indicated when the appellant was taken to Manderu Police Station. The court record however shows the appellant was arraigned in court on 3rd January 2012. Evidence therefore is not clear on the number of days the appellant spent in police custody before he was taken to court. Be that as it may, the law is settled that anyone claiming violation of constitutional rights of this nature can claim damages in a civil suit.

[11] The evidence is contradictory. I have stated above that the date when PW1 was allegedly raped is not known given her evidence and that of her father. If the appellant was taken to PW5 on 14th December 2011 and given that PW2 said the appellant went to his home ten days after the alleged rape, then it cannot be true that PW1 was raped on 14th December 2011 as reported to PW3. It is not stated what happened between 14th December 2011 to 29th December 2011 when the matter was reported to the police. Where was the appellant being held and what was happening for all that time? Further contradictions also are revealed in that PW1 said she was taken for treatment the following day after the alleged rape. PW2 stated the same that he took PW1 to hospital the next day. There is also evidence of PW3 who testified that he issued P3 Form to PW1 on 29th December 2011 and escorted her to Manderu District Hospital for treatment. Evidence of PW4 is that he examined PW1 on 30th December 2011.

[12] Further on evidence, PW4 found no evidence of sexual assault. He explained to the court that other than the stab wound on the left arm which was stitched, there was no evidence that PW1 had been raped. The examination was done so many days after the alleged rape and definitely evidence, if it existed, had been affected by the delay.

[13] Evidence on identification was adduced by PW1. She testified that she saw a man whom she identifies as the appellant walking towards her and on reaching her he attacked her by stabbing and raping her. It is true there was evidence to confirm the stab wound. What PW1 did not disclose that she was carrying a baby at the time of the alleged attack. This evidence was adduced by PW2 her father who told court in cross examination that the child was slightly injured during the struggle. PW1 did not even mention a struggle. If PW1 had seen the appellant on the date of the alleged rape, then her seeing him again on the day he went to their home would amount to recognition. Is this evidence water tight? This court does not doubt that the attack was during the day but I take note of the fact that the appellant was a total stranger, that PW1 was carrying a baby and that she was attacked and that she was in pain following the stabbing.

[14] Evidence of a single witness on identification of a suspect is treated with caution especially where circumstances do not favour positive identification. It has been stated that a mistaken witness can be a convincing one. Further, courts are called upon to examine closely the circumstances in which identification was made; how long did the witness have the suspect under observation; at what distance; in what light; whether the observation was impeded in any way; whether the witness had seen the suspect before; the length of time between the original observation and subsequent identification etc... **See R v Turnbull [1976] 2 All ER 549; Roria v R [1967] E.A and Criminal Appeal No. 108 of 1999 Joseph K. Kigundu & 2 others v R.** I am alive to the fact that PW1 described the suspect to her father but the description can fit many men.

[15] My considered view is that even though PW1 was alleged raped during the day, the circumstances surrounding identification were not conducive. She was carrying the baby; she was stabbed and alleged raped. Under such circumstances her concentration would have been on the pain from stab wound and the

welfare of the baby. It also took about 10 days according to PW2 for the appellant to be identified as the suspect.

[16] On the mode of arrest, evidence is that members of public took the appellant to the Police Reservist and thereafter to the police. I find nothing wrong with that and I have already determined the issue of detention at the police station before arraignment in court.

[17] On the crucial witnesses, the appellant has not identified whom he considers as crucial witnesses left out by the prosecution and he did not seek to have them summoned for the defence. On rejection of his defence by the trial court, this is not true. The trial magistrate considered it and found it unreliable. The appellant did not seek to call any witnesses and therefore he cannot claim that he was denied the chance to call witnesses.

[18] My conclusion of this matter is that the evidence is weak in terms of identification of the appellant as the person who raped PW1 and stabbed her hand. Medical evidence too does not support rape and as explained in my judgement this could be due to the length of time PW1 took before going for examination. In criminal trials, where the court finds there exists doubts, it gives the benefit of that doubt to the accused person. In this case the benefit of the doubt will go to the benefit of the appellant.

[19] The appeal is hereby allowed, conviction quashed and the sentence in both counts one and two is hereby set aside. The appellant by his own admission is a Somalia national. I order that once he completes serving sentence in count three for being unlawfully present in Kenya, if he has not already completed it, he shall be repatriated to the Somalia with immediate effect. I make orders accordingly.

S. N. MUTUKU

JUDGE

Dated this 5th day of June 2013

Signed and delivered this 10th day of June 2013 in open court.