ADOW KASSIM NOOR …….....….....APPELLANT

-VERSUS-

REPUBLIC…….....……...RESPONDENT

JUDGMENT

(**Formerly High Court Nairobi Criminal Appeal No. 418 of 2010 from original conviction and sentence by the Senior Resident Magistrate's court at Wajir in criminal case No. 2 of 2010)**

1. The appellant Adow Kassim Noor, being aggrieved by the conviction and sentence by the Senior Resident Magistrate in Wajir Resident Magistrate's Criminal Case No. 2 of 2010, has brought this appeal contesting the conviction and sentence. Initially this appeal was filed in Nairobi High Court, Criminal Division, and was assigned number 418 of 2010. Upon the establishment of Garissa High Court the matter was transferred to Garissa for hearing and disposal.

2. The appellant was charged with attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006 the particulars of which read as that:

"On the 22nd day of December 2009 at around 3.00am in Wajir East District within North Eastern Province, unlawfully and intentionally attempted to penetrate into genital organ namely vagina of F.I.A a lady aged 18 years with your genital organ namely penis".

It is worth mentioning here that an offence of attempted rape under section 4 of the Sexual Offences Act is committed when a person attempts to unlawfully and intentionally *commits an act which causes penetration with his or her genital organs.* The charge as framed is at variance with this provision in that it states that the appellant *attempted to penetrate into genital organ…..* However, it is this court's view that this failure to frame the charge as it ought to be is not fatal to appellant case as stipulated under section 382 of the Civil Procedure Code. The appellant understood what he was charged with.

3. The appellant faces an alternative charge of indecent act with an adult contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of this charge read as follows:

"On the 22nd day of December 2010 at around 3.00Am in Wajir East District within North Eastern Province, unlawfully committed an indecent with F.I.A a lady aged 18 years by undressing and touching her genital organ namely vagina".

4. The appellant has listed eight grounds of appeal which I have fully read and understood. Without reproducing them in full, I have summarised the grounds into three for clarity's sake and in order to correct the grammar. They are as follows:

i. **That the trial magistrate wrongly considered and relied on evidence that is contradictory, uncorroborated, inconsistent, malicious, fabricated, false and baseless and therefore unsafe to base a conviction on.**

ii. That the appellant was not accorded the benefit of an interpreter in Somali language which he understands well.

iii. **That there is no medical report linking the appellant with the offence**.

5. While conceding to the appeal Mr. Gitonga, the state counsel, submitted that the ingredients of the charge were not proved and that in sentencing the appellant the trial court considered extraneous evidence that was not provided during the trial. This submission of extraneous evidence was not elaborated upon during submissions. The state counsel further submitted that the ten year sentence handed the appellant is excessive when the offence attracts a five year sentence. I do not agree with counsel on this matter. Section 4 of the Sexual Offences Act, No. 3 of 2006 gives five years sentence as the minimum. The maximum goes as high as life imprisonment.

6. In determining this appeal, this court will consider whether the evidence adduced before the trial supports a conviction and whether the appellant was denied a fair trial by not according him an interpreter in Somali language. This court is alive to the fact that this is a first appeal and therefore this court is duty bound to re-evaluate and consider all the evidence adduced before the trial court and arrive at its own independent determination on whether to or not to uphold the conviction and sentence. Further, this court bears in mind the fact that it has neither seen nor heard the witnesses testify and should therefore make due allowances in this respect. This duty is firmed established in precedents. See **Selle v. Associated Motor Boat Co. Ltd (1968) EA, 123 and Okeno v. R. (1972) EA, 32.**

7. The evidence in this case is simple. F PW1, the complainant and the first prosecution witness, told the trial court that she was asleep in her hut at 3.00Am on 22nd December 2009 when she woke up to find someone sitting on her bed. The person pulled her dress up and on asking who the person was; the person held her by the throat and stabbed her on the left hand. She screamed and this alerted PW2, Hussein Ahmed Adan, a neighbour. PW2 went to complainant's house and arrested the person. The complainant identified the person who held her as the appellant in this case.

8. Hussein Ahmed, PW2, says he was asleep in his house, ten steps from complainant's house, when he heard screams from the complainant's house. He rushed there and found the appellant. He confirmed arresting him. PW2 said he used his torch to see the appellant. He said that Bishar Hussein Mohamed, PW3 and an assistant chief, found him holding the appellant. This evidence was confirmed by PW3 who told the trial court that he heard screams from the complainant's house. He said the complainant was his neighbour and lived across the road from him. On going to the complainant's house, he found PW2 holding the appellant and both were struggling. PW2 informed him that the appellant had tried to rape the complainant. He also stated that the complainant was bleeding on the left hand and that the complainant explained to him that the appellant had stabbed her.

9. This matter was not reported to the police until 24th December 2009, two days later. The police officer Robert Gitonga, who received the report, told the trial court that on 24th December 2009 at 6.25pm, PW1, PW2 and PW3 took the appellant to K.H Police post where he was on duty at the report office with another officer. He said it was reported to him that the appellant had attempted to rape PW1 on 22nd December 2009. He charged the appellant and later escorted him to Wajir Police station.

10. The appellant gave a sworn statement and was cross-examined. His defence is that he seduced PW1 and she had consented. However, when PW1's brother came and slapped her, she said that the appellant had attempted to rape her. The defence evidence does not clarify who the PW1's brother is but going by what the appellant stated during his submissions before this court and given that there is no other person mentions other than PW2 and PW3, this court deduces that the brother referred to here is PW2.

11. In his submissions before this court, the appellant stated that PW1, the complainant, was his friend for seven months and that there were witnesses who could confirm this. He said the trial court denied him an opportunity to call these witnesses. He claimed that PW1 attempted to rape the complainant and when he went to find out why PW1 was screaming, PW2 changed the story to say it was the appellant who had attempted to rape her. It should be noted that the appellant did not state this to the trial court and coming

at this stage, I find it an afterthought.

12. Is the prosecution evidence contradictory, uncorroborated, inconsistent, malicious, fabricated, false and baseless? PW1 says in her evidence that the appellant pulled her dress up, held her throat and stabbed her on the left hand. She did not say what the appellant used to stab her with. PW2 told the trial court that he found the appellant with a knife and PW1 bleeding on the left hand. PW3 told the trial court that he found the appellant and PW2 struggling. There is no mention of the knife by PW3 although he told the court that PW1 was bleeding on the left hand. From the evidence adduced in the trial court, it is only PW2 who mentions a knife. The police were not informed about any knife. Indeed PW4 does not mention any report to him concerning a knife or an injury on PW1's left hand.

13. Allegations of knife stabbing are serious ones and an injury of this nature would not have gone unnoticed by the police. It is expected that this would have been included in the report to the police and that the police would have taken PW1 to hospital for treatment. Did the appellant stab PW1? The evidence on this issue is not clear and given that report of stabbing was not given to the police this court highly doubts it. There was no knife recovered from the appellant.

14. On the issue of interpretation, I have perused and analysed the file records from the lower court. From the outset, there is no indication whatsoever of the language the court used to conduct proceedings. The corum of the court does not indicate what language the court was using in these proceedings. The only mention of language is that used by the witnesses. PW1, PW2, PW3 and the appellant used Somali language as indicated in the record while PW4 used English. The appellant has brought this ground of appeal alleging that the court interpreter before the trial court was a Boran and not very conversant with Somali language which the appellant understood. He says he was not able to follow court proceedings properly because of this. In his self made grounds of appeal he says the interpreter was using Gale language. He did not clarify whether Gale and Boran languages are one and the same. Be that as it may, I agree with the appellant that he was not accorded the services of interpretation. If this was done, it is not reflected in the record from the lower court. To fail to accord an interpreter to an accused person during trial is a miscarriage of justice and an infringement of one's constitutional right of fair trial as envisaged under article 50 (2) (m) of the Constitution which states: **50 (2) Every accused person has the right to a fair trial, which includes the right –**

……..
……..

(m) To have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

The issue concerning interpretation has been settled in various decisions of the superior courts and all the judicial officers should take it upon themselves to read and understand these decisions. **See Chaka Tsuma Chaka in Mombasa Criminal Appeal No. 45 of 1999 and Bernard Wachira Kamonye v. Republic in Criminal Appeal No. 386 of 2006**.

15. On the issue regarding medical evidence, the appellant states that there is no medical evidence linking him to the crime. Of concern to the court is the fact that the injuries alleged to have been inflicted by the appellant on PW1 on her left hand were not confirmed by medical evidence. This failure creates doubts as to whether the appellant stabbed PW1. This doubt goes to weaken prosecution case because this leads to more questions regarding this case, for instance, what happened to knife, if indeed one was used?; what about the attack, did it really take place? It is these doubts that the lower court should have considered in convicting and sentencing the appellant.

16. My reading of the judgement of the lower court reveals that the presiding officer neglected to take into account serious concerns regarding the manner in which he conducted the proceedings. A look at paragraph four of the judgement confirms an officer who was not alive to the evidence adduced before him. In that paragraph, he narrates the particulars of the alternative charge as follows: *particulars are that on the aforesaid date, time and place, the accused undressed the said F and touched her genital organs!* I

have no idea where this came from. I am aware that the appellant was not convicted of the alternative charge but all the same, the officers manning courts of law should pay attention to what they are doing.

17. From this analysis of the evidence of the lower court, and after considering the grounds of appeal and submissions of both the appellant and the counsel for the state, my findings are that the appellant was not accorded a fair trial by the lower court. The evidence is inconsistent, weak and unable to support the charges facing the accused person. I note that he did not cross-examine any witnesses. Given that he has claimed that he did not understand the proceedings due to language challenges this court cannot doubt such is the case.

18. The appellant was arraigned in court on 7th January 2009. He was convicted and sentenced on 25th March 2010. He has not enjoyed personal liberty for about two years. The evidence is not strong to sustain a conviction and therefore a retrial will not serve any useful purpose. In the circumstances, I allow the appeal, quash the conviction for the offence of attempted rape under **section 4 of Sexual Offences Act, No. 3 of 2006,** set aside the sentence of ten years imprisonment imposed on the appellant and order that the appellant be released from prison forthwith unless he is held for some other lawful cause.

Delivered this 30th Day of January 2012 in open court