REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 732 of 2006

OMAR BULLE OMAR………………...…………. APPELLANT

V E R S U S

REPUBLIC ……………………….……..….RESPONDENT

(From original decision in Criminal Case 232 of 2005 (Mandera) by R.K. Mibei, SRM).

J U D G M E N T

Omar Bulle Omar (*referred to herein as the appellant*) was charged with rape contrary to Section 140 of the Penal Code that on 16th day of September, 2005 at Yabicho location in Mandera District within North Eastern Province, had carnal knowledge of one R A D without her consent. He faced an alternative sentence of indecent assault on a female contrary Section 144 (1) of the Penal Code that on the 6th day of September, 2006 at Mandera District within North Eastern province indecently assaulted R A D by touching her private parts. The appellant was convicted on the main charge of rape and sentenced to a prison terms of seven years. He now appeals both conviction and sentence.

A brief background to this incident is in the testimony of R A D (P.W.1) aged 18 years, who was alone, looking after her father's goat, on 6/9/06 at 1.00 pm in B area. She started praying and while bowing down, she got hit on the back with a club. She fell on the ground. The person who hit her sat on her back and then turned her facing up, tore her clothes and removed her underpant. She saw and recognized the person as the appellant – that was her first time to see him. He inserted his penis into her vagina and raptured her private parts. It was P.W.1's first time to have intercourse and she felt a lot of pain as she had been circumcised and sewn up – so the sewn part raptured. He spermed into her thrice – the appellant had a knife which he held on P.W.1's neck. Appellant then left – P.W.1 was bleeding and she walked away, met another girl on the way, who washed away her blood. P.W.1 reported the incident to her parents. She gave a description of the person who had raped her as having a broken upper tooth, a scar on his face and a big scar on his stomach. A search was mounted and appellant was later arrested and P.W.1 was able to identify him at an identification parade. P.W.2 Kuresa Muktar Dahihe is a sister to P.W.1 and says she met P.W.1 standing, bleeding from her nose and her clothes were torn and unable to walk. P.W.1 told her she had been raped. P.W.2 went ahead and met someone who had a club and demanded from her the items she was carrying. He hit her and she ran away – she later identified the person as the appellant. P.W.4 Sammy Mutiso, is the officer who investigated the matter and re-arrested appellant from members of the public on 23/12/05.

On being put to his defence, appellant elected to give sworn evidence in which he denied the charges, saying he does not know the complainant. He says he had earlier on had an accident and was hurt on the stomach and he can't walk. On 23/9/06, someone apprehended him and asked whether he had seen the

alleged rapists and appellant said he did not know. They later went to Yabicho and complainant said that the appellant had not raped her, but the Chief slapped her and she said appellant was the one. He denies being identified in the parade and says this is a clan feud. He also told the court that after the accident, his penis got hurt and cannot erect but his medical reports got burnt up in the village.

In his judgment, the learned trial magistrate stated that the evidence before the court showed that the complainant was raped and that her evidence was corroborated by that of P.W.2 who met her bleeding. The P3 form showed that the complainant's hymen was torn and there was little bleeding from the hymen and the learned trial magistrate stated this:-

"***From these observations, it is clear therefore that there was sexual intercourse. The complainant in her evidence said that she suffered injuries during the ordeal. This is consistent with what is stated in the P3 form."***

The learned trial magistrate then posed the question" who raped this young lady." He then noted that P.W.1 was able to see the appellant when he turned her to face up and also the body markings on appellant during the incident and which "***are visible on the body of the accused person***" and which are the same marks P.W.1 used in identifying the appellant during the parade. The learned trial magistrate also considered the evidence of P.W.2 – her meeting appellant and the events thereto and said-

"***The two events happened in a short time and I believe that it was the accused person who was met by P.W.2 and who raped complainant …… there is no mistaken identity …… the offence was committed in broad daylight and the complainant properly saw the accused person. The accused person was properly identified at the identification parade. All the witnesses agreed on this point. This therefore defeats the accused's claims that he was not identified at the parade."***

The learned trial magistrate considered the appellant's defence which he described as wild as there was no medical document to support it and that the defence was a sham.

In his amended grounds of appeal, appellant stated that the learned trial, magistrate did not put into consideration that he was a first offender saying that first offender's are always victims of circumstances. Appellant says he had discovered where he had gone wrong and has repented to Allah and he promises not to repeat such satanic behaviour.

He also complains the trial magistrate went wrong when he sentenced him with an intent to warn those people with such character outside the prison jails saying rehabilitation is not for those outside the prison jails. Appellant prayed for reduction of the prison term to a less harsh one. He also complained that complainant failed to identify him during the identification parade and that she could only identify him through a mark on the ribs. The appellant further stated that its complainant's brother, whom he had quarreled with in mid 2007 who advised her to make such allegations against him.

In making his submissions to court, appellant informed the court that he has undergone surgery while in prison and displayed a bandaged lower abdomen. He fears that his life is now in danger and that he needs a special diet especially now and that he cannot get a proper diet while in prison. Appellant also lamented that he had become asthmatic and with a chronic cough and with the crowded cells and poor ventilation, he often suffers asthmatic attacks.

The appeal was opposed and the learned State Counsel, Mrs Obuo submitted that P.W.1 gave the graphic manner in which the offence was committed and was able to identify the appellant and that an identification parade was conducted by P.W.3 and P.W.4 identified the appellant. She also pointed out that P.W.2 and P.W.5 gave evidence which was consistent with that of P.W.1 and that the P3 form produced confirmed that P.W.1 had been raped. The learned State Counsel submits that the offence was proved beyond reasonable doubt and the conviction was proper and sentence was legal and not excessive.

It appears that the appellant is contesting identification at the scene and also at the identification parade. He is also contesting the sentence. From the judgment by the learned trial magistrate it is clear

that he considered that opportunity for identification – that although appellant attacked P.W.1 from behind and sat on her back, he eventually turned her round to face up and P.W.1 had a chance to look at his face and even observe marks on his body – which marks the learned trial magistrate noted appellant bore and which P.W.1 even used in identifying the appellant. Secondly the obtaining environment was favourable for identification and indeed the learned trial magistrate said as much in his judgment to that effect.

"***The offence was committed during broad daylight and the complainant saw properly the accused person."***

What about the identification parade to which appellant says complainant never identified him? CIP Boniventure Oburo (P.W.3) is attached to Garissa Police Station and is the one who conducted the identification parade and it is his testimony that:-

"***On 25/09/05, another witness called Rukia Abdi was brought. We conducted the parade in the same manner as I had explained. The accused person was in position three. She identified him. I asked him whether he had anything to say and he said he was satisfied."***

He signed the forms and on cross-examination P.W.3 said "***You were identified by touching***" Indeed it is in this context that the learned trial magistrate stated in his judgment that the appellant was properly identified at the identification parade. So really all the issues appellant raises which touch on his conviction were properly considered, analysed and well reasoned out by the learned trial magistrate and, that sentence and conviction was secure. As regards sentence, appellant has drawn the court's attention to his ill health, shown his bandaged abdomen and a host of medications he is using and I think the intention is that if for nothing else, then his health condition should mitigate for his prison terms and justify reduction. Is there any indication that the person and authorities are unable to provide for appellant's medical needs? If that were the case, then he wouldn't have undergone the surgical procedure (***which he did)*** while in prison. He wouldn't have the large number of medications he so willingly showed the court. The offence was committed before the enactment of the Sexual Offences Act 2006 ***(Act No. 3 of 2006***) and the law then applicable was the Penal Code ***(Cap 63***) Section 140 which provides that:-

"***Any person who commits the offence of rape is liable to be punished with imprisonment with hard labour, for life.***"

In considering review of sentences, I am guided by the decision in ***Ogalo Son of Owuora –Vs- Reg (1954) EACA 270*** that:-

"***The court does not alter a sentence on the mere ground that if members of the appellant court had been trying the appellant, they might have passed a somewhat different sentence…. Unless it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third centrum, namely that the sentence is manifesting excessive pressure in view of the circumstances of the case."***

I have already addressed the general circumstances surrounding the commission of the offence – it was terrible – attacking a young lady who was communicating with her God, the possibility that the offender may reform – given that he is a first offender visa vis the period of incarceration. I have already addressed the challenges to his health – the remarks by the trial magistrate about an increase of rape cases from the area and incidences of men raping children and women who are looking after livestock in the bushes – that statement in no way targeted a sentence on persons outside the prison, to my mind it was a general observation of trends within that locality.

Although in the last part of his sentencing the learned trial magistrate said that the sentence would serve as a deterrence to ward other against similar crimes – the spirit of the entire paragraph is directed at appellant specifically and that sentence in my view is neither harsh nor excessive and I find no reason to interfere with it. Consequently the appeal is dismissed both on sentence and conviction.

Dated, delivered and signed on this 16th day of April, 2008 at Nairobi.

H.A. Omondi

Judge