



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 19 OF 2019

ABDIRAHMAN ADOW ABDULLAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from the judgement of C. Maundu, Chief Magistrate Garissa Law Court in Criminal Case No. 1 of 2018)

JUDGEMENT

1. This is an appeal arising from the judgement of Hon. C. Maundu, Chief Magistrate Garissa in Sexual Offence Case No. 1 of 2018, where the Appellant was charged with the offence of rape contrary to Section 3 (1) (a) (b) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence are that, on the 29th December 2017 at around 1600 hours in Balambala District, Janajara Location within Garissa County, he intentionally and unlawfully had carnal knowledge of JID without her consent.
3. The appellant pleaded not guilty to the offence and the matter proceeded to full trial. After the hearing of the matter the Appellant was adjudged guilty, convicted and sentenced to 10 years imprisonment.
4. Being dissatisfied with the conviction and sentence, the Appellant moved this court by way of an appeal on grounds summarized as follows;
 - **The prosecution failed to prove the case beyond reasonable doubt.**
 - **The charge was defective as it was not supported by evidence.**
 - **There was no eye witness.**
 - **The evidence before court was contradictory and**
 - **The doctor's report was dubious.**
5. The State objected to the appeal which was canvassed by way of written submissions as follows;

Appellant's submissions

The lengthy submissions by the Appellant from its language may be summarized as to state that the trial court failed to consider the family decision, the doctor indicated that there were no traces of spermatozoa in the Complainant's vagina, the Complainant was injured by an unknown assailant, and further the Complainant was assaulted and not sexually assaulted.

State's Submissions

The State submitted that PW1, the Complainant gave a clear account of what transpired on the material day as she cut reeds when the Appellant accosted her, grabbed her breasts, knocked her down and forcefully had sex with her without her consent. In the process the Complainant sustained injuries to her head and body, while at the same time the Appellant tore her dress. Further, PW2 the Clinical Officer who examined the Complainant confirmed injuries sustained. PW2 found whitish substance in the vagina, numerous epidermal cells, motile bacteria and moderate puss cells.

On the issue of identifying the Appellant, the state submitted that the Appellant was known to the Complainant who positively identified

him.

Further, the evidence before court supported the charge facing the Appellant. And the appeal lacks merit.

6. From the evidence on record, the Complainant, PW1 gave an account of what transpired on the material day. She stated that on the 29th of December, 2017 at about 4 P.M. as she cut reeds, she heard noise behind her, she thought it was a snake but on turning she saw the Appellant who jumped and held her chest from behind, grabbed her breasts and closed her mouth with his hand and ordered the Complainant to keep quiet. He attempted to grab the panga the Complainant held; a struggle ensued where the Complainant sustained injury on her forehead. She also hit the Appellant who fell and on standing he knocked the Complainant and pulled his trousers to the knees and proceeded to insert his penis in her vagina. The Complainant screamed to no avail as no one came to her rescue, she then told the Appellant the police had arrived at which point the Appellant let go, leaving behind black sandals that were produced as evidence.

According to PW1, she did not find her husband at home after the ordeal. A neighbor advised her to report to the police which she did. She was later escorted to hospital by the police. She pointed to the police the Appellant's home which led to his arrest.

7. PW2 Samuel Kipnetich Langat a Clinical Officer at Balambala Sub-County Hospital examined the Complainant on the same date of the alleged incident at 9 P.M. On examination, he found the Complainant was shaken, had a small cut wound on the forehead with dried blood. She had moderate tenderness on the shoulders, had small bruises and moderate tenderness on both upper limbs, multiple injuries on the left leg and impacted thorn on the left thigh. She had generalized tenderness on the right leg. The injuries were about 5 hours.

He further found whitish substance in the posterior fornix of her vagina. HVS test showed numerous epidermal cells, numerous motile bacterial and moderate pus cells. She had no sperm. His conclusion was that the Complainant had been sexually assaulted. He further stated that epidermal cells are generated by friction trauma. As for the Appellant he found him to have had bruises on both knees and elbows. He formed the opinion that he had raped the Complainant.

8. PW3, PC Daniel Mbole Maundemaka informed the court that at about 18.40 hours on the material day, they were tasked to follow up the complaint of rape. Accompanied by two other police officers, he found the Complainant who had a torn dress at Janajara Police Post and she narrated the ordeal. They went to the Appellant's house and found him asleep and arrested him. They took later took the complainant to hospital on the material day and the day that followed. It is his evidence that PW2 confirmed penetration.

9. At the close of the prosecution case, the trial court found the accused had a case to answer. He was placed on his defence and he chose not to speak but called his mother and sister as his witnesses. The evidence of the witnesses had no value as they did not testify to the incident. The mother sought for his forgiveness.

10. There is no doubt from the evidence of the Complainant that she was sexually assaulted. The penetration was fortified by the evidence of PW2 who despite the fact that no sperm was found in the Complainant's vagina he nonetheless informed the court that epithelial cells are generated by frictional trauma which gave him the impression that the complainant was raped.

11. On her part the Complainant gave a graphic account of what took place, injuries she sustained which all were supported by the P3 form upon examination. Indeed, as in many other cases of this nature there was no eye witness to the incident.

12. The proviso to Section 124 of the Evidence Act gives the court the discretion of examining the Complainant's evidence and creating an impression on the same. it states;

“124.....

Provided that while in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded the proceedings, the court is satisfied that the alleged victim is telling the truth”.

13. The evidence of the Complainant was clear, she narrated her ordeal with precision and was able to repeat the incident to the police, the Clinical Officer and the court with clarity. The court believes that she told the truth. Injuries sustained were confirmed by PW2, indeed, even the injuries sustained by the Appellant as narrated by the Complainant were confirmed. The evidence of the Complainant is believable.

14. Further the fact that no spermatozoa was present *per se* does not rule out rape. Other injuries supported the allegation.

Section 3 of the Sexual Offences Act defines rape as follows: -

A person commits the offence of rape if,

- a) He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs.**
- b) The other person does not consent to the penetration.**
- c) The consent is obtained by force or by means of threats or intimidation of any kind.**

Section 2 of the Sexual Offences Act on its part defines penetration as follows: -

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

15. Penetration need not be complete nor is it a requirement that ejaculation resulting into presence of spermatozoa is a necessary ingredient of the offence of rape. PW2 detected friction as a result of penetration, his evidence supports the evidence of the claimant.

16. Indeed, the Supreme Court of India in the case of Parminder Versus the State of New Delhi (2014) 2 SCC 592 upheld a High Court ruling that it is **“quite possible to commit legally the offence of rape without producing any injury to the genital or leaving any seminal stains.”** It went further to state; -

“...to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law

In the judgment in the case of Wahid Khan vs State of Madhya Pradesh Criminal Appeal No. 1798 of 2008, the Supreme Court had held that **“even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.”**

17. On the issue of identification, in the case of Warungu -VS- Republic [1989] KLR 424 the court held that:

“..... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

18. The Complainant was known to the Appellant. The alleged offence took place at day time which allowed the complainant to see and identify the appellant. In the court’s view identification was positive.

19. When given an opportunity to raise his defence, the Appellant chose to be quiet. His witnesses did not help his case either. His assertion on appeal that the incident was fabricated against him is a mere allegation with no evidential support.

20. Based on the above analysis, the court finds the appeal lacking in merit and affirms both the conviction and sentence. The appeal is dismissed.

Dated, Delivered and Signed this 16th day of September, 2021.

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ALI- ARONI

JUDGE