



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 46 OF 2017

BISHAR HASSAN NOOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Wajir Resident Magistrate Criminal Case No. 238 of 2017 by Hon. Mugendi Nyaga (RM))

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Wajir with rape to a person with mental disability contrary to section 7 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 7th May 2017 at around 1200 hrs at Makaror Location Wajir West Sub-County within Wajir County intentionally and unlawfully caused his penis to penetrate the vagina of M.N. (name withheld) without her consent.
2. In the alternative, he was charged with committing an indecent act to a person with disability contrary to section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same day and place intentionally and unlawfully touched the vagina of M.N. (name withheld) a person with mental disability.
3. He denied both charges. After a full trial he was convicted of the main count of rape of a mentally disabled person and sentenced to serve ten (10) years in jail.
4. He was now come to this court on appeal. He filed his initial appeal in August 2017. Before the appeal was heard, he filed an amended petition of appeal and written submissions. His appeal as amended has six grounds.
5. At the hearing of the appeal, the appellant relied on his written submissions and elected not to make any oral submissions. I have perused and considered the written submissions of the appellant.
6. Mr. Omondi the Learned Assistant Director of Public Prosecutions appeared for the Republic and opposed the appeal.
7. Counsel submitted that, the prosecution proved its case beyond any reasonable doubt as the evidence of PW1, PW2, PW3 who was the complainant, and PW4 were consistent on how the incident occurred. PW5 a Clinical Officer also confirmed the presence of spermatozoa which was an indication of recent sexual intercourse.
8. Counsel submitted further that though the complainant had modest mental retardation, she explained her situation to the magistrate and could clearly remember what happened.
9. Counsel stated further that the absence of an eye witness was common in sexual offences and according to counsel the complainant in the present case could not be influenced to give false evidence as alleged in the petition of appeal. The sentence being lawful, counsel urged that the appeal be dismissed.
10. In response to the submissions of the Assistant Director of Public Prosecutions, the appellant said that all that the Assistant Director of Public Prosecutions stated did not connect him with the offence.
11. This is a first appeal and as a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own independent conclusions and inferences bearing in mind that I did not have the chance of seeing witnesses testifying to determine their demeanour and give allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32**.
12. At the trial, the prosecution called seven (7) witnesses. The appellant tendered an unsworn defence and did not call any witness.

13. The complainant testified as PW3.

14. In summary, PW1 A A was an uncle of the complainant and he said that somebody called Mohamed Nuno reported to him the incident on 7th April, 2017 but that he took the complainant to hospital the next day which was 8th April, 2017. PW2 was G N a brother of the complainant whose evidence was that a cousin A M reported to him that the complainant was said to be in Noor's house. PW3 was Halima Hassan who stated that on 7th May, 2017 she saw the complainant at 1 pm surrounded by many people. According to her the complainant took them to the scene where they saw the suspect.

15. It is not in dispute that the report to the police was made the next day (8/4/2017). It is also not in dispute that medical examination was done by PW5 the Clinical Officer Mohamed Mahat on 8th April, 2017. It is also not in dispute that PW6 Ahmed Haret Hassan carried out psychiatric examination of the complainant whom he found to be epileptic and a person of frequent anger outbursts who made reports that relatives had stolen her documents and concluded that the complainant was suffering from moderate mental retardation.

16. In my view, the fact that the complainant had the mental history explained by PW6 meant that there was a possibility that she could lose temper and make reports which were not reliable or truthful. As such, the evidence of other prosecution witnesses required to have been water tight on the allegations made against the appellant.

17. It is instructive that none of the witnesses who testified stated specifically that the complainant identified the person who defiled her except that PW4 who said that the complainant took her to a place she called the scene and that they saw a suspect on the day in question just after 1 pm. PW4 however did not say what happened to the suspect on that day (7/4/2017).

18. On the other hand, a report was said to have been made to PW1 A A who was an uncle of the complainant on the same day of the incident by Mohamed Nuno but no mention of the appellant was made. Another report was made by Abdullahi Mohamed to PW2 G N a brother of the complainant, but no specific description of the appellant and what he did was given to the brother of the complainant. The report on what happened and who the culprit was, very hazy and did not specifically point to the appellant.

19. Worse still, Mohamed Nuno who made the report on the incident to PW1 and Abdullahi Mohamed who made a report to PW2 about the incident were not called by the prosecution to testify and no reason was given by the prosecution for that failure to call these two crucial witnesses. The presumption is that the evidence of these two crucial witnesses would have been at variance with that of other prosecution witnesses, which is a reasonable ground for the court to acquit the accused person. See the case of **Bukenya vs Uganda [1973] 549**.

20. On the totality of the evidence on record, though the Clinical Officer PW5 Mohamed Mahat found presence of spermatozoa in the urine of the complainant, in my view, the prosecution did not prove that the appellant was connected to the alleged offence, as the spermatozoa were not tested to find if they emanated from the appellant.

21. The piece of carton found in the compound where the appellant was said to be a watchman did not prove that he was the culprit or connected positively to the offence. He or somebody else could have committed the offence in that compound which appears to have been guarded only at night. The fact that the appellant tried to ran away from a funeral when he was about to be arrested, did not prove that he committed the offence. People react differently to different situations, and he might have thought that he was being unfairly sought for and therefore wanted to maintain his freedom by moving away from that place.

22. Lastly, the statement by PW7 P.C Fardosa Mohamed that the appellant confessed the offence is not admissible as such confession was not made in compliance with the requirement of the law.

23. I thus find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set liberty unless otherwise lawful held.

Dated, Signed and Delivered at Garissa this 12th June, 2018.

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GEORGE DULU

JUDGE