



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 59 OF 2017**

**KHALIF MOHAMED GURE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and sentence in Garissa Chief**

**Magistrate Criminal Case No. 342 of 2014 by Hon. C. Maundu (CM)**

**JUDGMENT**

1. The appellant was charged in the Magistrate's Court at Garissa with rape contrary to section 3 (1) (a) as read with section 3 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 18<sup>th</sup> February 2014 at [particulars withheld] area within Garissa County unlawfully and intentionally caused his penis to penetrate the genital organ namely vagina N. M. O (name withheld).

2. In the alternative, he was charged with indecent act contrary to section 11 (A) of the Sexual Offences Act. The particulars were that on the same day and place he intentionally and unlawfully touched the vagina of N. M. O.

3. He was also charged with another substantive count of assault contrary to section 251 of the Penal Code. The particulars were that on the same day and place unlawfully assaulted N. M. O. thereby occasioning her actual bodily harm.

4. He denied all the charges. After a full trial, he was convicted of the offence of rape and also the offence of assault. He was sentenced to serve 10 years imprisonment for rape and 1 year imprisonment for assault, the sentences to run concurrently.

5. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his appeal in November, 2017. Before the appeal was heard however, he filed an amended petition of appeal as well as written submissions which he relied upon. The grounds of appeal with the amended petition are as follows-

- 1. The trial magistrate erred in law in convicting and sentencing him for the offences which was prejudicial.**
- 2. The mode of arrest was poorly conducted.**
- 3. The trial magistrate erred in convicting him without considering that the prosecution failed to discharge burden of proof to the required standard.**
- 4. Trial magistrate failed to consider many contradictions in the prosecution evidence.**
- 5. Trial magistrate failed to taken into account his defence and the existing grudge between him and the complainant.**
- 6. Trial magistrate erred in not taking into account as the investigations did not go into the roots of the case.**

6. At the hearing of the appeal, the appellant relied on his written submissions and added orally that he wanted the court to determine the appeal on the basis of his submissions.

7. The Principal Prosecuting Counsel Mr. Okemwa opposed the appeal and said that, PW1 the victim identified the appellant clearly as the culprit. The evidence of PW1 was corroborated by the medical evidence which confirmed sexual intercourse without consent. It was obvious

from the medical evidence that the complainant resisted and the appellant tried to strangle her, which was evidence of lack of consent, therefore both rape and assault were proved beyond any reasonable doubt. Counsel also wanted this court to note that the appellant almost jumped bail.

8. This is a first appeal. As a first appellate court, I am required to evaluate afresh all the evidence on record and come to my own conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testify. See the case of **Okeno vs Republic [1972] EA 32**.

9. I have re-evaluated the evidence on record. I have considered the submissions of both the appellant and the State, written and oral. I have also perused the proceedings and the judgement.

10. From the evidence of PW1 the complainant, the incident occurred at night around 9 pm. She stated that she knew the appellant before as a neighbouring herdsman. She was sleeping in a traditional Somali house in the bush where they take care of livestock when the appellant entered the traditional house which had no shutter door and flashed a torch at her. She also had a torch and flashed it at him. The appellant then went ahead to rape her after strangling her on the neck. Though she screamed, nobody came for her assistance and the appellant left after the incident. She said that she was merely in the company of her two year child who could not tender evidence in court. The father of the complainant M O who testified briefly as PW3 refused to give testimony on the incident as he said the father of the appellant had talked to him.

11. PW5 Moses Koech a Clinical Officer examined the complainant and found the hymen broken. He testified that there were bruises on the neck and also bruises on the genital and the bruises on the genital organ had not healed and he concluded that there was full penetration. He also stated that there was evidence that the complainant was going through the menstrual cycle.

12. In the medical report, it was indicated that there were scratches on the neck region. It was also noted that there were light bruises in the labia minora.

13. The appellant in his defence said that he was arrested from home by elders and that the charge against him was a frame up. He tendered a sworn defence and in cross examination initially said he did not know the complainant but later he admitted that he knew the complainant.

14. This was a serious case of rape as well as assault. I have gone through the judgment of the trial magistrate. It is a case of identification by a single witness at night. From the evidence on record, it was dark in that traditional Somali house where the incident is alleged to have occurred. However, the complainant stated very clearly that the appellant flashed a torch and she also flashed a torch at him and the possession of torches was a common practice in their community in the bush where they took care of their livestock.

15. The learned magistrate was aware that evidence of a single identifying witness has to be tested especially when the circumstances of identification were difficult. The magistrate considered among others a case of **Maitanyi vs Republic [1986] KLR 1986**.

16. I am also mindful of the fact that the proviso to section 124 of the Evidence Act (Cap.80) states that the evidence of a victim of a sexual offence does not require corroboration, if believable and the trial court believed the same and recorded the reasons for such belief.

17. In the circumstances of this case, I find and agree with the magistrate that, indeed the complainant was raped and that in the process she was injured on the neck which constituted also an offence of assault. I also agree with the trial magistrate that the evidence of the complainant was believable and the magistrate rightly believed the same, as the complainant stated clearly that she knew the appellant and flashed a torch at him which means she saw his face clearly. I have no doubt therefore that the prosecution proved beyond any reasonable doubt that the appellant was the culprit of both the rape, and the assault charge.

18. Consequently, I find no merits in the appeal. I dismiss the appeal and uphold the conviction of the appellant for the two offences. The sentences handed down by the trial court were also lawful. I uphold the sentences. These are the orders of the court.

**Dated and delivered at Garissa this 18<sup>th</sup> day of October, 2018.**

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**George Dulu**

**JUDGE**