

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 11 OF 2015

ABDIKADIR ADENAPPELLANT

V E R S U S

REPUBLICRESPONDENT

(From the conviction and sentence in Garissa CM Criminal Case No. 889 of 2014 – M. Wachira CM)

JUDGMENT

The appellant was charged with rape contrary to section 3 (1) (a) (c) as read with section 3 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 8th May 2014 at [particulars withheld] area within Garisa Township Garissa County intentionally and unlawfully caused his penis to penetrate vagina of AAK. In the alternative, he was charged with indecent act contrary to section 11 (a) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally and unlawfully touched the vagina of AAK.

He denied both counts. After a full trial, he was convicted on the main count of rape and sentenced to serve 10 years imprisonment. He has now come to this court on appeal on several grounds.

The grounds of appeal are that the prosecution did not prove its case to the required standards. Secondly medical evidence was not credible. Thirdly the magistrate shifted the burden of proof to him. Fourthly that the sentence was harsh and excessive. The appellant also filed written submissions which I have perused. He relied on the same.

Learned Prosecuting Counsel Mr. Okemwa submitted that the identification was not without possibility of mistake. The complainant Pw1 said that she identified the appellant through the voice while in fact she said in evidence that she saw him clearly at day break on the material day. Pw3 also said she identified him through the nose however the proper procedure was not followed as she did not touch him. Counsel submitted that there were various discrepancies in the prosecution evidence.

I have considered the evidence at the trial. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno Vs. Republic [1972] EA 32.***

The incident occurred in the early hours of the morning at about 5.15am after the Muslim morning prayers. The culprit was seen by the complainant Pw1 who reported the incident to Pw2 Rage Dubut Abdille. The said Rage Dubut Abdille testified in evidence that he was with the appellant for a considerable time trying to restrain him before the appellant ultimately left.

The said Pw2 however did not identify the appellant at the parade. Pw1 the complainant had to resort to voice identification to identify a person whom she said spent considerable time with her and raped her, then dragged her to the kitchen, and that the time of the day was such that she could identify this stranger. Pw3 Hassan Mohamed who is alleged to have identified the appellant by touching the nose was not at the scene. He was called on the phone and informed about the incident.

In my view therefore, though the complainant might have been raped by a person, that person was not proved by the prosecution to be the appellant. I am in agreement with the prosecuting counsel with regard to the issue of identification. It was not positive.

Another issue I want to address, is the charge sheet. In my view the charge was defective and could easily have prejudiced the defence of the appellant. Rape constitutes having carnal knowledge of a person without the consent of that person. Though in the charge sheet it is stated that the carnal knowledge was unlawful, it does not state that the complainant did not consent to the sexual act. It is therefore not clear what constituted the unlawfulness of the sexual intercourse. Consent was a matter to which the appellant should have pleaded to, and consent was also a matter which the prosecution should have proved. In my view therefore the charge sheet was also fatally defective. On that ground also the appeal will succeed.

For the above reasons I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 2nd day of September 2016

GEORGE DULU

JUDGE