REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 26 OF 2014

ADEN KALIL ABDILLE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal from the conviction and sentence in WAjir Criminal Case No. 74 of 2014 – l. Kassan PM*)

JUDGMENT

The appellant was charged in the subordinate court with rape contrary to section 3 (1) (a) (b) and (3) of the Sexual Offences Act. The particulars of offence were that on 4th march 2014 at [particulars withheld] Village in Wajir West District within Wajir County he intentionally and unlawfully caused his penis to penetrate the vagina of NIS without her consent. In the alternative he was charged with committing an indecent act contrary to section 6 (b) of the same Act. The particulars of the offence were that on the same day and place intentionally and unlawfully touched the vagina of NIS with his penis an act which was indecent against her will. He denied both charges. After a full trial he was convicted on the main count and sentenced to serve 20 years imprisonment.

Dissatisfied with the decision of the trial court the appellant filed his appeal in April 2014. In January 2015 with the permission of this court he filed an amended petition of appeal which he relied on. His grounds of appeal are as follows:-

1. The learned trial magistrate erred in law and in fact to convict him without considering that the prosecution failed to discharge the burden of proof against him to the required standards contrary to section 109 of the Evidence Act.
2. The trial magistrate erred in law and in fact in convicting him without considering that the alleged medical evidence was not credible as to who in particular committed the offence.
3. Learned trial magistrate erred in law and fact in shifting the burden of proof to him.
4. The learned trial magistrate erred in convicting him without considering that the prosecution evidence was contradictory and inconsistence.
5. The learned trial magistrate erred in denying him a lesser sentence and imposing on him a harsh and excessive sentence.
6. The learned magistrate erred in convicting him without considering that the investigation did not establish the truth of PW1's allegations.

During the hearing of the appeal, the appellant relied on his written submissions. I have perused and considered the written submissions.

The learned Prosecuting Counsel Mr. Mwangi opposed the appeal. Counsel stated that the appellant understood the charge well of the proceedings were interoperated into Kiswahili language and he

participated fully in the proceedings. With regard to identification counsel argued that PW1, 2 and 3 were clear in there evidence. The incident occurred in broad day light. The prosecution witnesses corroborated each other. Counsel maintained that PW1 was accosted by the appellant and PW2 found the appellant in the act while PW3 arrested the appellant. PW4 medical practitioner confirmed sexual activity and there was evidence of spermatozoa on PW1. Counsel submitted that the prosecution had proved it's against the appellant beyond any reasonable doubt.

In response to the Prosecuting Counsels submissions the appellant stated that the doctor did not examine him. In addition he was beaten before he was taken to court. According to him it was because of rift between two families that caused his being brought to court.

During the hearing of the case the prosecution called 5 witnesses. PW1 was the complainant. It was her evidence that she was aged 19 years. That on the 4th of March 2014 at 3pm while herding goats in Wajir near a watering place somebody came and grabbed him from the back by the neck. He swept her off her feet and she fell to the ground. He lifted her clothes and removed his kikoi. He then pushed his penis into her vagina and she screamed. Two men came and found the appellant on top of her. These were A and H. The appellant was arrested and taken to the police. The complainant was taken to the doctor for treatment and a P3 form was filled.

PW2 was H Y A. It was his evidence that he was near the well when he heard screams. He was with his friend A. They rushed to where the screams were coming from about 70 metres away, whether they found the appellant on top of the complainant in the bush. The appellant was only wearing a shirt and when he saw them he attempted to run away but they chased him and screamed. Many people were attracted and the appellant was arrested without being lost sight off.

PW3 was A A M. It was his evidence that he was also fetching water at the well and he heard screams from a woman. They rushed to the scene and they found the appellant on top of the complainant. He attempted to run away but they chased and arrested him and tied his hands.

PW4 was Mahat Mohamud a Clinical Officer. It was her evidence that on the 4th of March 2014 he received a complainant of an alleged defilement. He carried out investigations and filled P3 form and notes. He found that the complainant hymen was not intact. He saw no blood stains. He however noted some whitish substance which he identified as male sperms. He found that the complainant had an urinary infection. He did not conduct medical examination on the appellant.

PW5 was PC Julius Otieno a police officer. It was his evidence that he was instructed to investigate the case. He recorded statements and took P3 form documents He visited the scene. He arrested and charged the appellant. He produced a cloth worn by the complainant as an exhibit in court.

When put on his defence the appellant gave sworn testimony. He gave the story of how he came from Ethiopia from the 1stof February 2014 up to 2nd march 2014. He stated that in the process of crossing between Kenya and Ethiopia he bought a gun at 63,000/=. One day as he was walking he borrowed water to drink. Though he was given the water to drink, one of the men around said that he looked like a rapist. Those men then beat him up and the chief was called. Those men took away his gun, identity card, Kshs. 15,500/=, a torch and shoes. He stated that the case against him was a fabrication.

The trial court found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced him. There from arose the present appeal.

This is a first appeal. As a fist appellate court I am duty bound 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***.

I have re-evaluated the evidence on record. The appellant has raised several issues on appeal. From the evidence on record it is clear to me that the complainant was sexually assaulted. She gave evidence to that effect. The medical evidence confirmed that fact. The incident took place in broad day light. The real issue is whether the appellant was the culprit. Though I notice that no P3 form is in the file, in my view

the evidence on record which was not contradicted by the appellant shows that sexual penetration did take place. The absence of the P3 form is not fatal to the conviction. It was clearly produced at the trial, though it appears to be missing in the appeal court file.

The appellant was arrested by two eye witnesses PW2 and PW3 together with members of the public. There is no indication whatsoever that there could be any reason why these two people would frame the appellant. They were strangers to each other. There was no proven or alleged disagreement between them. These two people saw the appellant in the very act of raping the complainant. They chased and arrested the appellant without losing sight of him.

Though none of the members of public who assisted in arresting the appellant came to court to testify, I am of the view that the identification of the appellant was positive and with no possibility of mistake. I find that the appellant was the culprit. I find that the prosecution proved the case against the appellant beyond any responsible doubt. I will uphold the conviction.

With regard to sentence, the law in this country views sexual offences as very serious fences. They deserve to be viewed as such. These offences actually traumatize victims, in most cases, for life. The sentence is the sentence provided by law. I will also uphold the sentence.

To conclude I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered at Garissa this 2nd day of June, 2015

GEORGE DULU

JUDGE