REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 62 OF 2014

(From original conviction and sentence in Criminal Case No. 05 of 2013 of the Chief Magistrate Court at Garissa – M. WACHIRA – CM)

MOHAMED SIKU ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged with rape Contrary to Section 3(1)(a) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 31st December 2012 in Lagdera District within Garissa County intentionally and unlawfully caused his penis to penetrate the vagina of R.O.A without her consent. In the alternative he was charged with indecent act contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place did commit an indecent act with R.O.A a woman aged 54 years by rubbing his penis against her vagina. He pleaded not guilty to both charges. After a full trial, he was convicted on the main count of rape and sentenced to serve 10 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed an initial memorandum of appeal on 11th August 2014. On 22nd September 2014 however he filed an amended petition of appeal as well as written submissions. He relied on the amended petition of appeal which has the following grounds:-

1. The learned trial magistrate erred in law and fact to convict him without considering that the prosecution failed in all ways to prove their case beyond reasonable doubts contrary to Section 109 and 110 of the Evidence Act.

2. The learned trial magistrate erred in law and fact to convict him without considering that the prosecution's case was not investigated as to whether the complainant's allegations were trustworthy i.e the Investigating Officer was not availed in court to adduce his evidence.

3. The learned trial magistrate erred in law and facts to convict him on mere allegations without putting into consideration that the arresting officer was not summoned in court whereas the mode of arrest was poor and un established.

4. The learned trial magistrate erred in law and fact to convict him without considering that the medical examination in court failed to support the complainant's allegations hence, requiring further examination that is DNA test.

5. The learned trial magistrate erred in law and fact to convict him without considering that the Government Chemist failed to produce the report of DNA test hence weakening the prosecution case Contrary to Section 36 and 26 of the Sexual Offences Act.

6. The learned trial magistrate erred in law and fact to convict him without considering that he was not identified at the scene of crime and, upon arrest, no first report was produced to guide the arrest.

7. The learned trial magistrate erred in law and fact to convict him without considering that there was no evidence of identification parade.

The appellant also filed written submissions. During the hearing of the appeal, the appellant relied on the written submissions and he opted not to make oral submissions. I have perused and considered the written submissions of the appellant.

The learned Prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the complainant was found with bruises on the neck which evidence was not shaken by the defence. As such the prosecution had proved that rape had occurred. Counsel submitted that the appellant avoided challenging the circumstances of the attack and injuries suffered by the complainant even though the complainant stated very clearly that she saw the appellant in broad daylight during the incident. Counsel submitted that an identification parade was conducted and that the appellant was identified as the culprit. Counsel submitted further that this court should use the provisions of Section 354 of the Criminal Procedure Code (cap. 75) and substitute the conviction for the offence of rape with the alternative count of committing an indecent act, because the evidence proved indecent act and not rape.

In response to the prosecuting counsel's submissions, the appellant stated that he was a young man and that his life had been messed up and wanted to be released to chart his own life path.

During the trial, the prosecution called 4 witnesses. PWI was the complainant. She stated that she was aged more than 50 years and could remember that on 31st December 2012, while looking after goats in the bush near the road, a motor vehicle approached from Garissa side towards Dertu and stopped where she was. A person then alighted from the motor vehicle wearing a blue pair of jeans and beat and kicked her up until she fell down. He then removed her clothes and penetrated his penis into her vagina.

She screamed for help and people came to assist. That person ran away to the waiting vehicle, and people who came took her to a safer place and called her brother. She was then taken to Dertu Police Station where an identification parade was conducted and she identified the appellant.

She stated that she was able to identify the appellant because he alighted from the motor vehicle, came towards her and slapped her on the face. She stated that she suffered injuries on the foot and was taken to Dadaab Hospital for treatment and a P3 Form filed. She stated that she found the appellant in the Administration Police Camp wearing the same blue jeans he wore during the incident.

In cross examination, she stated that she saw the appellant clearly at the scene when he approached her. She could not however recall the colour of the motor vehicle. She stated that she was removing goats from the road at that time. She stated that the incident occurred during morning hours and that people came to rescue her and that the appellant ran away and was driven off. She stated that other motor vehicles had passed the same road. She then said that no motor vehicle had passed that morning before the lorry from which the appellant came.

PW2 was A B B a brother of the complainant, who was a businessman at Dertu Centre. It was his evidence that on 31st December 2012 at around 8.00 a.m, he received a telephone call from the complainant informing him that she had been beaten and raped by a person who came from a motor vehicle and stopped her as she was looking after goats. He was told that the man drove off after the incident. He therefore called the sergeant in charge of Dertu Administration Police Camp and informed him about the incident. He later learnt that the motor vehicle which was travelling from Garissa to Dertu,

had been detained.

In cross examination, he stated that he found the motor vehicle already detained at Dertu Administration Police Camp.

PW3 was Police Constable Crispin Juma of Kambios Police Patrol Base. It was his evidence that on 31st December 2013 at around 2.00 Pm, together with PC Maalimu Mohamed, Yusuf Noor and driver Ole Kipuri and the OCS Ifo Police Station, proceeded to the DO's office where one suspect had been arrested on a rape allegation. They found the suspect in the DO's office cells and the complainant seated outside the office. They also found a motor vehicle Registration No. KBK 876X a Isuzu lorry parked outside the office.

The complainant then told them what had happened to her. The complainant was then given treatment through the help of Red Cross at Dadaab Hospital. The doctor recommended that blood samples be taken from the complainant and the appellant and the same was taken to Government Chemist for analysis. He identified items that were taken to the Government Analyst for analysis.

In cross examination, he stated that the appellant was already under arrest at the Dertu Administration Police offices when they arrived. He stated that the complainant had identified him as the culprit.

PW4 was Dr. Boniface Musila a Gynecologist/Obestrician based at Mwingi Hospital. It was his evidence that on 31st December 2012 he was at Dadaab Sub District Hospital and he filled a P3 form for the complainant. He had been informed that the complainant had been sexually assaulted without use of protection. He examined her at 8.00 P.m and found her to be in fair general condition. A small bruise measuring a half centimeter diameter was on the neck. Everything else was normal. There was no bleeding or blood stains.

He took her vaginal swap specimen and sent the same to the laboratory for examination which showed no evidence of spermatozoa. According to him any sexual assault on the victim was unlikely to show injuries due to her age. He signed the P3 form which he produced as an exhibit.

A Doctor Kiogora was to testify according to the prosecutor. However he did not testify. The Government Analyst and the Investigating Officer also did not testify. The prosecution closed its case at this point.

When put on his defence, the appellant stated in his unsworn testimony that on 30th December 2012 he left Nairobi in a loaded motor vehicle. They arrived at Dertu and were stopped at the Administration Police Camp and he went to the office and booked the motor vehicle. He was asked to pay a fee of Kshs 200/= and he told them the fee was usually Kshs 50/=. After being adamant, the Administration Police Officers let go but when he boarded the motor vehicle the Administration Police officers told him to alight because the driver had hit someone. The driver was also arrested and both were asked to wait in the Administration Police Base. Police from Garissa Police Station then came and told him that he had raped a lady and he was taken to hospital and examined. He stated that he did not know the complainant.

This is a first appeal. As a first appellate court, I'm am duty bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences – ***See the case of Okeno -vs- Republic (1972) EA 32.***

I have evaluated the evidence on record. In criminal cases, the burden is always on the prosecution to prove it's case against an accused person beyond any reasonable doubt. ***See Woolmington –v- DPP (1932)AC 462***. The accused does not have the burden of proving himself innocent. He can shake the prosecution case by merely raising a doubt or doubts. He even has the right to keep quiet, where it suits him.

The appellant was convicted of the offence or rape. The prosecuting counsel has stated that the evidence on record did not prove the offence of rape but indecent act. Counsel has urged this court to substitute the

conviction of rape with a conviction for indecent act.

In my view, the evidence of the prosecution herein did not prove the offence of rape. I agree with the prosecuting counsel or this aspect. There was no evidence of sexual intercourse tendered in the court expect the evidence of the complainant. The medical evidence did not indicate any sign of commission of the offence of rape. Dr. Kiogora who was to come to testify in court did on this aspect not testify. The report on samples from both the complainant and the appellant which were taken to the Government Chemist for analysis were not produced in court.

The P3 form produced by PW4 Dr. Boniface Musila does not indicate any sexual assault. None of the people who went to the scene and assisted the complainant immediately after the incident were called by the prosecution to testify, and no reason was given for that failure. The prosecution has a right to determine which and how many witnesses to call in a criminal trial. However when crucial witnesses are not called and the case is weak, then the court is entitled to infer that the evidence of the prosecution witnesses who were not called to testify was likely to contradict the evidence of the prosecution on record- see the case of ***Bukenya –vs- Uganda(1972)EA 549***. I make that inference the benefit of which goes to the appellant.

Though the learned prosecuting counsel said in submissions that an identification parade had been conducted, no identification parade was actually conducted. All that happened was that the appellant was arrested at the DO's office and the complainant came and on seeing him, said this is the person who had raped her. That cannot be said to be an identification parade. An identification parade has its rules and what is required is that the witness to identify should not see the culprit before the parade. At the parade, about 9 or so people of similar appearance have to be lined up and the witness asked to say where any of them committed the offence, and if so, which one. That was not done in the present case. There was also no identification Police Officer who testified regarding the conducting of an identification parade. In my view therefore no identification parade was conducted. In addition the fact that the appellant was wearing a blue jeans even if true, in my view is not satisfactory to establish show positive identification. Blue jeans can be worn by anybody.

The learned prosecuting counsel has also requested that this court do substitute the conviction for rape with a conviction of indecent act. No doubt the counsel is saying that the evidence on record, even if it was true the appellant was the culprit, did not prove the offence of rape. I agree with him that the evidence on record did not establish the commission of the offence of rape. Counsel seems to rely on the small bruise noted on the neck of the complainant to establish the offence of indecent act. In my view, even assuming that it was true that the appellant bruised the neck of the complainant, that mere act did not necessarily amount to an indecent act. It could as well have been an assault and there is nothing indecent about an assault.

The complainant stated that she was removing goats from the road when the motor vehicle was approaching. In my view, it is quite possible that the speed at which the goats were being removed from the road might not have pleased the occupants of the lorry and perhaps one of them approached and harassed the complainant. That would be an assault rather than an indecent act. What I am stating is that not every assault by a man to a woman and vice versa is an indecent act.

Coming now to the present case, I find no sufficient evidence to connect the appellant with either rape, indecent act, or even assault on the complainant considering that key witnesses were not called to testify thus leaving a big gap in the prosecution case, which meant that the prosecution failed to prove beyond reasonable doubt that the appellant was the culprit.

In the result, I find that the appeal has merits. I allow the appeal quash the conviction and set aside the sentence imposed by the trial court. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Garissa this 3rd November 2015.

GEORGE DULU

JUDGE