



ABDI HUSSEIN OYOWAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 204 of 2008 in the Senior Resident Magistrate's Court at Wajir – Mr. A. Ingutya (SRM) on 28th November 2008)

JUDGMENT

1. This is an appeal arising out of a conviction entered against the appellant **Abdi Hussein Oyow** by Wajir court on 28th November 2008.
2. The appellant **Abdi Hussein Oyow** was charged with rape contrary to **Section 3(1)(a)** of the **Sexual Offences Act**. The particulars in the charge sheet are that on 1st July 2008 at about 1 a.m. within Sarif location, the accused had carnal knowledge of M.M.B. without her consent.
3. Mr. Mochache, learned counsel for the appellant submitted that the evidence adduced was not sufficient to convict the appellant, and that the evidence, such as was tendered, was riddled with contradictions, anomalies and short comings. He further urged that the medical evidence relied upon to convict the appellant was not in conformity with the law, and that therefore the conviction was not proper and should be quashed.
4. I have perused the record and note that the complainant testified that someone whom she knew came into the room, undressed and held her by the throat so that she could not scream. He then raped her. She was only able to scream when he left. That the man was chased and arrested. There was however, no evidence that she came out of the house to see who or how he was arrested.
5. **PW2** testified that she saw a naked man being chased by people who had torches. When he was arrested she realised that it was the accused. She did not participate in the chase and arrest. Save for one Zainab Yaro, Dubow and Ahmed, other witnesses who were mentioned were not called to testify.
6. Zainab Yaro testified as **PW3** and said that she came out of her house when she heard people wailing. She saw people chasing a man. They passed by her compound. She heard later that the complainant had been raped. On cross-examination she said that she did not see the appellant that night.
7. **PW4**, alleged to have seen the appellant being chased. He was throwing pieces of wood at his pursuers. She did not participate in the chase, and only heard later that the complainant had been raped.
8. **PW1** and **PW2** stated that the appellant was arrested and taken to the A.P. Camp, but none of the Administration police from the Camp were called as a witness.
9. The prosecution case rests on the evidence of **PW1** since none of the other witnesses witnessed the attack. Her testimony however, did not inspire much confidence. On cross examination she stated that the same suspect had raped her on two previous occasions and that that is why she knew him. That she

had reported to the area chief who arrested the appellant but that the appellant ran away, in handcuffs. In the same breath, however she stated that the appellant was her husband's uncle, and that she therefore knew him very well. In her testimony however she did not disclose that her husband's uncle attacked her. She said **"I saw someone. He came and held my neck"**. If she knew her assailant that well, she would have referred to him by name or relationship.

10. The incident took place at about 1 a.m. when the complainant had already retired to bed, yet she would have us believe that there was a lantern burning in the house when the assailant arrived to enable her to see and identify him.

11. The evidence of **PW5** the nursing officer was that he attended to the complainant four days after the incident, his evidence was that there was evidence of sexual intercourse due to sperm like substance that he noticed on the vaginal walls of the complainant. He admitted that he did not submit it to laboratory tests to ascertain what the substance was. I therefore see no nexus between the substance found in the body of the complainant, and the offence. Furthermore the complainant was a married woman and sexual intercourse with her husband was not ruled out.

12. In any case, **PW5** being a nursing officer, the prosecution did not lay a basis that would qualify him to adduce medical evidence.

13. I find that the charge itself was defective for failure to include material particulars. It did not disclose the nature of the instrument employed by the appellant to cause penetration into the genitals of the complainant. Miss Maina, the learned state counsel, conceded the appeal for the same reasons traversed above.

For the foregoing reasons I allow the appeal, quash the conviction and set aside the sentence.

The appellant is set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **3rd** day of **October 2012**.

L. A. ACHODE

JUDGE