REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 323 of 2008

SULEIMAN IDDI ……..……. APPELLANT

VERSUS

REPUBLIC ……...……. RESPONDENT

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JUDGEMENT

The Appellant Suleiman Iddi has filed this appeal against both his conviction and sentence imposed by the learned District Magistrate Mombasa. The Appellant relied wholly on his written submissions which had been filed in court whilst Mr. Onserio learned State Counsel submitted orally and opposed the appeal on behalf of the Respondent State.

The facts giving rise to this appeal are as follows. The Appellant was charged before the Mombasa Law Courts on two counts as follows:-

COUNT NO. 1

ATTEMPTED RAPE CONTRARY TO SECTION 4 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

"*Suleiman Iddi: On the 15th day of January 2007 in Mombasa District within Coast Province, unlawfully attempted to have carnal knowledge of E.A without her consent."*

COUNT NO. 2

ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE

Suleiman Iddi: On the 15th day of January 2007 in Mombasa District within Coast Province, unlawfully assaulted E.A thereby occasioning her actual bodily harm."

The Plea was taken on 22nd January 2007 on which date the Appellant pleaded guilty to Count No. 1 of the charge. The facts were read out and after pleading guilty to those facts the Appellant was sentenced to serve ten (10) years in prison. The matter was set down for hearing of

Count No. 2. On 18th April 2007 the Appellant pleaded "*not guilty*" to Count No. II. The prosecutor thereafter applied to withdraw the charge under S. 87(a) Criminal Procedure Code which application was allowed. The Appellant being dissatisfied with both his conviction and sentence has now appealed to this court.

In hearing this appeal I am mindful of my obligation as a first appellate court as stated in the case of Okeno –vs- Republic Criminal Appeal 75 of 1971 where it was held that –

"*(vi) It is the duty of a first appellant court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld."*

I have perused the written submissions made by the Appellant and I do note that his grounds of appeal fall broadly into three –

(i) That his guilty plea was not unequivocal

(ii) That no evidence was adduced by the prosecution with respect to Count No. 2

(iii) That his sentence was both harsh and excessive.

With respect to the first ground, the record shows that on 22nd

January 2007 when the charges were read out to the Appellant he responded to Count No. 1 on page 1 line 8 –

"*That is true. I attempted to rape her."*

When Count No. 2 was read out the Appellant's response was as given on page 1 line 10 –

"*It is not true. I deny"*

Thereafter the facts were read out to the Appellant to which he responded –

"*True I tried to rape her."*

The learned trial magistrate duly convicted the Appellant. He was called upon to mitigate and stated (page 2 line 5).

"*I plead for forgiveness"*

Thereafter the trial magistrate whilst noting that the offence was "*serious and prevalent"* proceeded to impose a sentence of ten (10) years imprisonment with respect to the first count. In his written submissions the Appellant alleges that the charge and facts were read out to him in a language which he did not comprehend. He cited the case of ADAN –VS- REPUBLIC [1973] E.A. 445. This case laid down very clearly the procedure to be followed in recording a plea of guilty from an accused person. The Court of Appeal sitting in Nairobi held in this regard as follows:-

"*(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands*

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts

(iv) If the accused does not agree to the facts or raises any question of his guilt his reply should be recorded and change of plea entered;

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

This ruling therefore makes very clear the steps that a court ought to follow in recording a plea from an accused person. So far as I can tell, the learned trial magistrate did comply with all these requirements. The charges were read out to the accused. The accused own words in reply were recorded by the court. The facts were read out. The Appellant did not dispute or seek to challenge any part of the facts as read out to him. He accepted the facts as they were. Once again the trial magistrate recorded the exact words of the Appellant –

"*True I tried to rape her."*

It is only then that a plea of guilty was recorded. In his written submissions the Appellant seeks to challenge his guilty plea on the grounds that he did not comprehend the language used in court. In the Adan case it was held that the charges must be read out to an accused person in a language which he understands. The languages of the courts in Kenya are English and Kiswahili. However where an accused does not understand any of these languages the court is obliged upon request by the accused to provide for interpretation into a language which the accused does understand. At no point in these proceedings did the Appellant seek for interpretation into a language other than English or Kiswahili. The court record clearly indicates that proceedings were interpreted from English to Kiswahili. The Appellant cannot claim not to have understood Kiswahili yet he participated very vocally and actively in the proceeding. He responded to the charge in clear terms saying –

"*That is true. I attempted to rape her."*

For the Appellant to have responded this way it is clear that he well understood the charge against him. Later on after conviction the Appellant was called upon to plead and stated –

"*I plead for forgiveness*"

These cannot be the words of a man to whom the proceedings were incomprehensible. Later on at page 6 line 20 after the facts were read out a second time to the Appellant and he was asked to plead to Count No. 2 he stated –

"*It is not true"*

I find that the Appellant could not have participated so actively in the courts proceedings if as he claims he did not understand the language. I am satisfied that the record indicates that the proceedings were translated into Kiswahili a language which the Appellant understood very well and that is why he was able to respond to the charges and the facts in the manner in which he did.

The Appellant further alleges that he was cajoled into entering a plea of guilty by a promise that he would be placed on probation. Again at no time did the Appellant raise this issue during his appearance in the lower court. The Appellant has not made any suggestion that it was the learned trial magistrate who offered him probation if he pleaded guilty. The Appellant has likewise made no such allegation as against the court prosecutor. The Appellant has not named the officers whom he claims "*cajoled"* and persuaded him to plead guilty. If indeed such an offer had been made it was illegal and in any event was not made by the trial magistrate nor the court prosecutor thus the Appellant had no need to heed the same. In my view this is a mere afterthought, a fabrication by the Appellant in an attempt to deny his guilty plea. I am not convinced that any such "*cajoling"* actually took place at all.

On the whole I find that the plea was properly and procedurally taken. The facts were read out as required. The Appellant entered a plea of guilty which in my view was unequivocal. I find no reason to disturb this conviction and I do hereby uphold the same and dismiss this ground of the present appeal.

The second ground of this appeal is that no evidence was adduced by the prosecution in support of Count No. 2. In actual fact it was not necessary to adduce any evidence in support of Count No. 2 since the prosecution withdrew that charge under S. 87(a) Criminal Procedure Code. The record clearly (page 7 thereof) indicates that on 16th May 2007 the court prosecutor applied as follows:-

"*No witnesses were bonded. Complainant traveled upcountry. It is not known when she will be back. I now pray to withdraw the charge under S. 87(a) CPC"*

The Appellant did himself respond to this application by saying –

"*I have no objection"*

The trial magistrate thereafter allowed the application. In view of that withdrawal the Appellant stood discharged of Count No. 2. Indeed no conviction was made and no sentence was imposed on this count. There was no need to adduce evidence on this charge. I find this ground of the appeal has no merit and the same is dismissed.

Lastly the Appellant appeals against his ten (10) year sentence terming the same harsh and excessive. The Appellant was convicted under S. 4 of the Sexual Offences Act No. 3 of 2006. This section reads as follows:-

"*4. Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life."*

Thus the provision under which the Appellant has been charged provides for a minimum sentence of five (5) years and a maximum of life imprisonment. As such the ten (10) year term imposed upon the Appellant was indeed lawful. The Appellant argues that the sentence is harsh. Rape or the attempt thereof is not a minor offence like a misdemeanour. It is a very serious offence which has traumatic and lasting effects on the victim. The facts show that the Appellant threw the complainant to the ground and tried to rape her. The complainant was only rescued by members of public because she screamed for help. Had this intervention not occurred I have no doubt that the Appellant would have proceeded to rape the complainant. The offence as the trial magistrate pointed out is "serious and prevalent" and as such a deterrent sentence is called for. I find that this sentence provided exactly that – a deterrent. As such in my view and given the circumstances

it is not excessive and I do hereby dismiss the appeal against sentence.

Based therefore upon the foregoing I find that this appeal has no merit and I do hereby dismiss the same in its entirety. As such the conviction and sentence imposed on the Appellant are hereby confirmed.

Dated and Delivered at Mombasa this 6th day of November 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Monda for State

Appellant in person

M. ODERO

JUDGE

6/11/2009