IN THE COURT OF APPEAL

AT NAIROBI

CORAM: P.KIHARA KARIUKI, (PCA), GATEMBU & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 361 OF 2012

BETWEEN

ALAS BILLE ADEN ……..APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Being an appeal from the sentence of the High Court of Kenya

at Nairobi (Warsame, J.) dated 24th March, 2010

in

HC. Cr. A 742 of 2007)

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JUDGMENT OF THE COURT

1. **Alas Bille Aden**, hereinafter referred to as the appellant, was charged before the Senior Resident Magistrate's Court at Wajir with the offence of rape contrary to section 140 of the Penal Code. He was also charged in the alternative with the offence of indecent assault on a female contrary to section 144 (1) of the Penal Code.

2. The brief particulars of the case were that on the 12th January 2006, at around midnight at Elnur Location, in Wajir District, within the North Eastern Province, the appellant had carnal knowledge of **A A B** without her consent.

3. The facts led before the trial court were that **A A B (PW1)**, a girl of over sixteen years, was on the 12th January 2006 herding goats at Kokote with **Z A B (PW2)** who is the appellant's daughter, and the appellant. On their way back home, they had decided to camp out as it was late and they feared being attacked by wild animals. At around midnight, **A** felt someone undress her. She woke up and saw that it was the appellant undressing her. She struggled with him and screamed, but he pinned her down and raped her for about an hour. **Z**, roused from sleep by **A's** screams, went over to where she had slept, and saw someone get off **A**. **Z** recalled that it was the appellant who was lying on **A**. The appellant got up and ran away, leaving **A** and **Z** alone until morning. In the morning, they went and reported what had happened to **A's** father, **A B (PW3)**. **A** and **Y M M (PW4)** took **A** to the Wajir Police Station to report

the incident, and later to Wajir District Hospital for treatment. **A** and **Y** also testified that on a previous occasion, the appellant had been caught raping **A**, but the matter had been settled by the elders.

4. PW1 was examined by **Dr. B.K. Wahome**. The P3 form was produced on his behalf by **Dr. Divale Soma (PW5)** who was familiar with this handwriting and signature. The examination revealed that **A's** hymen was bruised, and that she had semen and intra vaginal discharge, all which pointed to a sexual attack with incomplete penetration.

5. In his defence, the appellant denied ever raping **A** or even having seen her before. In cross-examination, he further denied knowing his brother, **A**.

6. After hearing the prosecution and defence, the trial court (**Wakumile, RM**) found the appellant guilty of rape and convicted him. The appellant was then arraigned before **King'ori PM**, who sentenced him to serve twenty years imprisonment with hard labour.

7. Being dissatisfied, the appellant preferred a first appeal to the High Court. In that appeal, the appellant alleged that there was no interpretation of the language used during trial; that the evidence which the court had relied upon to convict him was inconsistent, uncorroborated and contradictory; that the prosecution had failed to avail vital witnesses; and that there was a violation of his rights under section 72 (3) of the now retired Constitution of Kenya.

8. That appeal was heard and determined by **Warsame, J.** (as he then was) who agreed with the trial court that the evidence led by the prosecution was sound, and held that the trial court reached a proper finding in convicting the appellant on the basis of this evidence. The learned judge rejected the appellant's complaint on the language used in trial, and found that the appellant had adequate opportunity to follow the trial proceedings. The first appellate court also held that the slight inconsistencies in **A's** and **Z's** testimonies did not diminish or affect the weight of the evidence presented before the Court. The first appellate court consequently confirmed the conviction and upheld the sentence, provoking this second appeal.

9. The appellant filed grounds of appeal in which he mainly takes issue with the identification evidence led during the trial; that the evidence led did not discharge the burden of proof; and that the court failed to address the fact that his rights under section 72 (3) (b) of the Constitution had been violated.

10. During the hearing of this appeal, the appellant appeared in person. He was aided by an interpreter, who translated from Somali to English. The appellant submitted to us that he was not guilty of the crime for which he was convicted, and urged us to reduce his sentence as he is an old man of 65 years of age, who is not accustomed to the diet in prison. **Mr. Kivihya,** learned counsel for the State, argued that the sentence is legal and that there is nothing to warrant interference with it. He further argued that the appellant has advanced humanitarian reasons and not legal reasons, and as such, we ought to dismiss the appeal.

11. In a second appeal, we are enjoined by section 361 of the Criminal Procedure Code to consider matters of law only. We are also alive to the fact that in a second appeal, the Court is bound by the lower court's findings, unless those findings are not supported by the evidence. See ***Boniface Kamande & 2 Others v Republic*** ***[2010] eKLR (Criminal Appeal 166 of 2004):***

> ***"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."***

12. The concurrent findings of fact were that on the night of 12th January 2006, the appellant had carnal knowledge of PW1 without her consent. The circumstances for identification were good as there was

moonlight, and PW2, the appellant's daughter, saw him running away from the scene of the incident. The medical evidence showed that PW1 had suffered a sexual assault. There is nothing on record that warrants our interference with these findings; we find them to be based on sound and cogent evidence, and accordingly we reject the appellant's contention that the charge was not proved to the required standard.

13. As we have stated, this Court's jurisdiction on second appeals is limited to matters of law only. Section 361 (a) of the Criminal Procedure Code provides that:

> ***"A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall, not hear an appeal under this section –***
>
> a. ***on a matter of fact, and <u>severity of sentence is a matter of fact</u>; or…"***
>
> We therefore decline the appellant's invitation to reduce the sentence imposed on him, as it was anchored in law.

14. We now turn to consider the appellant's submission that his rights under section 72 (3) (b) of the retired Constitution were infringed. The portion of the Constitution that is pertinent to the present appeal is reproduced hereunder:

> ***A person who is arrested or detained –***
>
> ***(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest …, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."***

15. From the charge sheet, it is clear that the appellant was arrested on the 17th January 2006, and arraigned in court to take plea on the 24th January 2006. Because of this, the appellant submits that he was prejudiced, although he has failed to state how. He would have us adopt the approach in ***<u>Albanus Mwasia Mutua vs Republic</u> (2006) eKLR (Criminal Appeal 120 of 2004)*** where this Court held that violating this right would entitle an accused person to an acquittal, despite the strength of the evidence that is present in support of the charge.

16. We do not find these assertions to have merit. Instead, we find the correct proposition of law to be what was set out by this Court in ***<u>Julius Kamau Mbugua v Republic</u> [2010] eKLR (Criminal Appeal 50 of 2008)***. In that appeal, this Court departed from the position in ***<u>Albanus Mwasia Mutua v Republic</u> (supra)*** and stated that section 72 (3) (b) of the Constitution was not intended to create a situation where a trial on merit could be avoided. The Court rendered itself in the following manner:

> ***"In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process."***

The Court further stated that:

> ***"…the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable [sic] by damages."***

17. We need not say more. It is for these reasons we find no merit in this appeal. Accordingly, it is dismissed and we hereby so order it.

Dated and delivered at Nairobi this 4th day of April, 2014

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR