REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.66 OF 2020

DEDAN MWANZIA NDETA...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Being an appeal from the original sentence of Hon. B. Ireri in Makindu Senior Principal Magistrate's Court SPM (S.O) Case No.84 of 2019 pronounced on 18th June, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with rape contrary to section 3(1) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 14th August 2019 at Katulani village in Nzaui Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of M.W.M (name withheld) without her consent a person with mental disability.

2. In the alternative, he was charged with committing an indecent act contrary to section 11(a) of the Sexual Offences Act. The particulars of offence were that on the same day and place, willfully and unlawfully touched the vagina of M.W.M using his penis, without her consent, being a person with mental disability.

3. He denied both charges. After a full trial, he was convicted of the main count of rape and sentenced to serve 10 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds –

> ***1. That the trial magistrate erred in law and facts by allowing the prosecution side to conduct a case against the appellant with the charge sheet being defective.***
>
> ***2. The trial magistrate erred in law and fact by failing to find that the elements constituting the offence of rape were not proved beyond reasonable doubt.***
>
> ***3. That the trial magistrate erred in law and fact by failing to find that the prosecutor's case was uncorroborative and inconvertible.***
>
> ***4. That the trial court (erred) to find that the elements forming the offence of indecent act were***

not proved beyond reasonable doubt.

5. The trial court erred in law and fact when he failed to find that the prosecution did not meet the applicability of section 179 (1) (2) of the Criminal Procedure Code, (cap. 75)

6. The learned magistrate erred in law and fact by failing to find out whether the prosecution witness evidence had acts or omissions.

5. The appeal proceeded through filing of written submissions. I have perused and considered the submissions of both the appellant and the Director of Public Prosecutions.

6. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. See **Okeno –vs- Republic (1972) E.A 32.**

7. In proving their case, the prosecution called five (5) witnesses. Pw1 was Fredrick Wambua an Assistant Chief who received a report on the alleged defilement on 14/08/2019 at 2pm and advised that a report be made to the police.

8. Pw2 was the alleged victim aged 19 years and said to be mentally challenged. It was her testimony that on 14/08/2019 at 11:00 am the appellant went to her home and defiled her.

9. Pw3 was AN the grandmother of the alleged victim whose evidence was that she went to visit a neighbour and on coming back found the victim crying and on enquiry the victim disclosed that the appellant had defiled.

10. Pw4 was Sylvester Waita a Clinical Officer, whose evidence was that on 15/8/2019 he examined the victim and found her with freshly perforated hymen. Pw5 was PC Danu Hellen the Investigating Officer who conducted investigations and charged the appellant.

11. When put on his defence, the appellant tendered unsworn defence and said that he was a casual worker and that on 13/8/2019 at 11 pm the Assistant Chief knocked at his door, and then he was taken to Emali Police Station and later charged with an offence he was not aware of.

12. The prosecution was required to prove beyond any reasonable doubt all the elements of the offence. The elements of the offence of rape are penetration, lack of consent and the identity of the culprit.

13. From the evidence of the victim Pw2, it is quite clear and the prosecution has established that there was no consent to the sexual act. If indeed there was consensual sex, there was no reason why Pw2 would have said otherwise. Indeed she would not have disclosed the incident to anybody. Secondly, the evidence on record was that the victim was still distressed and crying when the grandmother Pw3 came back home which was evidence of an unusual and disturbing occurrence. All this in my view all this goes to the credibility of the evidence of Pw2 the victim, in line with the provisal to section 124 of the Evidence Act (cap.80). Her evidence is believable and I so believe her testimony on lack of consent.

14. With regard to penetration in my view, this was likewise proved by the prosecution beyond any reasonable doubt when the evidence of the victim Pw2 is considered together with the evidence of the Clinical Officer Pw4 Sylvester Waita. The medical evidence tendered by Pw4 is very clear that there was fresh perforation of the hymen, thus in my view penetration of a sexual nature was proved by the prosecution beyond any reasonable doubt.

15. I now turn to the identity of the culprit. From the evidence on record, both the appellant and the victim Pw2 knew each other well as people living in the same neighborhood. The incident also occurred in broad daylight at 11:00 am. In my view therefore, there was no possibility of mistaken identity. Just like the trial court therefore, I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. The appeal against conviction will thus be dismissed.

16. With regard to sentence, the appellant was sentenced to 10 years imprisonment which is the minimum sentence for the offence under the Sexual Offences Act. I find no basis for interfering with the sentence imposed. I will uphold the sentence.

17. Consequently, and for the above reasons, I dismiss the appeal, and uphold both the conviction and sentence of the trial court.

Delivered, signed & dated this 25th day of January 2022, in open court at Makueni.

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George Dulu

Judge