REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL 86 OF 2018

(Being an Appeal from the Judgment in Kyuso Principal Magistrate's Court Criminal Case No. 11 of 2018 by Hon. John Aringo (RM) on 25th day of October, 2018)

REPUBLIC..... RESPONDENT

VERSUS

JMN.....APPELLANT

J U D G M E N T

1. **JMN,** the Appellant herein was charged with the offence of rape in the view of a family member and a person with mental disability contrary to **Section 7 of Sexual Offence Act No. 3 of 2006 vide Kyuso PM's** Court **Sexual Offence Case No. 11 of 2008.**

The particulars of the charge presented to that court were that on **7th day of July, 2018** at **8:00PM** at **[*particulars withheld*]** within **Kitui County**, the Appellant raped (name withheld) a person with mental disability. He also faced an alternative charge of committing an indecent act with an adult contrary to **Section 11 of the Sexual Offence Act** but since he was convicted in the Principal charge this court will delve on the same.

2. The Appellant denied committing the Offence and the prosecution presented five witnesses. The Prosecution's case principally relied on eye witness account in relation to the act of rape and the evidence of the victim's mother **(PW1)** and the medical officer **(PW4)** to establish and prove the mental state or mental disability of the victim.

3. This court has perused at the record of proceedings from the lower court and it is apparent that there were two eye witness, **MM (PW2)** and **SMN** (PW3) who found the Appellant on the act at around 8:00PM behind the kitchen of the home of the victim. According to PW3, the Appellant sent him to buy some alcohol by appellant which he obliged and he testified that when he got back he found the Appellant raping the victim. The said evidence was corroborated by PW2 who also testified that he found the Appellant having sex with the victim who was mentally challenged.

4. The Medical Officer **(Amicas Makau) (PW4)** from **Ngomeni Health Centre**, testified that he was a **Clinical Officer**. He testified and confirmed that the victim was mentally challenged since birth and could not fully *express herself*. He further opined that the presence pf epithelial cells noted from examination of her vagina, was indicative of sexual act.

5. When placed on his defence, the Appellant denied committing the offence and testified that he had a land dispute with the mother of the victim.

6. The trial court upon evaluation of evidence found that despite sufficient evidence that the Appellant had committed a sexual offence, the particulars in the charge sheet were defective as they were at variance with the evidence tendered in court. He then convicted the Appellant with the offence of sexual assault contrary to **Section 5(1) of the Sexual Offence Act No. 3** of **2006** and sentenced to serve **10 years** in prison.

7. The Appellant felt aggrieved and filed this appeal raising twelve grounds though some are repetitive. The grounds are listed as follows: -

(i) That the learned Magistrate erred in fact and law by failing to acknowledge that the Appellant did not commit rape Contrary to **Section 7 of Sexual Offence Act**.

(ii) That the Trial Magistrate erred by not considering the defence.

(iii) That the sentence meted out was harsh and excessive.

(iv) That the trial court erred by not considering his evidence.

(v) That the evidence tendered by the prosecution were contradicting and could not sustain the charge.

(vi) That the Trial Magistrate erred by not establishing the age of the victim.

(vii) That the trial court erred by failing to be guided by medical evidence.

(viii) That the evidence tendered against him were scanty.

(ix) That the trial court erred by invoking the provisions of Section 179 of the Criminal Procedure Code.

(x) That the decision of the trial court was against the weight of evidence.

(xi) That the trial Magistrate erred by considering extraneous matters and not evidence in meting out the sentence against the Appellant.

8. In his written submissions, through M/s Mulinga Mbaluka and Co. Advocates, the Appellant reiterates that he never committed the offence of rape disclosed in the charge sheet. He submits that the witnesses gave contradicting evidence and contends that the same were just hearsay, which should not have formed a basis of his conviction.

9. The Appellant contends that the trial court failed to appreciate his defence stating that he raised the fact that he had a dispute with the mother of victim which could have made the victim's family to frame him.

He alleges that the prosecution did not disprove his allegations against the victim's family regarding existence of a dispute.

10. The Appellant further submits that there was no complainant in the case because the mother of the victim did not testify as an intermediary in the trial. This court however finds that this ground has been raised improperly and without leave because it is not one of the grounds listed in the petition of appeal. That ground is belated and cannot be entertained for want of leave as stipulated under **Section 350(2) (iv) of the Criminal Procedure Code**.

11. The Appellant also submits that the maker of the P3 form tendered in Evidence was not called to testify to accord the Appellant the opportunity to cross examine him. This court notes again that this is a new ground in this appeal which has been belatedly raised in written submission and for the foretasted reasons this new ground is improperly raised for want of leave. The Appellant was duly represented. There is nothing that barred him from seeking leave to rely on new or further additional grounds in his appeal. I also find that the Appellant complains of not being accorded a Kamba interpreter during trial are belated. He never raised the issue during trial or in the petition of his appeal.

12. The Appellant submits that the P3 tendered in evidence shows that the rape was reported on 9th July, 2018 when the offence was committed on 7th July, 2018. He avers that the delay has not been accounted for.

13. He asserts that the P3 does not indicate that force was used because in his view no injuries were detected. He points out that the P3 tendered in evidence states that there were no tears, bruises or swelling noted on the genitalia of the victim and that the same suggests that there was no penetration.

He further submits that the **P3** indicates that the whitish discharge from the vagina of the victim as noted in the P3 was not smelly and the hymen broken was not a recent development. This evidence in his view did not establish the offence of rape. He further contends that though specimens from the victim was taken for further tests, there was no outcome of any analysis done. He faults the information provided by the **P3 Form** stating that it fell short of establishing that rape had occurred.

14. The Appellant has also faulted the evidence tendered by Investigating Officer **(PW5)** saying that he gave conflicting evidence in regard to the charge sheet. In his view the said officer stated that the offence was committed on 7th September, 2018 when the charge sheet indicates that the Appellant was arraigned in for offence committed on **6th August, 2018**. He argues that it would seem that he was arrested before the commission of the offence.

15. The Respondent through the Office of Director of Public Prosecution has opposed this appeal through written submissions dated 2nd November, 2020 by Mr. Vincent Mamba learned Counsel from the Office of Director of Public Prosecution. The prosecution submits that their case against the Appellant was proved beyond doubt reiterating the evidence of PW1 indicated that the Appellant met the victim with full knowledge that the mother was away.

16. It avers that the Appellant has not demonstrated that admission of evidence of PW1 violated his rights under **Article 50(4).** This court however finds this assertion misplaced because the Appellant has not raised any issue regarding his rights under **Article 50(4) of the Constitution of Kenya 2010**.

17. This court has considered this appeal and the submission made by the Appellant. I have also considered the brief submissions made by the Respondent.

As I have observed above the Appellant herein was charged with Sexual Offence under **Section 7 of Sexual Offence Act** which offence relates to committing an act which causes penetration within the view of a person with mental disabilities.

18. The trial court in its judgement found that there was an anomaly in the charge sheet because of the manner it was drafted. I have had a perusal of the charge sheet and in my considered view though there is an error in it, the error is quite insignificant and does not in any way make it at variance with the evidence tendered.

19. The charge sheet presented to trial court read as follows: -

> **''Rape in the view of a family member, a person with mental disability contrary to Section 7 of Sexual Offence Act Number 3 of 2006''.**

The provision of **Section 7 of Sexual Offence Act** refers to sexual assault generally and refers it as: -

> **''Acts which causes penetration or indecent acts committed within the view of a family member, child or person with mental disabilities''.**

The drafter of the legislation used the conjunctive word ''**or**'' after a coma in order to bring out the clarity but when the prosecution drew the charge, it apparently left out both the coma and the conjunctive word **''or''** which completely changed the statement of offence. The learned trial magistrate appears to have misdirected himself in trying to correct the anomaly because all that he was required to do was to invoke the provisions of **Section 382 of the Criminal Procedure Code** and correct the error or the omission in the charge sheet. The correction in my considered view word not have occasioned any miscarriage of justice to the Appellant. This court hereby invokes the said provision in rectifying that error or omission in the charge sheet presented to the trial court because in my considered view so long as a charge sheet clearly discloses that an offence known in law occurred and there are sufficient particulars to support the charge with sufficient detail to enable an accused person answer to it or take an informed plea, the charge is sustainable. Courts need to be vigilant on this because victims of crime most a time have no role in drafting of charges presented in court and so if a victim falls onto a poor drafter, he/she should not be denied justice on account of poor drafting.

Either the court taking plea should defer the plea until the charge sheet is properly drawn or if it finds itself in a corner and only notices the defect when writing the judgement then either invoke the provisions of **Section 382 of Criminal Procedure Code**, if the accused person is not prejudiced or invoke the provisions of **Section 179 of the Criminal Procedure Code** if the evidence tendered discloses an offence known in law.

Section 179 of the Criminal Procedure Code

> ''***(1) When a person is charged with an offence consisting of* several *particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.''***

20. Having said that looking at grounds of Appeal, argued before this court, this court finds that the appeal mainly raises two issues which are: -

> **(a) Whether the prosecution case was proved beyond reasonable doubt.**
>
> **(b) Whether the defence was considered**.

21. (**a) Whether the Prosecution's case was proved to the required standard.**

I have considered the Appellant's main contention which can be summarized as follows: -

> **(i) He says the age of the victim was not established.**
>
> **(ii) He also says there was no medical report to establish that the victim had mental disability.**
>
> **(iii) That penetration was not established.**

22. This court finds that the Appellant has pointed out key ingredients of the offence under which he was charged and convicted.

I will begin with the age of the victim. I have perused through the evidence tendered and find that Prosecution Witness 5 tendered a copy of the birth certificate of the victim which was exhibited as Exhibit 4. The birth certificate indicates that the victim was born on **3rd May,1999**.

According to the victim's mother, the age of the victim was 18 years which is reflective of the information in the certificate of birth notwithstanding that the birth certificate suggests she was **19 years** old at the time of the incident. The one-year difference in my view is

insignificant and does not mean that the age of the victim was not established. There is no much difference whether the victim was aged **18 years** as stated by the mother (**PW1**) or 19 years was indicated by the birth certificate (**P Ex. 4**) in any event.

23. On the question of the mental disability, this court finds that the evidence tendered by the prosecution contrary to the Appellant's contention, sufficiently proved that the victim suffered mental disabilities. In this regard, court is persuaded by the following: -

> **(a) The evidence tendered by clinical officer (PW4) which was the mental assessment report dated 14.8.2018 (P. Exhibit 3) shows that the victim was mentally challenged. That report corroborated the evidence of the mother (PW1) and PW2 (the cousin).**
>
> **(b) The trial court noted in its judgement that the victim was present in court during trial and this is what the learned trial magistrate noted;**
>
> **''She was present in court but could not testify.''**
>
> **She is given to flights of fancy and outbursts of laughter. A medical assessment report produced as exhibit 3 described her condition as birth asphyxia''**

24. The evidence tendered by the prosecution in relation to the mental state of the victim, in view of the above proved beyond doubt that the victim was mentally challenged. The big question is whether the evidence tendered really proved that the victim was raped or violated sexually.

25. It is true that, to establish a charge of rape, defilement or indeed an offence of a sexual nature, penetration is a key ingredient.

The question that crops up is did the evidence tendered by the prosecution prove penetration? This court is cognizant of the fact that cases of this nature involving imbeciles or people with mental disabilities is at times hard to prove because most often if not always, the victims are either unaware of what happened to them in the first place or cannot express themselves.

26. I have perused through the evidence tendered. I find the evidence of **PW2** and **PW3** corroborative to the evidence tendered by the medical officer **(PW4).** According to the medical officer the presence of epithelial cells found in genitalia could have been caused by sexual act or friction on the vaginal walls. PW2 and PW3 found the Appellant on the act literally and even if the examination done on the victim's genitalia revealed no bruises or any foul smell as pointed out by appellant in my view that alone does not mean there was no sexual contact. As a matter of fact, the medical officer when challenged by the Appellant during cross examination was candid. He retorted ''I did establish that there was a sexual act''

27. The Appellant contends that there was no evidence that force was used which is true but this is a matter involving a mentally retarded person. It is also true that the victim's hymen may have been broken in an earlier encounter. It is difficult to tell whether it was broken by the same culprit (because evidence was tendered showing that he was a frequent visitor and a neighbour who could come and spend nights in that homestead) but what is beyond doubt is that on **7th July, 2018** at around **8:00 PM** behind the kitchen he was caught in the act. The fact that the mother never testified as an intermediary pursuant to the provisions of Section 31 of the Sexual Offence Act does not render the finding of the trial court erroneous. It is true that the trial court was required to declare the victim **''a vulnerable witness''** and allow the mother or guardian testify on her behalf but the victim's mother testified on her own behalf and the finding by the trial court in relation to the penetration had nothing to do with her evidence.

Penetration was established by the medical officer and exhibits tendered and the evidence of **PW2** and **PW3** who find the culprit in the act.

28. The Appellant contends that his defence was not considered but I have looked at the proceedings and noted that the trial court considered his defence. The Appellant had a brief unsworn defence. He simply denied the offence and stated that he had a land dispute with the victim's mother. He further went on to request to be placed on probation if found guilty. The trial court found that despite the fact that the charge sheet was poorly drafted, the Appellant knew the offence under which he was charged which in my view is key. It is key because as I have observed above there is no denying that the charge and the particulars thereof were drawn badly, but still that notwithstanding the charge and particulars disclosed an offence known in law and with sufficient detail to enable the Appellant answer to it. He was not, so to speak, exposed to unfair trial because he was able to defend himself against accusation levelled against him. He did not tender any evidence to show that there was a land dispute or point differences between him and the victim's mother or the family to raise some doubts about the prosecution's case. In my reassessment/re-evaluation of the defence put forward, I find no tangible evidence that any of the prosecution's witness had a grudge against him or could have been motivated to fix him for whatever reason.

In the end this court finds no merit in this Appeal save that his conviction should have been under **Section 7 of Sexual Offence Act** and not under **Section 5(1) of Sexual Offence Act** as indicated in the judgement from the trial court. This court herby sets aside the conviction of the Appellant under **Section 5 (1) of Sexual Offence Act** and in its place the conviction is hereby entered against under **Section 7 of the Sexual Offence Act**. The sentence of **10 years** is upheld since both sections prescribes the sentence of not less than 10 (ten) years.

Dated, Signed and **Delivered** at **Kitui** this **11th** day of **February, 2021.**

HON. JUSTICE R.K. LIMO

JUDGE