



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E032 OF 2021

BENSON NYAGA NDERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act. The particulars of the charge are that on the 30th day of March, 2017 in Mbeere South Sub-County within Embu County intentionally and unlawfully caused his penis to penetrate the vagina of MW without consent.
2. The appellant also faced an alternative count of Indecent Act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, the particulars of the charge being that on the 30th day of March 2016, within Embu County intentionally and unlawfully touched the vagina of MW with his penis.
3. He pleaded not guilty to the charge and in support of the case, the prosecution called six (6) witnesses and at the close of the prosecution's case, the appellant was placed on his defence. He tendered unsworn defence and called no witnesses.
4. In a judgment delivered on the 16th day of December, 2019, the trial court convicted the appellant in the alternative count but acquitted him in the main charge and sentenced him to serve ten (10) years in prison.
5. Being dissatisfied with the conviction and the sentence, the appellant appealed to this court vide a petition of appeal filed on the 4th day of February, 2020 wherein he has listed five (5) grounds of appeal but looking at them, he has essentially raised one ground to the effect that his defence was not considered by the trial magistrate.
6. In her response, counsel for the respondent submitted that the appeal is misconceived for the reason that the appellant herein was heard in Criminal Appeal No. 6 of 2019 and therefore this matter is *res judicata*. She urged the court to dismiss the appeal.
7. In this regard, the court has perused the relevant record and in particular Criminal Appeal No. 6 of 2019 and I have noted that the said appeal related to a different person namely Benson Nyaga who had been charged with the offence of defilement in respect to a different complainant and on different dates. The said submission by the respondent is therefore misplaced.
8. The offence of rape and the ingredients of the same are provided for in Section 3(1) of the Sexual Offences Act No. 3 of 2006 as follows:
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3.(1) A person commits the offence termed rape if –

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration;

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

9. On the other hand, the offence of indecent act with an adult is provided for in Section 11A of the Act as follows: -

11A. Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.

10. The complainant testified as PW1. It was her evidence that, on the 30/03/2017, in the evening, she was heading home from the borehole to fetch water using a donkey when she heard footsteps from behind. The person held her by the hand and took her to a nearby valley, removed her clothes including her pant and a biker, lay on top of her and promised her a present in the form of money and asked her not to report the incident. The person penetrated her using his male genital organ. She stated that she did not know the person but she was able to identify him.

11. That, after the incident the appellant threatened to harm the complainant with a knife if she told anybody about the incident. She went home and told her mother who took her to hospital the following day.

12. It was her further evidence that the appellant went to their home the following day and she ran away for safety and hid in the terraces and according to her, the appellant was wearing the clothes that he had worn on the date of the incident which were white in colour. She stated that she used to see the appellant in their locality before the incident and that she did not have any grudge with him. She could not scream because the appellant had covered her mouth with his hands.

13. The mother of the complainant testified as PW2. She testified that she had sent her to fetch water with a donkey but the donkey went back alone with the water. She stated that the complainant suffers from mental ailment or retardation. She decided to follow up and went to the borehole but she did not find her. Upon going back home, she found PW1 at home crying and narrated to her how a person held her hand about 200 meters away from home and pulled her into the shrubs and pushed her down in a ditch.

14. That the person removed his penis and inserted it into her vagina and when she tried to scream, the person threatened to knife her and so she kept quiet. That the person had sexual intercourse with her after which, he asked her to go and not tell anybody and he promised to give her something in compensation.

15. She reported the incident at Makima AP Post and she was advised to take the complainant to hospital, which she did.

16. That on the 31st of the same month she was informed that the appellant was in her shamba and in the company of her son, Titus, (PW3, they arrested the appellant and took him to Makima AP Post where he was re-arrested and taken to Kiritiri Police Station where she reported and she was issued with a P3 Form.

17. On the first element of intentional and unlawful penetration, though the complainant testified that the appellant penetrated her using his genital organ, the evidence of PW6 does not support her evidence. Dr. Phyllis Muhonja (PW6) produced the P3 form which was filed by Dr. Njiru, on the 6th day of April, 2017. In his examination, there were no bruises in the vulva and the vaginal wall and the hymen was previously perforated. He saw her six days after the incident and he used the details that are in the treatment notes.

18. It was her evidence that the P3 indicates that the penetration was before the incident and that though there may have been penetration, it was not noted in the P3 form. Going by that report, the prosecution did not prove that there was penetration of the genital organ of the appellant into that of the complainant.

19. On the identification, the complainant was able to identify the appellant. It was her evidence that the appellant went to their home the following day and she ran away for safety and hid in the terraces. She was able to identify the clothes that the appellant wore on the date of the incident and even the colour, which she stated was white. It was her further evidence that she used to see the appellant in their locality before the incident.

20. In the case of **Peter Musau Mwanzia Vs Republic [2008] eKLR** the Court of Appeal had this to say about the evidence of recognition;

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time the witness, in seeing that the suspect at the time of the offence can recall very well having seen him earlier on or before the incident.”

21. It is clear that the complainant knew the appellant and did not have difficulties in recognizing him as the perpetrator.

22. On the aspect of the consent, Sections 42, 43, 44 and 45 of the Sexual Offences Act No. 3 of 2006 deals with this subject. **Section 42** states as follows;

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

In Section 43(1);

An act is intentional and unlawful if it is committed –

(a).....

(b)

(c) *in respect of a person who is incapable of appreciating the nature of an act which causes the offence.*

In Section 43(2)

The coercive circumstances, referred to in subsection (1)

(a) *include any circumstances where there is –*

(a) *use of force against the complainant or another person or against the property of the complainant or that of any other person.*

Section 43(4)

The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act –

(a)

(b).....

(c).....

(d).....

(e) *mentally impaired; or*

(f).....

23. In her evidence PW2 stated that the complainant is mentally retarded and therefore incapable in law of appreciating the nature of the act that she was indulging into and could not have given her consent. However, as the court has already found, the prosecution did not proof that there was intentional and unlawful penetration.

24. In view of the foregoing, I find that the learned magistrate was right in acquitting the appellant in the main count.

25. On the alternative count, there is ample evidence by PW1 that the appellant committed an indecent act with her by removing her clothes including a biker and a pant.

26. However, I find that the appellant was charged and convicted under the wrong Section of the law in that he was charged under Section 11(1) instead of 11A of the Sexual Offences Act. The evidence of PW2 who is the mother to the complainant is that the complainant was aged 29 years and therefore an adult. He ought to have been charged with indecent act with an adult and not indecent act with a child.

27. The sentence provided for under Section 11(1) is 10 years imprisonment while Section 11(A) provides for a sentence of five (5) years.

28. In view of that, I hereby set aside the sentence of 10 years and substitute it with a sentence of five (5) years. The period that he spent in custody being one year and four months be deducted from the sentence.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF AUGUST, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent