REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.69 OF 2019

BENARD JUMA MASINDE……..…..….APPELLANT

VERSUS

REPUBLIC……...…….….RESPONDENT

*(An appeal from conviction and sentence in original **Bungoma CMCR S.O 63/2018** delivered on **10.5.2019** by **Hon. J. King'ori - Chief Magistrate**)*

JUDGEMENT

The Appellant **BENARD JUMA MASINDE** was charged with offence of rape contrary to Section 3 (1) (a) as read with Section 3 (3) of the Sexual Offences Act No. 3 of 2006.

He also faced an alternative charge of indecent Act contrary to Section 6(a) of the Sexual Offences Act NO. 3 of 2006.

After full hearing where the appellant also gave sworn evidence, the appellant was found guilty of the main charge of rape convicted and sentenced to serve 40 years imprisonment.

Aggrieved by the conviction and sentence the appellant appealed to this court on the following grounds:

1. That the trial magistrate erred both in law and facts by imposing a 40 years sentence upon me which is excessive.

2. That the learned trial magistrate grossly erred in law and

3. facts by failure to consider that appellant defence and more so to call its crucial witnesses to rebut the same in accordance with Section 212 of CPC.

4. That the learned trial magistrate grossly erred both in law and facts to admit the evidence of sign language interpretation done by the sister to the complainant who is not an expert in such evidence as admissible in law contrary to Section 48, 49, 50, 52 of evidence act Cap 80.

5. That the learned trial magistrate grossly erred both in law and facts to accord an unfair trial to the appellant contrary to article 25 (c) 50 (2) (p) (h) (g)

6. That the learned trial magistrate erred in law and facts by failure to consider that the prosecution witnesses were not credible.

7. That the trial grossly erred in both law and facts by failing to order for extraction of blood and spermatozoa for purposes of DNA and forensic tests thus the case was not proved to the regained standard this is contrary to Section 36 (1).

The Appellant filed further supplementary grounds on 31.7.2019 which are that:

1. That the complainant was genuinely believed to have consented to penetration from her Acts.

2. That the prosecution failed to prove their case to the required standard by inviting a sign language Expert to interpret and communicate with complainant's signs.

3. That no medical/expert examined nor assessed mental status of complainant.

The evidence before the trial court was that the complainant JW was aged 25 years. She is deaf, dumb and physically challenged and is unable to use her lower limbs and is therefore moves by way of assistance of wheel chair. For purpose of the proceedings she is a vulnerable witness in terms of Section 31 of the Sexual offences Act.

On 11.7.2018 at around 3 p.m. PW1 SS the brother of the Complainant left her outside in their house in her wheel chair and went to fetch water from a well. When he came back, he found the wheel-chair outside but complainant was not there. He checked the house and in one of the bed-rooms he found appellant standing next to the complainant who was lying on a mattress on the flour on her back. She appeared in pain and was naked. He asked Appellant what had happened and appellant stated that he had assisted her to the house. He suspected that the complainant had been raped. He raised an alarm and people came including Protus Makhanu a neighbour. He informed Protus what he had seen. They then took the complainant to hospital where it was confirmed that she had been raped. Matter was reported to police and appellant as arrested and charged.

PW3 Protus Simiyu Makhanu was at his home when he heard noise from home of the complainant. He went there and found accused in the sitting room with complainant and her brother S. S explained what he had found and they took complainant to Kabula Dispensary and alter Bungoma County Referral Hospital where she was examined. PW4 Elias Alukwe a clinical officer at Bungoma Referral Hospital examined the complaint and found she had blood spots at Vagina orifice, and there were presence of white discharge. He concluded that the complaint had been raped.

The Appellant gave sworn evidence. He testified that he wanted a shamba and demanded his payment but was not paid. He was then arrested. He was charged and first saw the complainant in court.

It is upon this evidence that he was found guilty and convicted.

The appellant filed written submissions. In his submissions, the appellant submitted that the acts of the complainant suggested that she genuinely consented to penetration. This is because when her brother found her in the bed room she was naked, lying on the mattress facing up on her back suggesting she consented to the act. Further the fact that she was not screaming or crying suggested she consented to the act.

The appellant further submitted that the complainant was not mentally assessed to show that she was unable to speak and communicate in sign language before she was declared a venerable witness. This he submits was the violation of the tenets of a fair trial and a violation of appellant's rights. Appellant submitted that the court did not consider his defence and that the sentence of 40 years imprisonment was excessive and harsh.

Finally he submitted that no DNA analysis was done and therefore the charge was not proved.

M/s Nyakibia for the state opposed the appeal. Counsel for the Respondent submitted that all the ingredients of the offence of rape were established. She submitted that the applicant was a neighbour to the complainant and therefore known. He was found in the house. The complainant was found having been undressed and raped which was confirmed by the doctor, and that the complainant being a person who is mentally hand capped was not able to give consent and that the sentence of 40 years imprisonment imposed was appropriate.

The appellant was charged with offence of rape contrary to section 3(1) (a) as read with Section 3 (3) of the Sexual offences Act. See 3(1) provides

The prosecution in a charge of rape must prove the ingredients of the offence which are:

1. The complainant was an adult

2. There was penetration

3. That the complainant did not consent to the Sexual Act leading to penetration or consent obtained by means of threats or intimidation.

4. Identification of the accused as the person who did the act of penetration.

There is no doubt that the complainant was an adult. The age in the P3 form of the complainant is indicated as 25 years. The evidence of PW1 the brother also indicated that she was and adult aged 25 years old.

The second ingredient is whether there was penetration. Penetration as defined in Section 2 of the Sexual offences Act means the partial of complete insertion of the genital organ of a person into the genital organ of another person.

Penetration can be proved by direct evidence of the complaint and confirmed by medical examination. However as in this case where the complainant is unable to express herself, by medical examination. PW4 who examined the complaint testified that upon examination of her genital organ, he found blood spots on the vaginal orifice and whitish fluid was coming from the vaginal orifice. As a result of the examination he concluded that there had been penetration. The evidence of the brother of complainant was that he had left the complainant outside in her wheel chair. When he came back he found her in bed-room lying down on a mattress naked and appellant was in that room. Even when PW2 came he found the appellant in the house. There is no dispute by the appellant in his brief defence about this fact. I am satisfied that therefore that the evidence placed appellant at the scene.

The appellant in this submission raised two main issues:

1. That there was no medical evidence to show that complainant was deaf, dump and physically challenged as to make him to be a vulnerable witness for her not to testify.

2. A vulnerable witness in under Section 2 of the Sexual Offences Act is defined accordingly:

> ***"Vulnerable person means a child, a person with mental disabilities or an elderly person and vulnerable witness shall be construed".***

While in borderline cases, there may be need for Medical Examination report to confirm disability of the complainant, for him to give congent testimony in obvious cases where by observation of court, the witness is physically or mentally challenged, the court by observation ought to make a note of that disability and declare the complainant a vulnerable witness under the provisions of Section 31 of the Act. This therefore will set the stage for reception of evidence of other witnesses to testify or their behalf.

The appellant submits that the trial magistrate failed to consider appellant defence.

Upon perusing the judgment, I am satisfied he duly considered the appellant brief defence but rejected the same.

Finally the appellant submits that the prosecution failed to extract the blood and spermatozoa for DNA analysis to prove that he is the one who penetrated the complainant. It is now settled that penetration ought not to be deep or result in ejaculation of spermatozoa for it to amount to penetration under the Sexual offence Act. Penetration can be partial or complete to amount to penetration under the act. The fact that DNA analysis was never done does not water down the evidence adduced by the prosecution.

The last submission is that there was no evidence that the complaint never consented to the act. Sec 44 (1) of the Sexual offences Act provides:

> *1. If in proceedings for an offence under this act, it is proved-*
>
> > *(a) That any of the circumstances specified in subsection (2) existed; and*
> >
> > *(b) That the accused person knew that those circumstances existed, the complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it.*
>
> *2. The circumstances are that-*
>
> > *(a) Any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;*
> >
> > *(b) Any person was, at the time of the offence or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;*
> >
> > *(c) The complainant was, and the accused was not, unlawfully detained at the time of the commission of the act;*
> >
> > *(d) The complainant was asleep or otherwise unconscious at the time of the commission of the act;*
> >
> > *(e) Because of the complainant's disability, the complainant would not have ben able at the time of the commission of the act to communicate to the accused whether the complainant consented;*
> >
> > *(f) Any person had administered to or cause to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the commission of the act.*
>
> *3. In subsection (2)(a) and (b), the reference to the time immediately before the act is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.*

The Appellant was a person with mental capacity. She could not therefore give consent that is necessary to find that there was no rape.

In my finding I am satisfied that the appellant conviction for offence of rape was supported by evidence and proper.

The appellant submits that the sentence of 40 years imposed was harsh and excessive. Section 3(3) of the Sexual Offences Act **observes**:

> ***"A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."***

The provision provides for a minimum sentence of 10 years imprisonment but can be enhanced to life imprisonment.

I hereby set aside the sentence of 40 years imposed substitute thereof the term of twenty (20) years imprisonment.

Dated at BUNGOMA this 29th day of January, 2020.

S. N. RIECHI

JUDGE