REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 10 OF 2018

GMM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. C. A. Mayamba (SRM) in

Kilungu Senior Resident Magistrate's Court Sexual Offence No. 42 of 2017 delivered on 20th March, 2018).

JUDGMENT

1. **GMM** the Appellant was charged with the offence of Rape contrary to Section 3(1) (a) (b) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 25th November, 2017 in Kilungu County within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of **MM**, without her consent.

2. In the alternative count he faced a charge of committing an indecent act with an adult contrary to section 11(a) of the Sexual Offences Act No. 3 of 2007(2006). The particulars were that the Appellant on the 25th November, 2017 in Kilungu County within Makueni County, intentionally touched the vagina of **MM**, with his penis against her will.

3. After a full hearing he was found guilty, convicted and sentenced to ten (10) years imprisonment on the main count of rape. Being aggrieved with the judgment he filed this appeal raising the following grounds;

***i) That** the trial magistrate erred both in law and fact by failing to observe that the court was duty bound to make an independent opinion in relation to the burden of proof and not to make an independent opinion in relation to the burden of proof and to shift it to the Appellant as there was no credible evidence to prove penetration.*

***ii) That** Trial learned trial magistrate erred in law and in fact in convicting the Appellant against the prosecution evidence and when there was no evidence to connect the Appellant to commission of the offence.*

***iii) That** learned trial magistrate erred in law and in fact in convicting the Appellant when there was no corroboration on the evidence of the complainant and without warning itself of the danger of acting on uncorroborated testimony of the complainant.*

***iv) That** learned trial magistrate erred and misdirected himself in failing to find that the burden of proof in criminal cases is beyond reasonable doubt.*

***v) That** the learned trial magistrate erred in shifting the burden of proof to the Appellant and finding that he had a duty to discharge to court.*

***vi) That** the learned trial magistrate erred in points of law and fact by failing to evaluate the evidence as a whole and as a result reached to a decision which was insupportable having regard to the entire evidence adduced.*

***vii) That** the learned trial magistrate erred in law and fact by convicting the Appellant without evidence of incapacitation of the complainant.*

***viii) That** trial court erred in law and in fact by not discrediting the evidence of the prosecution witnesses was full of contradictions and inconsistencies.*

***ix) That** the trial court erred in law and in fact in convicting the Appellant when there was no medical evidence.*

4. The prosecution called four (4) witnesses to prove its case. PW1 (MM) the complainant was born on 22nd November 1995 (birth certificate EXB4). It was her evidence that the Appellant whom she knew asked her to go to his house. He removed her clothes, and made her to lie on the grass.

He inserted his penis into her genitals. She felt pain and screamed and he warned her to keep quiet.

5. When he was through he went away and she went home and reported to her mother (PW2). She said it was not the first time she was engaging in sex with the Appellant. She was taken to Kola hospital.

6. Her mother **JM** who testified as **PW2** said her daughter PW1 is epileptic. On 25th November 2017 around 6.00 p.m., she realised the girl was not at home and she got worried. She called her and her sound came from the direction of the Appellant's home. She came carrying some little firewood and she noticed grass on her body and hair. On inquiring PW1 told her the Appellant had removed her pant and done bad things to her.

7. She took PW1 to Kola hospital and reported at Kola police station from where she was referred to Nunguni hospital. She identified the treatment card, P3 form and PRC form (EXB 1-3) and she produced PW1's birth certificate (EXB 4).

8. In cross examination she denied owing the Appellant any money. She further said PW1 is an adult and dependent on medicine. She said her reason for the delay in taking PW1 to hospital was lack of money.

9. **PW3 Eric Kasiamani** a clinical officer from Kilungu hospital stated that PW1 was examined on 30th November 2017.

She had been referred from Kola to Kilungu for further management and treatment. She complained of having been raped. Upon examination her genitals were found to have no injuries. Hymen was broken, high vaginal swab revealed yeast cells and pus cells; H.I.V test and pregnancy tests were negative. His conclusion was that PW1 had been defiled. He produced the outpatient card (EXB 1(a)) and Kila (EXB 1 (b)); P3 form (EXB 2) and PRC form (EXB 3). He confirmed having done a urinalysis but he produced no results.

10. **PW4 Cpl. John Mburu** is the investigating officer. He said the Kola police station received PW1's report of defilement on 30th November 2017 at 1.00 p.m. PW1 was accompanied by her mother PW2. She was not fluent in her speech but he recorded their statements. He instructed the area assistant chief to arrest the Appellant. He visited the scene and confirmed that the Appellants and PW2's homes were 150 meters from the scene. That the scene was a foot path and bush and he was led there by PW2.

11. In his unsworn defence the Appellant denied the offence adding that PW1 was his cousin. He explained that on 24th November 2017 he went to PW2 to get his money (Kshs. 3,500/=) borrowed by her. She did not give him the money and instead threatened him and promised to have him jailed. The next day he stayed home throughout with his father. On 26th November 2017 PW2 called at their home and asked him to go with his parents to their home that evening, and he went with his father. PW2 claimed that PW1 had been raped, the previous day.

12. He said he was the suspect in the matter but he was not examined. On 3rd December 2017 he reported the issue of the money and rape to the assistant chief. They were referred to Kola police station from where he was arrested.

13. Both parties filed written submissions which were highlighted by their respective counsel. Mr. Hassan submits that in the judgment the court held that due to the complainant's mental incapacity she was unable to give consent. He contends that there was no medical evidence adduced on the complainant's mental incapacity. Relying on two cases i.e. **David Mwangi Njoroge –Vs- Republic (2015) eKLR (2) Wilson Morara Siringi –Vs- Republic (2014) eKLR** he submitted that unless proved otherwise the assumption is that everyone is sane. Further that the alleged mental incapacity did not absolve the issue of consent.

14. Counsel went further to submit that the medical evidence is that the hymen was broken, but there were no injuries to the complainant. The question is whether the hymen was freshly broken. He argued that if any sex occurred it was consensual.

15. He submitted further that from the evidence of PW1 and PW4 it is not clear what the scene of the incident was. That according to PW4 he was led to the scene by PW2 and not PW1. Such inconsistencies should have been resolved in the Appellant's favour. He also contends that the Appellant's *alibi* was disregarded by the trial court.

16. In opposing the appeal Mrs. Gakumu counsel for the Respondent submits that the evidence adduced by the prosecutor was cogent and reliable. On consent she argues that the court noted PW1's incapacity which was confirmed by PW2. She contends that PW3 stated that PW1 had been penetrated which corroborated PW1's evidence on this. That the scene was as described by PW1 and confirmed by PW2's evidence showing there was grass on PW1's clothes. PW4 also talked of a bush.

17. On the *alibi* defence she submits that the Appellant called no witness, especially his father whom he alleged to have been with. On this issue she further argues that Section 124 of the Evidence Act does not require an eye witness.

18. On the sentence of ten (10) years imprisonment she submits that it was a minimal one and should not be interfered with.

19. In a rejoinder, Mr. Hassan submits that on 24th January 2018 the court made an order for the Complainant to be examined by a psychiatrist. He argues that Section 22 (1) of the Mental Health Act provides the procedure on how a mentally challenged person is to be examined.

20. This is a first appellate court and it is under duty to re-examine the evidence adduced before the trial court and arrive at its own conclusion. In the case of **Odhiambo –Vs- Republic (2015) I KLR** it was held;

> ***"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."***

21. I have considered the evidence on record, the grounds of appeal, the rival submissions and the authorities cited. The two issues I find falling for determination are;

> *(i) Whether there was penetration of PW1 genital organ.*
>
> *(ii) If the answer to (i) is in the affirmative the issue would be whether PW1 consented to the penetration.*

22. It was PW1's evidence that she was asked by the Appellant to go to his house. From the evidence the sexual encounter was not in the Appellant's house but on the grass. She demonstrated to the court how it happened. PW3 the clinical officer was clear that the only observation that made him conclude that PW1 had been raped was the broken hymen. Otherwise there were no injuries on the genital area while the tests done were negative.

23. In her own evidence PW1 at page 6 lines 16-17 states;

> ***"It was not the first time (Amenidunga na kijiti yake kubwa mara mingi."***

At page 6 lines 20-21 she states in cross examination;

> ***"You have done it very many times."***

With this confession by PW1 it is clear that the finding by PW3 has a lot of question marks. If indeed PW1 and Appellant had been sexually involved with each other severally her hymen could not have been said to be broken as a result for the sexual intercourse of 25th November 2017.

24. PW3 did not explain as to whether the breakage was a fresh or old one. The position would have been different if he had said that the hymen was missing. PW1 told the court that she had had sex with the Appellant several times. There is no evidence that she had ever reported to her mother (PW2) or anybody else what she had been involved in with the Appellant. One is left to wonder what was so special about the encounter of 25th November 2017. I find no answer to this from the evidence adduced. Further a broken hymen per se is not proof of sexual intercourse.

25. It therefore means that the only evidence available to confirm penetration of her genital organ is that given by PW1. Was her evidence credible? The trial magistrate who saw and heard her found her to be a credible witness and has stated so in his judgment. Section 124 Evidence Act provides;

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
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> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

26. From this provision the court can rely on the sole evidence of a victim of sexual assault to convict. Following PW1's demonstration and evidence on what happened I agree with the learned trial magistrate that indeed there was penetration of PW1's genital organ.

27. This brings me now to issue no. (ii). Did PW1 consent to the sexual encounter? Section 42 and Section 43 of the Sexual Offences Act are relevant here. They provide as follows;

> ***Section 42.*** *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.*
>
> ***Section 43(1).*** *An act is intentional and unlawful if it is committed-(a) In any coercive circumstance;*
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> *(b) Under false pretences or by fraudulent means; or*
>
> *(c) In respect of a person who is incapable of appreciating the nature of an act which causes the offence.*
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> ***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;

(b) Threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) Abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

Section 43(3). *False pretences or fraudulent means, referred to in subsection (1) (b), include circumstances where a person –*

(a) In respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;

(b) In respect of whom an act is being committed, is led to believe that such an act is something other than that act; or

(c) Intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmissible disease.

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) Asleep;

(b) Unconscious;

(c) In an altered state of consciousness;

(d) Under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;

(e) Mentally impaired; or

(f) A child.

Section 43(5). *This section shall not apply in respect of persons who are lawfully married to each other.*

28. The trial magistrate after a brief *voire dire* examination of just two questions made this observation at page 5 lines 16-17.

"The witness is slightly incapacitated. To give unsworn evidence."

Further in his judgment he made very serious findings which form some of the grounds of appeal. He stated this; at paragraphs 18 -20 page 25 of the R.O.A.

"In the instant case, this court was able to see the complainant who was a person with special

needs. Yes, she was an adult but as per the evidence of her mother, she required special needs owing to health conditions. In voire dire examination, it can be noted that she gave her age as between 5 and 6 years though she was visibly an adult.

In her condition, one cannot say that she had any free will to give a consent, as she lacked the mental capacity to grant any consent.

Further to that the complainant gave a testimony of the ordeal she went through. It was her testimony that she screamed 'uuiwi uuiwi' when accused had inserted his penis into her genitals. It is a distressed condition which cannot allude to any consent as was discussed in the case of ALLAN RED PATH cited above."

29. The Respondent has submitted that PW1 was mentally incapacitated as observed by the trial court. It is true that the court made an observation. Prior to this observation being made, the prosecution had on 24th January 2018 requested for time to take the complainant for psychiatric examination. The court did make an order to that effect. One would logically have expected the prosecution and the court to await the results of the said examination before taking the evidence of the complainant.

30. Surprisingly on 13th February 2018 the court proceeded to conduct a *voire dire* examination of the complainant (PW1) without any report on her exact mental status. No such report was ever produced before the closure of the prosecution case.

31. I have also noted from the evidence of PW2 (mother to PW1) that the complainant was epileptic and was dependent on medicine. She

also attends a special needs school. It was therefore very critical that a medical report on her mental assessment be filed in court. The doctor would have been in a better position to explain the level of her mental incapacity and whether she was in a position to make personal decisions or not. Her unsworn evidence and the answers in cross examination do not give the impression of a person who is incapable of making a decision. Her responses to questions in the examination in chief and cross examination are very clear.

32. With due respect to the trial magistrate I find that without medical backup he had no capacity to determine whether PW1 lacked the mental capacity to grant consent. Again PW1 said she felt pain when the Appellant inserted his penis inside of her. She is the same one who says that the two of them had done this thing so many times. Her mother denied hearing any screams yet their homes are not far apart. It is very unlikely that PW1 screamed.

33. At paragraph 21 of the judgment the trial magistrate states;

> ***"The fact that she had grass and soil on her hair and clothes was also indicative of lack of consent, as there is no person in his or her right minds goes engaging in sexual activity outside and on grass or soil."***

This finding is not backed by the law or any evidence on record. The court should therefore have restricted itself to what was before it.

34. In his defence the Appellant alleged that he was being punished by PW2 because of the money she owed him.

This had been put to her in cross examination and she denied it. He raised a defence of *alibi* saying on the material day he was home with his father. Whether he called his father as a witness or not it was the duty of the prosecution to displace that *alibi*.

35. From the above findings and evidence it is clear that at the time of the alleged incident PW1 was aged 22 years and an adult for that matter. She was therefore in a position to give or deny consent to anyone wanting sex from her. If she was incapacitated from making any such decision, then that fact had to be clearly proved to the court by the prosecution. Whoever alleges a fact must prove it. Section 107 of the Evidence Act provides;

> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

36. I agree with Justice Majanja's finding in the case of **Wilson Morara Siringi –Vs- Republic Migori High Court (2014) eKLR** where he states;

> ***"(15) In conclusion I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that***
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> ***the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. This approach is inconsistent with the provisions of Article 12 of the Convention on the Rights of Persons with Disabilities which requires State parties to recognise persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others. Kenya ratified this Convention in 2008 and by dint of Article 2(6) of the Constitution it forms part of the law of Kenya.***
>
> ***(16) It is therefore improper and inconsistent with the Convention and an affront to the right of dignity of a person protected by Article 28 to label any person as mentally retarded and proceed on the basis that the person is incapable of making a free choice to engage in sexual intercourse. What the Sexual Offences Act, 2006 requires is that the prosecution must prove beyond reasonable doubt that at the time the act of penetration is committed, the complainant was incapable of consenting by reason of mental impairment. In this case the prosecution failed to discharge that burden."***

37. The upshot is that the prosecution failed to prove that PW1 was not mentally fit to give consent in this incident. I find merit in the appeal which I allow.

38. **The conviction is quashed and the sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 20th day of February 2020, in open court at Makueni.

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H. I. Ong'udi

Judge