



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 33 OF 2019

CYPRIAN KIPRUTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable G. Adhiambo in Kapsabet Principal Magistrate's court Criminal Case No. 1583 of 2015 dated 18th November, 2015)

JUDGMENT

CYPRIAN KIPRUTO, the appellant herein, was charged in the lower court with the offence of Rape, contrary to *Section 3(1) (a) (b)* as read with *Subsection 3* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 27th day of June 2015 at within Nandi county, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of RM, without her consent.

In the alternative the appellant was charged with the offence of Indecent Act with an adult, contrary to *Section 11(A)* of the *Sexual Offences Act No. 3 of 2006*. The particulars of this offence being that on the 27th day of June 2015 within Nandi County, the appellant unlawfully and intentionally caused his penis to come into contact with the vagina of RM, against her will.

The prosecution case is that by the time of the alleged offence, the complainant who gave evidence as PW-1 was aged 70 years. She was living in her house alone at [*particulars withheld*] village. However PW-2 who is her daughter was her close neighbour. The appellant herein was their neighbour and PW-1 knew him since his childhood, while PW-2 had known him for about ten years.

On the night of 27/6/2015 at about 11.00 p.m PW-1 and PW-2 were asleep in their respective houses. PW-1 was woken up by a person who was forcefully opening the door to her house. The door opened and the person went to where she was sleeping. He took a blanket and covered her face. He removed her underpant and raped her. She screamed and PW-2 was woken up by the screams. She grabbed a torch and ran to the house of PW-1. She found both doors to the house open. The torch was on. She directed the light on the bed of PW-1 and saw the appellant (Cyprian) lying on top of PW-1. When he saw the torch light he stood and tried to escape. He had removed his gumboots and placed them under the bed. PW-1 had no pant and her skirt and blouse had been pushed upward. PW-2 grabbed the appellant tightly on his jacket. The appellant struggled to free himself out of the jacket. He managed and escaped leaving the jacket in the hands of PW-2 and the gumboots under the bed. Other neighbours turned up to assist, but after the appellant had vanished.

The following morning PW-2 took PW-1 to Kibiyet Sub County Hospital. She was examined and treated. They then reported at Kibiyet police station. PW-4 took the report and issued the complainant with a P-3 form. The P3 form was filled on 29/6/2015 by PW-5. The clinical officer found that she had bruises on the left side of the labia minora. There was no discharge from her vagina. Some taken samples were examined in the laboratory and no spermatozoa were noted. Epithelial cells were also absent. Blood was tested for HIV and the test was positive. However according to the witness she could not have been infected by the appellant, or in the alleged incident.

The appellant was also examined on 6/7/2015. No injuries were noted on his penis and there was no urethral discharge. Urinalysis revealed no spermatozoa and pus cells. VDRL test was negative as well as HIV. Their respective P3 forms were thus filled. The appellant was then charged.

The appellant defence is that on 27/6/2015 he completed work at 4.00 p.m and went to take beer till 6.30 p.m. He then went home and made supper. At about 8.00 p.m he headed to the centre for cigarettes. While at the centre he heard PW-2 had alcohol. He headed there for beer. He found that she had closed the door but lights were on. He called her out and asked her whether she had beer. She said she had opened the door. The appellant took chang'aa worth Kshs.80. He gave her 200/- note for the beer and expected 120 Kshs change. She said she had no change. She went outside and returned armed with a Jembe. The appellant asked where she was with the jembe and she said she

had gone to hide some things. The appellant said since she had no change he could leave his gumboots and collect them once he avails the KShs.80 for the beer. However, PW2 was not agreeable. She said she had to be paid. She threatened him with the jembe she had. Appellant tried to escape and she held on his jacket. He set himself free by removing the jacket. He ran away and she chased after him while screaming. He ran to his house and slept. The following morning he went to work to raise money to pay for the beer and get his items. On 1/7/2015 he was arrested. It was alleged that he had raped the complainant.

The trial court evaluated the evidence and found that the appellant had committed the alleged offence. He was convicted and sentenced to serve 15 years imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

- (1) The evidence was insufficient to support the charge and to warrant a conviction.
- (2) The medical report was not in support of penetration.
- (3) The trial was not fair.
- (4) The appellant defence was not given due consideration.

I have considered the charge, the evidence on record, judgment passed and sentence meted, the grounds of appeal and submissions by both sides.

Having done so, I have found that this is a case in which the prosecutor called well for the relevant evidence of which was well recorded by the trial court. The appellant's defence was as well properly recorded. The entire evidence was meticulously weighed by the trial court in relation to facts and the applicable law, and the right decision made. It is a case where I need not say much, save for that, of which is actually a repetition, that the appellant in this case was arrested "red handed", in the act, by PW-2. PW-1's evidence is vivid that the appellant raped her. Though she used a technical term, being a woman aged 70 years and a mother, she definitely knew that rape is having sex without her consent. The circumstances under which PW-2 found the appellant and PW-1 makes it clear that he was raping the complainant. Identification was proper as the appellant was well known to both the witnesses (PW1 and PW2) for a long period, and when he was found he escaped leaving behind his jacket and gumboots, a fact he concedes to in his defence. The evidence of PW-5, the clinical officer, corroborates the evidence of PW-1 and PW-2 to the effect that there was penetration. Penetration probably was not full, but in law even partial or slightest penetration would suffice for the offence. The appellant's defence was just a crafted story. It was not covered during cross examination of PW-2 and was an afterthought. As it was rightly observed by the trial magistrate, it was contradictory for if PW-2 had the KShs. 200 the appellant wouldn't have left his gumboots as he alleged, and if he went with KShs.200 the following day he would have looked for change to go and pay KShs.80 and not work for KShs.80 so as to go and pay. The defence case was properly dismissed or rejected.

The sentence of 15 years imprisonment is lawful and given the circumstances of the case where the offence was committed against a senior citizen of 70 years, deserved. I find no ground on which I can rightly interfere with the conviction and or the sentence.

The appeal lacks merit and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED VIRTUALLY at ELDORET this 29th day of March, 2020.

In the presence of:-

- (1) Appellant in person
- (2) Mrs. Hellen Githaiga for State
- (3) Mr. Gregory - Court assistant