



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO 78 OF 2018

JOSEPH KOECH CHELANGA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE DECISION OF HON. SITATI (SRM) IN CRIMINAL CASE NO. 30 OF 2016)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

JOSEPH KOECH CHELANGA.....ACCUSED

JUDGMENT

1. The Appellant was charged with the offence of **Rape of a person with mental disability contrary to Section 7 of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 15th day of February, 2016 at around 1000 hours in [particulars withheld] village within Elgeyo Marakwet County intentionally caused his penis to penetrate the vagina of PJ without her consent within the view of PJ's mother.**
2. The alternative count was **committing an indecent act with an adult contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 15th day of February, 2016 at around 1000 hours in [particulars withheld] village within Elgeyo Marakwet County, intentionally touched the vagina of PJ with his penis against her will.**
3. The Appellant was convicted and sentence to 10 years' imprisonment hence this appeal. He has raised several grounds of appeal which the court shall consider hereunder. For now, it is necessary to summarise the evidence as presented during trial.
4. PW1 the Complainant who appeared confused and out of herself told the trial court that she was raped by the Appellant while she was in a chicken house. She said that her mother was milking cows. When cross-examined she said that she did not know why she was unable to scream.
5. **PW2 EK** said that the Complainant was her child and she was mentally retarded. She said that on the material day she met the Appellant as she was going to milk the cows. She had left the Complainant at home washing the utensils. When she came back she found the door to the house locked and the Complainant came out.
6. She went on to state that the Appellant was beside the door zipping his trouser and upon inquiring he said that he had done nothing. Her son then advised that she takes the complainant to Kapcherop health centre where it was confirmed that she had been raped. She then had the matter reported at the police station where she was issued with the P3 from which was later filled at the hospital.
7. On cross examination she said that she met the Appellant red handed and that her suspicion was confirmed at the hospital.
8. **PW3 LUKA KOSGEI KIPTOO** a Clinical Officer from Kapcherop Health centre examined the Complainant and produced the P3 form which he had filled. He found that there were sperms when vaginal swap was taken and that the Appellant on the other hand had some venereal disease when he was examined.
9. **PW4 PC SAMUEL SUNGUNYA** from Kapcherop police station took over the investigation from P.C **BENSON NJERU** who had been

transferred. He said that the Appellant was found to have raped the Complainant who was mentally challenged. He also produced the letter from the hospital which showed the Complainant's said condition.

10. When placed on his defence, the Appellant gave unsworn evidence denying the charges.

11. DW 2 NC who is the Appellant's younger brother said that they knew that the Complainant was mentally challenged and on the material day her mother was suspicious that she had been raped. He said that he went with her to Kapcherop health centre and at the said hospital it was PW2 alone who went inside. She later reported the matter but the Appellant denied.

ANALYSIS AND DETERMINATION.

12. The court ordered parties to file written submissions which they have done and which this court does not intend to reproduce them here.

13. The fundamental issue which has captured the mind of the court is the procedure taken by the trial court on the conduct of the matter once it was alerted or became aware of the mental condition of the Complainant. It appears from the record that it was notified by the Respondent of the mental state of the complainant and even during the trial the court noticed that she was *"laughing and smiling"*.

14. The court once it was seized of such complainant must then proceed as per the provisions of Section 31 of the Sexual Offences Act. The same states as follows;

"(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is:-

- a) **The alleged victim in the proceedings pending before the court;**
- b) **A child; or**
- c) **A person with mental disabilities.**

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable; a person with mental disabilities. Witness if in the court's opinion he or she is likely to be vulnerable on account of -

- a) **Age;**
- b) **Intellectual, psychological or physical impairment;**
- c) **Trauma;**
- d) **Cultural differences;**
- e) **The possibility of intimidation;**
- f) **Race;**
- g) **Religion;**
- h) **Language;**
- i) **The relationship of the witness to any party to the proceedings;**
- j) **The nature of the subject matter of the evidence; or**
- k) **Any other factor the court considers relevant.**

3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures:-

- a) **Allowing such witness to give evidence under the protective cover of a witness protection box;**
- b) **Directing that the witness shall give evidence through an intermediary;**

c) directing that the proceedings may not take place in open court;

d) Prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

e) Any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may:
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(a) Convey the general purport of any question to the relevant witness;

(b) Inform the court at any time that the witness is fatigued or stressed; and

(c) Request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including: –

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) Any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) The need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) The question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness."

15. Section 3 thereof provides that an intermediary may be summoned so as to explain the vulnerability of the witness. The court *suo moto* may declare such witness a vulnerable.

16. In the matter at hand this crucial step was not considered. The wisdom of the drafters of the said portion of the act was to ensure that there was due process followed for the benefit of the vulnerable person and by extension the accused. Although the procedure may not be mandatory, in the instant case the evidence of the Complainant needed some further collaboration. This discretion ought nonetheless to be exercised judiciously and in each particular case or on a case to case basis.

17. It is noted also that the Investigating Officer produced the report indicating the mental status of the Complainant. Despite the fact that there was no objection from the Appellant, taking the totality of the matter and the fact that the Complainant was of unsound mind the maker of the report should have been summoned to produce and be cross examined on it.

18. For the foregoing reasons, I shall not determine the other grounds of the appeal as this may compromise the rehearing of the case. This court therefore finds that this is a matter fitting retrial. The same is not very old and it is presumed that the witnesses can still be traced noting that they were neighbours after all.

19. In the premises, the appeal is allowed only to the extent that there be a retrial before another court with competent jurisdiction other than Hon. Sitati (SRM).

20. The Appellant shall be released on the same bond terms as imposed during the trial.

21. Orders accordingly.

Dated, signed and delivered via Zoom at Kitale on this 30th day of April, 2020.

H. K. CHEMITEI

JUDGE

30/4/2020