



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 48 OF 2019

MICHAEL KIPKOSGEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable H.M Nyaberi

in Iten Principal Magistrate's court Criminal Case No. 09 of 2016

dated 12th March, 2019)

JUDGMENT

In the main count, the appellant herein was charged with the offence of Rape, contrary to *Section 7* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 13th day of August 2016 at in Keiyo North Sub-County, within Elgeyo Marakwet County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of EJJ without her consent within the view of EJJ, a person with mental disabilities.

In the alternative the appellant faced an offence of committing an indecent act with an adult, contrary to *Section 11(A)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars hereof being that on the 13th day of August 2016 n Keiyo North Sub County within Elgeyo Marakwet County, the appellant intentionally touched the vagina of EJJ a person with mental disabilities, with his penis, against her will.

The prosecution case is that the complainant in this case was born in 1972. She is mentally challenged and unable to speak. She lives with her mother, the PW-1 in this case at [*particulars withheld*]village. On 13/8/2016 about 6.00 p.m, PW-1 left the complainant in the house and went to a neighbouring land to drive the goats home. While driving the goats home she heard the complainant screaming. She rushed home to find out what was happening to her. To her surprise she found the appellant pressing the complainant against the wall. The complainant's pant had been removed. When the appellant saw her, he wore his short and shirt. He was inclined to escape but PW-1 ordered him to stop and screamed. Neighbours turned up to

assist. Among them was PW-5 who held the appellant upon his arrival, H, A and K. They tied the appellant hands. PW-5 got into the house and saw one sandal therein, while the appellant was wearing the other. The victim was sitting on the floor crying. The appellant was taken to Kabulwo police station. They were told to take the victim. They took her and she was taken to Cheliget Health Centre. She was examined by PW-4 who noted that her pant had dry blood spot. She was mentally challenged, disabled, not oriented in place and time, and confused. There was presence of bruise on the labia minora and labia majora. On the vagina there was spermatozoa. The nursing officer concluded that she had been penetrated and ejaculated on. A P-3 form was filled and signed to that effect. The suspect was also examined. His penis was relaxed and no bruises were noted on it or his anus. No specimen were collected. He claimed to have had successive penetration and ejaculation due to influence of alcohol. His P-3 form was as well filled and signed.

The appellant was then charged. His defence is that he comes from the same village with the complainant and knows her. On 13/8/2016 he was arrested at 10.00 p.m. He was taking alcohol. He was taken to Kabulwo police post and then to Chegilet hospital for examination. He was then arraigned in court and charged.

The trial court evaluated the evidence and found that penetration was not established beyond reasonable doubt. However, the alternative count was and he was therefore acquitted of the main count and convicted on the alternative count. He was consequently sentenced to serve

10 years imprisonment.

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

- (1) The evidence was manipulated.
- (2) The charge sheet was fatally defective.
- (3) Presented reports were not cogent.
- (4) Prosecution case was full of discrepancies.
- (5) His defence was disregarded.

I have considered the charges preferred against the appellant, evidence adduced, judgment passed and the sentence. I have as well evaluated the grounds of the appeal and submission by both sides.

In the main count of rape there was a mix up where the wrong section was indicated as *Section 7* of the *Sexual Offences Act*, instead of *Section 3(1) (3)* of the said *Act*. The particulars of the offence towards the end brought in the other offence under *Section 7*, when it alleged the act was carried out within the view of EJJ, a person with mental disability. This EJJ is the one who was alleged to have been raped and there is no way offence under *Section 7* of the *Act* could as well have been committed against her. However, the mix up is insignificant as the appellant was acquitted of that offence.

The alternative count is in order in its statement of the offence and the particulars. It is not defective in any way. The evidence of PW-1 is well corroborated by the evidence of PW-5. PW-1 caught the appellant in the act and was arrested at the scene. The bruises noted on labia minora and majora of the complainant, and spermatozoa on it, shows that the appellant's penis got contact of her vagina. The complainant given her established mental condition was incapable of giving consent to the sexual activity, and gave no consent. The appellant's defence is of mere denial and offers no meaningful challenge to the prosecution case. The trial magistrate was therefore correct in dismissing it. I do find that the appellant was rightly convicted of the offence.

On the sentence, it is legal and fair. I find no reason of interfering with the same.

The appeal therefore lacks merit and is accordingly dismissed.

S. M GITHINJI

JUDGE

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

In the presence of:-

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