



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 4 OF 2018

SILAS NJAGI MAKEMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of

Hon. L. N. MESA (S.R.M) in the Principal Magistrate's Court at

Marimanti Law Courts in Criminal Case No.SOA 7 of 2017 dated 5th October 2017.)

J U D G E M E N T

1. **SILAS NJAGI MAKEMBO**, the Appellant herein was charged with the offence of rape contrary to **Section 3(1) (a) (b) (3)** of the **Sexual Offences Act No.3 of 2006**. The particulars presented to the trial court were that on 8th July 2017 in Tumbura Sublocation Tharaka South within Tharaka Nithi, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of GGW without her consent.

2. The Appellant did deny committing the offence but after trial he was found guilty of the offence of rape contrary to **Section 3(1) (a)** as read with **Section 3 (3)** of the **Sexual Offences Act**. He was convicted sentenced to serve 10 years imprisonment.

He felt aggrieved by both the conviction and sentence and preferred this appeal. Before I consider the grounds, I will consider a brief summary of the case against the appellant at the trial court.

3. The prosecution's case against the Appellant was hinged on the evidence of the complainant (PW1) who narrated the ordeal she underwent on the material date after tethering her goats on a hill near her home. The complainant's husband JG (PW2) corroborated the complainant's testimony as he told the trial court that he saw her wife coming downhill screaming that she had been raped. The couple went and reported the incident at Marimanti Police Station who referred the complainant to Marimanti District Hospital where she was examined and treated. The torn black pant was tendered as P. Exhibit 1 by investigating officer (PW3) while the P3 was tendered P. Exhibit 2 by Benard Mwenda (PW4) the clinical officer who examined and filled the P3. The medical officer opined that the complainant had been raped owing to presence of semen on the vagina wall of the complainant and a torn pant (P Exhibit 1).

4. When placed on his defence, the Appellant denied committing the offence saying he was implicated due to a boundary dispute over his father's land. He claimed that at the material time of the offence he was busy making bricks a claim that was supported by the wife (DW2) and a neighbour Gerevasio Mureithi Kautha (DW3) who both confirmed that the Appellant was with them making bricks. The trial court dismissed the defence and found the Appellant guilty.

5. The Appellant as I have observed above was dissatisfied with the trial court's verdict and lodged this appeal listing the following grounds namely;-

i) That the trial court erred by failing to note that there was no independent witness.

ii) That there was no swab taken to establish presence of spermatozoa.

iii) That the undergarment worn by the complainant was not produced in evidence during trial.

iv) That the prosecution's case was not proved beyond doubt.

v) *That the prosecution's evidence was conflicting and uncorroborated.*

vi) *That DNA test was not conducted to ascertain the truth.*

6. In his written submissions, the Appellant has submitted that the trial court should not have meted out the minimum sentence because of the decision in Denis Kinyua -vs- Republic [2017] eKLR which held that a court should exercise discretion. However this court finds that this new ground has been raised by the Appellant in his written submissions without first seeking leave to raise new grounds as provided under **Section 350 Criminal Procedure Code**.

7. The Appellant further contends that the prosecution's case was not proved beyond reasonable doubt. He avers that there were no treatment notes tendered and that the black pant tendered did not match the one worn by the complainant stating that the complainant's husband indicated that the pant was black with a red strip at the end.

8. The Appellant also contends that the pant tendered in evidence should have been taken for forensic analysis at the Government Chemist to see if it had any specimen connecting him with the pant.

9. He contends that the complainant was married and the semen found at her vaginal wall could have belonged to her husband and that the only thing that could have established who did the act was DNA analysis.

10. He also faults the clinical officer (PW4) who testified stating that he used to word "we" in explaining the action taken at the hospital. This in his view cast doubt in who actually carried out the examination of the complainant. He submits that all those referred to "we" should have been summoned to testify.

11. The Appellant has faulted the trial court for not recalling the prosecuting witness after he had asked the charges to be read afresh. This in his view exposed him to unfair trial. This ground however is belated and raised without leave of this court as provided under **Section 350 of the Criminal Procedure Code**.

12. He faults the trial court for rejecting his defence which he terms reasonable and raised doubts about the prosecution's case.

13. The Respondent has opposed this appeal through written submissions by Office of the Director of Public Prosecution dated 27th May 2020. The Respondent avers that it proved its case at the trial beyond reasonable doubt and it proved all the ingredients of the offence as defined under **Section 3(1) of the Sexual Offences Act**.

12. The Respondent contends that the act of penetration was proved by the complainant's evidence and that the P3 and the torn pant tendered in evidence during trial was sufficient proof. It is submitted that the Appellant opted not to cross-examine the complainant and this meant that the evidence tendered was the truth and unchallenged.

13. The State further avers that the clinical officer (PW4) who examined the victim noted the presence of semen in the victim's vagina and that the same indicated rape. It points out the torn pant is indicative of force used against the complainant against her will or lack of consent from her.

14. The Respondent further avers that it was not necessary for DNA test to be conducted to prove their case arguing that rape is not proved only by DNA but rather evidence. It has relied on the case of Evans Wamalwa Simiyu to buttress their contention.

15. The State further avers that the Appellant's defence was considered and the fact that he failed to cross-examination the victim and PW2 shows that his assertions that his defence was not considered is an afterthought.

16. This court has considered this appeal and the response made. The Appellant was as I have observed above charged with rape contrary to **Section 3(1) (a) (b)** as read with **Section 3 (3)** of the **Sexual Offences Act**. As submitted by the Respondent, there are 3 important ingredients which must be established and proved by the prosecution for a conviction to be found in an offence of rape. **Section 3 (1) of Sexual Offences Act** gives the 3 elements as follows:-

" A person commits the offence of termed rape if-

a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organ

b) the other person does not consent to the penetration or

c) the consent is obtained by force or by means of threats or intimidation of any kind."

17. In his first ground of appeal the Appellant states that the prosecution did not avail independent witnesses. However, this court having gone through the proceedings finds this ground unfounded because the prosecution apart from the complainant and her husband (PW2), there were other witnesses like the investigating officer (PW3) and the clinical officer (PW4) .

18. The Appellant's contention that the prosecution's case was not well proven because of failure to conduct or carry out a DNA test is also not well founded. It is true that an offence of rape or any other sexual offence for that matter is not necessarily only proven by DNA analysis. The law (SOA) requires that for an offence of rape to be established as observed above 3 crucial elements must be established and proved. They are;

i) Prove of penetration

ii) Prove that the act of penetration is unlawful and intentional

iii) Lack of consent or use of force/intimidation to obtain the consent.

The law does not state that there must be DNA test/analysis to establish that an offence of rape took place.

19. I have considered the evidence tendered by the complainant (PW1) and PW2 and note that the Appellant never challenged their testimony that the complainant was raped by force. I also find that a torn pant (P. Exhibit 1) was tendered in evidence which is indicative of lack of consent by the complainant. She screamed after the ordeal and the husband (PW2) was attracted by those screams. It is evident that the Appellant had the opportunity and the intention to commit the unlawful act which he did. I am not persuaded by his assertion that the pant tendered in evidence was not the pant described by PW2. I find the description to be in tandem with what was tendered in court and described by PW1, PW3 and PW4, notwithstanding the omissions in their description about a red strip at the end of the pant. That omission is an insignificant detail which does not affect the credibility of the said witnesses or the credibility of the evidence that the pant was torn. The clinical officer (PW4) also described the pant as torn and not changed after the ordeal which shows beyond doubt that force was used by the Appellant in committing the offence.

20. This court further finds that though the clinical officer casted doubts as who physically examined her and treated her by the use of plural term "**we**" instead of "**I**", I find that the P3 was signed by him which clears any doubt as to who examined the victim and made the crucial findings that she had been raped. The clinical officer clearly told the trial court that he found the presence of semen in the complainant's vagina and the argument by the Appellant that the semen could have belonged to her husband though arguable is displaced by the evidence of the complainant herself. The Appellant did not challenge in cross-examination to state she had sexual intercourse with the husband that same morning prior to the incident. It can therefore be deduced that the complainant was telling the truth because she was not challenged at all during cross-examination.

21. I also find that contrary to the Appellant's assertions his defence was duly considered. He did not bring up by way of cross-examination the issue of personal differences either with PW1 or PW2 when they testified. He also never tendered any evidence that established that he had personal differences with the complainant or her husband both of whom in their respective testimonies denied existence of any personal differences with the Appellant.

In the end this court finds no merit in this appeal.

The same is dismissed. Both the conviction and the sentence are upheld.

Dated, signed and delivered at Chuka this 29th day of June 2020.

R. K. LIMO

JUDGE

29/6/2020

Judgment dated, signed and delivered in the open court in presence of Momanyi for State and in presence of Appellant via zoom.

R.K. LIMO

JUDGE

29/6/2020