



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 48 OF 2018

(Being an appeal from the Judgement of Hon. P. Biwott (PM) dated 27th June 2018 in Criminal Case No. 111 of 2017)

DIVAS KIBET SABILA.....APPELLANT

VERSES

REPUBLIC.....DEFENDANT

JUDGEMENT.

1. The Appellant was charged with the offence of **Rape contrary to Section 7 of the Sexual Offences Act No.3 of 2006**. The particulars of the charge were that **on the 18th day of September 2017 at [Particulars Withheld] within Transzoia County caused your genital organ penis to penetrate into the vagina of GN a person with mental disability.**
2. The alternative charge 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 are that **on the 18th day of September 2017 at [Particulars Withheld] within Transzoia County intentionally touched the vagina of GN with your penis without her consent.**
3. The appellant was found guilty and sentence to 10 years' imprisonment hence this appeal. The grounds of appeal as raised by the appellant are that the evidence as presented were contradictory in nature, that that the witnesses were blood relatives, and that the trial court rejected his cogent defence.
4. The summary of the evidence as presented is worth a summary before looking at the merits or otherwise of the appeal.
5. **PW1 AOO** testified that the Complainant was his neighbour and that on the material date at around 10am he was in his farm. He heard some commotion at her neighbour's home and he rushed to check what was there. He found MW struggling with someone.
6. It was alleged that he had raped the Applicant and the Appellant's zip was opened. He called the Kenya Police Reservist who came and took the man away.
7. On cross examination he said that he had not seen the Appellant before and he found him struggling with the said M.
8. **PW2 ZW** testified that she was the mother to the Complainant who was mentally challenged. She said that she was home that time and she went to check why the door to the house was locked. She peeped through the window and saw someone inside and she screamed. Her son M came and he wrestled the man down. The Complainant said that she had been raped.
9. **PW3 CN** the Complainant testified that she was outside the house and the Appellant came and took her hand and went with her to the house. She said that she did *tabia mbaya* to her. The Appellant was beaten by his brother and a neighbour.
10. **PW4 PETER MASAKE** a clinical officer from Kitale County Referral hospital examined the Complainant and found that her hymen was torn but not fresh. She found vaginal discharge as there were epithelial cells. He concluded that there was penetration.
11. **PW5 MWW** testified that he was grazing his cows at around 10.00 am on 18/9/2017. He heard PW2 screaming and he rushed to the scene and was told that there was someone inside the locked house. The house was locked from inside and he kicked the door and a man opened it. He came out and he struggled with him and he felt down. He was assisted by PW1 who called the KPR and he was taken to Kolongolo police post.
12. The Complainant was taken to the hospital and on the way she got a seizure but was still taken to the hospital. On cross examination he said that the Appellant had 3 children.

13. **PW6 JACKSON MUKHANDI ELIMA** said that he was a Kenya Police Reservist and was in his house when he was called by PW1 concerning a suspect who had been arrested. He rushed to the scene and found the Appellant tied with a rope. He called for a motorbike and took him to the police post.

14. When placed on his defence, the appellant gave unsworn evidence denying the charge. He said that he was a high school teacher at **[Particulars Withheld]** high school. He said that he was heading home on that day using a motorbike. That on the way there was a tyre burst and he had to walk through a shortcut.

15. On the way through a homestead she saw someone standing in the compound and he requested for water. The drunk lady wanted some money and she raised alarm and many people came. The same woman asked for his tribe. She accused him that he had raped his daughter. People came and he was beaten. He was taken to Kolongolo police station.

ANALYSIS AND DETERMINATION

16. The court has perused the submissions by the parties herein carefully. The learned state counsel supported the finding of the trial court and urged the court to uphold the same. He said that all the ingredients of the offence were met.

17. The Appellant on the other hand submitted that there was insufficient evidence to convict him and that the appeal be allowed. He said that the trial court failed to consider his defence which was plausible.

18. Section 3(1) of the Sexual Offences Act sets out three grounds necessary to establish this offence, namely penetration, identity of the perpetrator as well as lack of consent.

19. Careful perusal of the evidence as presented indicates that although the witnesses did not clearly say that they found the appellant in the act, the evidence by the clinical officer who examined the Complainant on that day found evidence of penetration. He said that there was epithelial cells and vaginal discharge.

20. It follows therefore that had she been examined sometimes later perhaps one would have concluded that she may have engaged sexually elsewhere. On the contrary she was taken to the hospital and examined the same day.

21. On the issue of lack of consent, although there was no scientific or medical evidence that she was of some low mental status, the evidence of the family members as well as the Clinical Officer found for a fact that she was not totally of sound mind. This therefore indicates that she could not consent to sexual advances by the Appellant.

22. The issue of identity was proved by the fact that the Complainant was able to identify him. At the same time, he was found at the scene. Although he submits that the witnesses were relatives, the other witnesses including PW1 were not her relatives.

23. The unsworn evidence by the Appellant was not very convincing. How he explained about the issues of some alarmist women, the issue of his political affiliations and much more ought to have been subjected to cross examination. In short it was of not much probative value.

24. In the premises, the appeal is unmeritorious and it is hereby dismissed.

25. On the question of sentencing the court finds that the Appellant has been in custody for about three years. The period meted against him was appropriate. Taking however the authorities emanating after the Supreme Court of Kenya decision in Francis Muruatetu & another vs. Rep. Petition no 15 of 2016 its apparent that this court can still tamper with the sentence.

26. The same was referred to by the court of appeal in Muleke in **DISMAS WAFULA KILWAKE VERSES REPUBLIC CRIMINAL APPEAL NO. 129 OF 2014 (KISUMU)**

27. For the above reason the Appellant is set free unless lawfully held. He shall nevertheless serve a **One-year Probation period** from the date herein under the relevant Probation Officer.

Dated, Signed and Delivered at Kitale this 29th October 2020.

H. K. CHEMITEI

JUDGE

29/10/2020