



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 48 OF 2017

(FORMERLY HCCRA NO. 101 OF 2014)

DAVID CHEBOR.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 920 of 2013 delivered on the 12th day of June, 2014 by Hon. E. Bett, SRM]

JUDGMENT

1. The appellant appeals from the original conviction and sentence for 12 years imprisonment for the offence of rape contrary to section 3 (1) (a) (b) (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that he “on the 13th day of November 2013 at [particulars withheld] Location in Baringo North District within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of F.K. without her consent in contravention of the said Act.”
2. By a Petition of Appeal dated 20/6/2017, the appellant challenged both the conviction and sentence on the grounds of insufficiency of evidence, non-credibility of prosecution witnesses and failure to consider his evidence in defence. The appeal was opposed by the DPP who submitted that there was overwhelming evidence against the appellant to justify the conviction and sentence.
3. I have consistently with the duty of the first appellate Court considered the evidence presented before the trial Court a-fresh together with the submissions of the appellant and the DPP's Counsel herein, giving allowance as necessary to the fact that this Court did not have the benefit of hearing or seeing the witnesses and or observing their document. See **Okeno v. R** (1972) EA 32, that it:

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. **In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.**”*

Issue for Determination

4. The issue for determination is whether the complainant in the case was raped by the appellant as alleged. There was no issue of identification of the appellant as the appellant himself in his unsworn statement admitted knowing the complainant and indeed alleged that they “were friends with her. I was with her upto 3/11/13” and “later on 13/11/2013 the complainant came and sought water at my house. I gave her water as I was still unwell and I continued to sleep. Later her husband came and asked whether I had seen her. I told him I had not seen her.” Pw1 the complainant and Pw3 her husband had testified that the appellant was their neighbor.

Determination

5. Upon considering the evidence of the prosecution witnesses and the unsworn statement of the appellant/accused as a whole, I find that the appellant did rape the complainant Pw1 in an incident which took place on 13/11/14 and detailed in the evidence of Pw1 as follows:

“I remember on 13/11/2014 I was going to collect firewood at around 4.00 pm when the accused escorted me in the forest and grabbed me. He strangled me and I escaped. He then told me “nipe hizo vitu.” I told him I could not. He strangled me further and he took my panga and cut me on the left leg. I asked him for the panga and once he gave me the panga I also cut him on the left leg. I got an opportunity to run away but I fell down and he now grabbed me while on the ground. He then tore my skirt. This is the Skirt

(MFI 1) (skirt is torn). He then removed my under pant and rape me. After he did the act he then said I told anybody he would kill me. I took my firewood and upon arrival I told my husband I had been raped by David.”

6. Pw3, the complainant’s husband confirmed the report by his wife:

“On 13/11/13 I was at home when at 6.00 pm when my wife came from collecting firewood. She was crying and on inquiry she told me she had been raped by David Chebor. She was injured on the neck, forehead and also a cut on her leg. She was wearing his skirt which was torn (shows MFI 1). It was late and we could not make it to hospital. In the morning, I brought the complainant to hospital at Kabarnet District Hospital.”

7. The Pw3’s evidence as to the report by his wife the complainant, her emotional state and the injuries on the complainant whom he saw about 2 hours after the time of the attack were consistent and corroborative of the complainant’s evidence. The unsworn statement of the appellant merely that he had on the date 13/11/13 seen the complainant who he alleged was his friend when she went to ask for water does not raise any doubt as to version of events related by the complainant.

8. Although the evidence of the Clinical Officer, Pw2 did not conclusively establish penetration as on examination he reported that “*there were no tears, bruises or lacerations and there was no discharge and no spermatozoa*” and only concluded penetration from the presence of epithelial cells in the complainant’s vagina and from the history as related by the complainant, it has been held by the Court of Appeal that the lack of medical evidence is not fatal to prove of rape which may be established by the evidence of the complainant. See **Kassim Ali v. R** (2006) eKLR where the Court of Appeal (Omolo, Bosire & Githinji, JJA) held that “**the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.**”

9. Indeed, section 124 of the Evidence Act provides that the Court may convict in cases of Sexual Offences despite want of corroboration in circumstances where the Court believes the complainant victim of Sexual Offence was telling the truth as follows:

124. Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.

10. On this count, the appellate Court defers to the trial Court which observed the witnesses during testimony and found as recorded in the judgment that:

“I had the opportunity of examining the demeanor of both Pw1 and Pw3 when they gave their evidence. Even after being subjected to rigorous and provoking cross-examination by the accused their evidence remained consistent.”

11. There was further congruence in the evidence of Pw1 and Pw3 that the accused had so terrorized them that they had to flee from their home and seek refuge at Kipsaraman Police Post. Pw1 said:

“I was brought to Kabarnet District Hospital and reported at Kipsaraman Police Post and they began to look for the accused. The accused could come at night and knock at my door and threatened to kill me. We ran away until he was arrested.”

Pw3 testified as follows:

“In the morning, I brought the complainant to Hospital at Kabarnet District Hospital. We then went home after treatment. On reaching home we were told the accused was looking for us to harm us. I run away and came to sleep at Kipsaraman Police Post Division.”

12. Although it is never the duty of accused to prove the innocence, the Court notes that in his defence the appellant sought and obtained on 28/2/14 summons from 4 witnesses who would testify for the defence and despite adjournment for (8) eight times to allow the Defence witnesses to come to Court, they failed to attend Court and the appellant closed the case for the Defence on 5/6/2014. Suffice it to state that the unsworn statement of the appellant did not raise any reasonable doubt on the Prosecution’s case. It only alleged friendship with the complainant and her husband both of whom he said he used to drink with upto the time of this arrest.

13. Although the sentence for rape has a minimum of 10 years imprisonment this Court has no basis for interfering with the sentencing discretion of the trial Court in imposing a penalty of imprisonment for 12 years, on the principle of **Wanjema v. R** (1971) EA 493. As the sentence is not manifestly excessive or based on the wrong principle or misapprehension of the evidence. It may be that the trial Court, was properly, moved by the blatant conduct of the accused in raping the complainant and threatening her and terrorizing her together with the husband into fear and fleeing from their home, as if the rape was not bad and an indignity, enough for the family.

Orders

14. Accordingly, for the reasons set out above, I find no merit in the appellant's appeal from the conviction and sentence of imprisonment of 12 years for the offence of rape contrary to section 3 (1) of the Sexual Offences Act, and the appeal is, consequently, dismissed.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.