



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCRA NO. 134 OF 2017**

**ABDUL NUUR.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 387 of 2015 delivered on the 13<sup>th</sup> day of March, 2015 by Hon. S.O. Temu, PM]**

**JUDGMENT**

1. Upon a ruling by this court on 21/2/19 the complainant in the matter testified pursuant to section 358 of the Criminal Procedure Code, principally stating that she had forgiven the appellant, as shown in the record of proceedings for the day, 1/4/2019 as follows:

“1/4/19

*Coram: Hon Justice Edward M. Muriithi*

*Court Assistant: Ms. Macharia*

*Accused: Present*

*Matter is for hearing of the complaint on pursuant to the Ruling of the Court of 21/2/19.*

*Appellant*

*I understand Kiswahili language.*

*Interpretation from Tugen/Kiswahili by Daisy*

*Adult female Christian sworn and states in Tugen with interpretation in Kiswahili/English -*

*I am ETK. I know the accused/appellant. He is my neighbor in [Particulars Withheld] village. He raped me. I have forgiven him. I have to tell the Court that I have forgiven him. I have not been forced to forgive him. I forgive on my own volition. The appellant's children have been following me. I have taken pity of the children and I have decided to forgive the appellant.*

*Appellant*

*I do not have anything to ask the witness.*

*DPP*

*I urge the Court to look at the evidence before making any decision on the matter. As the complainant has forgiven the appellant, we shall not be opposing the appeal.*

*Appellant*

*I am grateful to the DPP and the complainant. I will not repeat the act. I shall be grateful if the Court release me. I have been in custody since 19/6/2015, almost 4 years.*

Court

*Judgment on 25/4/19*

*1/4/19/19”*

2. The DPP did not oppose the appeal and has urged the court to consider the evidence before the trial court and suggested that the insistence of the complainant to withdraw the charge right from the beginning of the trial before the trial court may be an indication as to the credibility of the charge itself. See paragraph 7 of the Ruling of 21/2/2019, as follows:

*“The Court agrees with the DPP that the insistence of the complainant from the very first day of trial to withdraw the complaint may be a pointer to credibility of the prosecution’s case and the complainant who was at trial aged 60 years and of sound mind, is a person capable of consenting to the withdrawal of the charges at the trial stage, and reconciling with her alleged assailant on appeal, as well as to the very act of sexual act subject of the charge of rape for which the appellant was convicted and sentenced provoking this appeal. See section 42 of the Sexual Offences Act.”*

3. As a first appellate court, I have reevaluated the evidence as urged by the DPP pursuant to **Okeno v. R** (1972) EA 32. From the record, the appellant who according to the Clinical Officer who examined her is aged 60 years had sought to forgive the appellant since the first day of trial on 17/9/15 when the prosecutor prayed for time to consult and the trial Court ruled that:

*“The prosecutor is granted a chance to consult as they require as the offence is serious. Hearing on 30/9/15”.*

4. On the return date of 30/9/15 the prosecutor reported that:

*“The complainant is not ready to testify as she alleges that she has forgiven the accused. I need time to consult the in charge DPP”.*

The court ordered that:

*“The matter is adjourned to enable the prosecutor consult. Mention on 7/10/2015”.*

5. It would appear that although set for mention the matter proceeded to hearing on 7/10/2015 with the complainant testifying but again restating at the end of examination-in-chief that:

*“I wish to forgive the accused as he is my neighbor”.*

It would appear that the trial court did not accept to her request.

6. On cross-examination, the complainant Pw1 detailed her allegation as follows:

*“The incident took place on 17/7/2015 at 5.00pm. I was from Rose’s house when Gor raped me it was at my land in the morning. There are people and animals who use the road I was using. I did not meet any person that day. I had met you near your home. You did not talk to me before you grabbed me. I did not see any person on the road that day. I did not meet any man that day. My husband had come and rescued me from your house where you were raping me as I screamed.*

*You held me from the road. I had managed to scream. The center is a distance from your house. My husband is the only one who heard the screams. You have neighbours but they are far. The house where you stay was a shop before you had ran away with my clothes that I was wearing”.*

7. The complainant’s husband Pw2 testified in chief that he was coming home at about 5.00 pm when he *“heard screams from the accused’s house [and] was able to recognize the complainant’s voice as the one who was screaming. I had gone to the said house and I had found the accused in the house raping the complainant.”*

On cross-examination Pw2 said:

*“I was taking care of the cows on the said date. I take care of my animals almost every day. **The cows have never entered into your farm. I had met the complainant in your house. I was alone that day taking care of the cows. There are people within the area. I had found you raping the complainant in your house. I am telling the truth. You are our neighbor and there are other neighbours in that area.***

***You were in your house when you raped the accused. I found you raping my wife and I saw you. I did not take any photographs at the scene. I am the one who took my wife home”.***

8. Pw3, the clinical officer who examined the complainant on the allegation of sexual assault testified as follows:

*On examination of the private parts she had no injuries in her vagina but there was whitish discharge....There was no spermatozoa noted."*

9. When put on his defence, the appellant gave sworn evidence denying the rape charge and explaining the incident as a result of disagreement following entry of the complainant's cattle on to his land as follows:

*"The charges are not true. On Wednesday I woke up and I went to my land up to 1.00pm and I went home to rest. One lady came to my house screaming using abusive language. I asked her to leave as she was drunk. I had seen cattle on my land and chased them. When I reached the gate I met the complainant's husband and he was the owner of the cattle. He abused me that I was refugee and I did not know the meaning of cattle. The complainant left together with his wife.*

10. Weighing the evidence of the prosecution against the evidence of the defence as a whole, I find the explanation of the incident by the defence to be more palatable and to, therefore, raise a doubt as to the prosecution case because the complainant's evidence did not explain how she ended up in the accused's house except to say that he "grabbed" her and it is unlikely that with her screaming as she alleged no other neighbor had witnessed the grabbing and the ensuing rape by the appellant. In addition the evidence of the husband Pw2 does not explain how he gained access to the appellant's house to rescue his screaming wife who was allegedly being raped by the appellant. It is wholly unlikely that the appellant would have been raping the complainant with the doors to his house wide open for easy access to passersby such as the complainant's husband who was the only person to happen to pass by at the exact moment of the rape. The medical evidence did not at all show evidence of forceful sexual intercourse.

11. And now come to persistent attempt to forgive the appellant right from the first day of trial to the appeal before this court. It appears to me to be a belated attempt by the complainant to correct the consequences of her "false witness". There appears to me to have been nothing to forgive the appellant. It is the complainant and her husband, Pw2, in my view who should seek forgiveness for what clearly is less than truthful witnessing against the appellant.

12. In the full circumstances of the case, I do not think it proper to refer the matter for investigation and Prosecution, if appropriate, of the complainant and her husband for possible perjury in the interest of harmonious existence of the two neighbors' households.

#### **Orders**

13. Accordingly, for the reasons set out above, I quash the conviction of the appellant for the offence of rape c/s 3 (1) (3) of the Sexual Offences Act and set aside the sentence of imprisonment for 10 years therefor.

14. There shall, therefore, be an order for the release from custody of the appellant, unless he is otherwise lawfully held.

*Order accordingly*

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF APRIL 2019**

**EDWARD M. MURIITHI**

**JUDGE**

#### **Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.