



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 63 OF 2015

BETWEEN

SHADRACK KIPTANUI AYABEIAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. N.C. Adalo, RM dated 28th April 2015 at the Magistrates Court at Iten in Criminal Case No. 1118 of 2013)

JUDGMENT

1. The appellant, **SHADRACK KIPTANUI AYABEI** was convicted and sentenced to 10 years' imprisonment for the offence of rape contrary to **section 3(1)(a)** of the **Sexual Offences Act** ("the Act"). The particulars of the offence were that on 5th October 2013 at [particulars withheld] Village, Kibagoi Location within Elgeyo Maragwet County, he caused his penis to penetrate the vagina of HJM by use of force.
2. In his grounds of appeal, the appellant complains that the trial magistrate disregarded his defence without any reason and that the trial court shifted the burden of proof. He complained that he was not afforded a fair trial and the resulting sentence was harsh. He also stated that the prosecution failed to prove the offence beyond reasonable doubt.
3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).
4. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the **Sexual Offences Act, 2006**;

A person commits the offence termed rape if –

- (a) He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.*
- (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.*

5. From my appreciation of the evidence, I am satisfied from the testimony of PW 1 that she was subject to an act of penetration by use of force. Her narration was clear and concise and was as follows;

On 5th October 2013 at about 6.00pm. I was in my home alone, my husband had not come. I was in the kitchen when the accused came and immediately attacked me and slapped me and strangled me. The door was open I had not locked it because it was still early he said I should give him money gathered from the group. I told him that I did not have. He tightened his grip and lifted me and took me to a bed in the kitchen and removed my pants and started raping me he removed his shorts, he just unzipped his shorts and removed his penis and inserted it on my vagina. He raped me until my husband came. I cannot remember the time the accused held my throat so tight that I could not scream but just groan pain, my throat still hurts.

6. Her husband PW 2 who came to her rescue on the material evening saw her in a state of distress while the clinical officer, PW 3 who

examined her on 8th October, 2013 confirmed bruises on the head and neck due to strangulation and inflammation on the labia which was due to penetration. PW 2's torn clothes were also produced in evidence.

7. The main issue in this appeal is whether the appellant was the assailant. The incident took place in the evening and PW 1's testimony was clear that given the time of interaction she could not have failed to recognize the appellant as she knew him from his childhood. Further, PW 2 told the court that he recognized the appellant as he was leaving as it was still bright. Both PW 1 and PW 2 reported the incident to the Chief and the appellant was arrested. In addition, PW 1 and PW 2 named the appellant to the people who came to their assistance after they had raised alarm. Nothing was suggested to them that they were lying or that they had a grudge with him. Consequently, in light of the positive evidence of recognition the appellant's defence that he was at a burial was displaced. Since the appellant was from the same locality as the other witnesses no doubt they would have known about the funeral he was attending but he did not disclose the details of that funeral hence his alibi was a sham.

8. Having examined the proceedings, I find that they were regular and the appellant was afforded a fair trial.

9. The sentence imposed on the appellant is mandatory minimum sentence under **section 3(3)** of the **Act**. It was neither harsh nor excessive. The conviction and sentence are affirmed and the appeal is dismissed.

DATED and DELIVERED at ELDORET this 25th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mumu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.