



REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 42 OF 2018

JOSEPH KINYANJUI WANGARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from conviction and sentence in Cr. Case No.7136 of 2015 from the Cm's Court sitting at Thika judgment dated on 15th day of June, 2017, before Hon. C.A. Otieno Omondi, PM)

JUDGMENT

1. The Appellant was convicted for the offence of Rape Contrary to Section 3(1) (a) (b) (3) of the Sexual Offences Act and sentenced to 10 years imprisonment on the 15th June 2016.

The particulars of the offence were that on the 16th September 2015 he intentionally and unlawfully within Kiambu County caused his penis to penetration the vagina of DW without her consent. He also faced an alternative charge of committing an Indecent Act with an adult contrary to Section 11A of the Act to the said DW on the 16th September 2015 – herein after referred to as the victim.

2. This appeal is against both the conviction and sentence.

3. The duty of the first appellate court is to re-evaluate the evidence afresh and make own independent findings – **Okeno –vs- Republic (1972) EA 32.**

From the Petition of Appeal filed on the 18th September 2018, three issues arise for determination.

1. Whether there was penetration
2. Whether the penetration was by the appellant.
3. Whether there was consent by the victim
4. Whether the conviction was supported by the evidence on record.

4. **Section 3 of the Sexual Offences Act** states the ingredients of the offence of rape which the prosecution must prove to sustain a conviction:

- (1) *Intentional and unlawful penetration of the genital organ of a person by another.*
- (2) *Absence of consent*
- (3) *Whether consent is obtained by force or by means of threat or by intimidation of any kind.*

5. **Section 42** of the Act states that

“Consent is obtained by choice if the person agrees by choice and has the freedom and capacity to make that choice.”

The victim of the offence was 23 years old, and a University student. She therefore had the capacity to consent or to deny sexual intercourse

with the appellant, or anybody else. She testified as **PW1**.

That the appellant was her friend and had not had sexual intercourse with him.

However, on the material date the two agreed to meet and went to the appellant's house that without her consent and by threatening her with a knife, forced his penis to penetrate into her vagina despite her attempts to thwart the commission of the act.

6. It was her evidence that once in his house, he locked it up, forcefully removed all her clothes, tied them and hid them, dipped her pair of trousers in water, forced her to wash his dishes and clean the floor all under his watch and threatening to injure her if she screamed.

7. She further testified that the appellant took her money and her telephone handset, and slapped her when she resisted. For fear of further injury, and been unable to further resist his attempts, the appellant raped her twice and only released her at 8.30 p.m. without her money, her telephone and in wet clothes. It was her evidence that when she sensed danger while in the appellant's house around 4.00p.m. she called her brother (PW2) for help but the appellant took away the telephone set and put it off, and when he locked her in the house and stepped out leaving his telephone on the table, the victim called his brother who made a report at the Ruiru police station that her sister was at danger.

8. **PW2** Stephen TK is a brother to the victim. He testified having received a distress call from the victim and having made a report at the Ruiru police station. His further testimony was that when the victim was eventually set free, around 8.30 p.m. he received her in wet clothes at the Ruiru bus stage.

He further confirmed having accompanied the victim back to Ruiru police station where the incident was reported and where P3 – PExt 1 was issued and taking her for treatment same evening at the Ruiru Sub-district hospital where she was issued with the treatment notes PExt 2 and PRC Form PExt 3.

9. **PW3** was a clinical officer from the Ruiru sub country Hospital with consent of the appellant, she produced Dr. Kamu's medical report upon examining the victim on the 18th September 2015. The clinical findings of the doctor were

- Bruises on thighs, soft tissue injuries
- Hymen broken,
- White discharge
- Spermatozoa seen, with a conclusion that there was penetration of the victim's genitalia.

The information is contained in the **P3** form.

10. In his brief unsworn statement of defence, the appellant did not answer to any of the victim's and the prosecution witnesses' evidence on the offence.

His evidence was that he too was a university student as well as a research assistant/enumerator at Kenya National Bureau of Statistics, and that on the 13th December 2015 at Ruiru Town, while with the victim's sister whose name he did not state, at about 3.00p.m. he was arrested by police officers from Ruiru police station in the company of four people and later charged with the offence that he denied having committed.

11. It is evident that the victim did not consent to sexual intercourse with the appellant. Upon struggling and violence being meted to her, being slapped, forced to wash dishes and clean the floor of the appellant's house, her clothes being dipped into water and being forcefully locked up in his house for six hours, her money and telephone being detained, the ingredients of rape were proved – See Court of Appeal case **David Mwangi Njoroge -vs- R (2015) e KLR, and Cr. Appeal No.14 of 2014 Charles Ndirangu Kibue -vs- R (2016) e KLR**.

Lack of consent or consent obtained by force or threats and intimidation are elements of crime of rape as defined in **Section 3(2) of the Sexual Offences Act**.

12. The medical evidence by **PW3** on behalf of Dr. Kamu confirmed that indeed there was penetration into the victim's genitalia. The victim was examined the same evening soon after she was released by the appellant.

Though the victim admitted having engaged in sexual intercourse before it was the doctor's testimony that white discharge with both live and dead spermatozoa which the doctor stated are expected to die within 72 hours meaning the spermatozoa found in her vagina were from a recent intercourse, within 72 hours and therefore falling within the relevant period.

I therefore decline to accept the appellant's submission that penetration was not proved, as all the ingredients were proved to the required standard of proof.

13. The appellant was arrested about six months after the commission of the offence.

In the Criminal Justice System, there is no requirement that an offender/suspect must be arrested and charged soon after commission of the

offence, though it would be more prudent to attain arrest in the shortest time possible, or within reasonable time as soon as investigations are completed. I do not think, in my opinion, that there is any reason grave enough to vitiate a valid judgment for the reason only that the appellant was arrested six months after the commission of the offence.

14. The appellant having opted not to answer to the charges facing him in his defence, he cannot be allowed to raise such issues like identification, recognition, whether there was penetration or even consent to sexual intercourse at Appeal level. The appellant wasted the golden opportunity he was granted to defend himself and as such, the prosecution's evidence stood uncontroverted and unchallenged.

15. In its totality, the appellant has failed to poke any holes in the prosecution evidence in his appeal.

Consequently I find that the prosecution proved the charges against the appellant beyond any reasonable doubt. The appeal is dismissed.

I uphold both the conviction and the sentence being the minimum sentence prescribed under Section 3(3) of the Sexual Offences Act.

Dated and signed at Nakuru this 27th Day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and delivered this 10th Day of April 2019.

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C.MEOLI

JUDGE