



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 3 OF 2017**

**MWIKYA MASAVE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the Original Conviction and Sentence in the Senior Resident Magistrate's Court at Kilungu, Criminal Case No.668 of 2015, delivered by Hon. Onzere E.M (RM) on 14<sup>th</sup> July 2016)*

**JUDGEMENT**

**Introduction:**

1. The appellant was charged with **rape contrary to section 3(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 6<sup>th</sup> day of December 2015 at 2.00pm at [particulars withheld] Village, Lima Location, Kilungu Sub-County within Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MM a person with mental disabilities.
2. There was an alternative charge of **committing an indecent act contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and at the same place, the appellant intentionally and unlawfully touched the vagina of MM a person with mental disabilities.
3. The learned trial magistrate convicted him on the main charge and sentenced him to 20 years imprisonment.

**The Appeal:**

4. Aggrieved by that decision, the appellant filed a homemade appeal and raised the following 5 grounds;

*a) That the learned trial magistrate erred in law and fact by convicting him on a defective charge sheet.*

*b) That the learned trial magistrate erred in law and fact by relying on the prosecution evidence which was not proven beyond reasonable doubt.*

*c) That the learned trial magistrate erred in law and fact by convicting him in the absence of vital witness evidence (complainant).*

*d) That the learned trial magistrate erred in law and fact by relying on the Doctor's evidence which did not link him with the offence and was uncorroborative.*

*e) That the learned trial magistrate erred in law and fact in failing to consider glaring inconsistencies and contradictions in the prosecution's evidence.*

5. Directions were given that the appeal be canvassed by way of written submissions. The appellant complied and the learned prosecution Counsel elected to rely on the evidence on record. I have duly considered the submissions and the evidence on record.

**Duty of Court:**

6. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

7. I will deal with ground (b) (d) and (e) together and the rest individually.

8. A summary of the prosecution's case was that on 06/12/2015 at around 2.00pm, the complainant's father heard unusual noises coming from a nearby river and when he proceeded there, he saw the appellant assaulting the complainant sexually. He called for help and the appellant was arrested.

**Whether the charge sheet was defective:**

9. The appellant submits that the particulars of the offence did not match the offence and that the whole of section 3 of the Sexual Offences Act ('the Act') does not talk about rape of a person with mental disabilities.

10. **Section 3** of the Act provides that a person commits the offence termed rape if;

*(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;*

*(b) the other person does not consent to the penetration;*

*(d) the consent is obtained by force or by means of threats or intimidation of any kind.*

**3 (2)** In this section the term '**intentionally and unlawfully**' has the meaning assigned to it in section 43 of this act.

11. **Section 42** of the Act provides that;

*42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.*

12. **Section 43** states that an act is intentional and unlawful if it is committed;

*a. in any coercive circumstance.*

*b. under false pretence or by fraudulent means; or*

*c. in respect of a person who is incapable of appreciating the nature of an act which causes the offence.*

13. **Section 43(4)(e)** further provides that;

*The circumstances in which a person is incapable in law in appreciating the nature of an act referred to in Subsection 1 include circumstances where such a person is, at the time of commission of such an act –*

*(e) mentally impaired.*

14. There is a report from Dr. Munga Edgar dated 16<sup>th</sup> May 2016 on record which was prepared pursuant to a Court order given on 3<sup>rd</sup> May 2016. It confirmed that the complainant had a mental disability.

15. The report of Dr. Munga Edgar dated 16<sup>th</sup> May 2016 confirmed that the complainant in this matter had a mental disability. That being the case, the implication of section 43 is that a mentally challenged person cannot consent or appreciate the nature of an act that causes an offence under the Act. Evidently, the law acknowledges that persons with mental disabilities can also be victims of rape and has accordingly put safeguards against the vice. Section 3 of the Act cannot be read in isolation as the appellant purports to do. There was therefore nothing defective about the charge sheet. That ground of appeal has no merit and should fail.

**Failure by the complainant to testify:**

16. After failing to secure a sign language interpreter, the prosecution requested the trial Court to declare the complainant a vulnerable witness and to appoint the complainant's mother (PW2) as an intermediary. Relying on Dr. Edgar's report, the trial Court found that the complainant was not in a position to testify but did not make any comment on the request for the intermediary.

17. Section 31 of the Act talks about vulnerable witnesses. It provides that;

*(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—*

*(a) the alleged victim in the proceedings pending before the court;*

*(b) a child; or*

(c) a person with mental disabilities.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—

(a).....

(b) intellectual, psychological or physical impairment

(c) .....

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures—

(a) .....

(b) directing that the witness shall give evidence through an intermediary;

(c) .....

(d) .....

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

18. My interpretation of the above sections is that an intermediary comes into play where the trial Court is in doubt as to whether a witness should be declared vulnerable. In this case, there is nothing on record to suggest that the learned trial magistrate was in doubt and was therefore under no obligation to record reasons for not appointing one. Section 31(4)(e) of the Act gives the trial Court a wide latitude of determining the measures to employ in order to protect such a witness. In my view, excluding such a witness from testifying properly falls within the provisions of the said section. The trial Court's decision to exclude the complainant from testifying on account of her vulnerability was therefore sanctioned by the law. This ground of appeal lacks merit.

#### **Whether the prosecution proved its case beyond reasonable doubt:**

19. **PW1** was the complainant's father, RMM. He testified that on 06/12/2015 (the material day) he was at home when heard noises coming from the river. They were being made by his daughter. He rushed there and found the appellant raping his daughter. His daughter was completely naked and her clothes were torn. The appellant had removed his trousers but he had his shirt on. A neighbour's son and RM also went to the scene. He restrained the appellant who wanted to run away.

20. **PW2** was the complainant's mother, RK. She testified that on the material day, she was taking a walk when she found the appellant having sex with the complainant. The complainant had a top but did not have her bottom clothes. The appellant had removed his trousers. PW1 was at the scene as well as children and other people. People started stoning the appellant but were restrained by the headman. When the chief arrived, the appellant told him that the complainant was his wife of two years and he knew how to communicate with her. The chief called the police who came and arrested the appellant.

21. **PW3** was Eric Kasiamani, a medical officer at Kilungu hospital. He testified that the complainant was taken to the hospital by her father and informed that she had been raped by someone known to PW1. He examined her and found that her hymen was not freshly perforated. The labia majora was normal. Lab tests showed that the complainant had a sexually transmitted infection and he therefore concluded that she had been raped. The complainant had no visible injuries. She was given drugs to prevent pregnancy and treat the infection. The appellant's clothes and underpants were not torn. The appellant was not taken to the hospital and as such, they did not examine him

22. **PW4** was Josephine Kalekye, the investigating officer. She testified that she recorded the statements of eye witnesses and also visited the scene. The complainant was taken to hospital on 07/12/2015. The river is about 5 meters from the complainant's home. PW1 told her that he heard noises from the river and proceeded there whereupon he found both appellant and complainant naked. He called neighbors who arrived and saw what was happening. The appellant was arrested and the rape charges preferred against him.

23. On cross-examination, she was not aware as to whether the appellant was examined and what the findings were. She relied on the evidence of the eye witnesses and medical reports in her investigations.

24. The evidence of the eye witnesses on how they found the complainant did not tally. PW1 said that she was completely naked and PW2 said that she had a top. I agree with the appellant that if indeed the two eye witnesses were at the scene, it was impossible for them to see

different things. Further, PW1 said that the complainant's clothes were torn but he was contradicted by PW3 who said that the clothes and underpants were not torn.

25. Notably, the two eye witnesses were the complainant's parents yet from the evidence on record, there were other people at the scene. I appreciate that the prosecution has the liberty to determine the witnesses to call but in this case, it would have been prudent for them to call an independent witness.

26. The medical evidence showed that the complainant was largely okay save for a sexually transmitted infection which was not linked to the appellant as he was not examined to ascertain whether he had a similar infection. In my view, this was a fatal omission by the prosecution and it ought to have created doubt in the mind of the trial Court.

27. As rightly submitted by the appellant, the contradictions and inconsistencies in the prosecution's case could not be ignored especially in light of the fact that the medical evidence did not corroborate the evidence of the eye witnesses. The doubt created by the contradictions and inconsistencies should have been exercised in favour of the appellant. In a nutshell, the prosecution did not prove its case to the required standard.

**Conclusion:**

The appeal has merit. The court makes the following orders;

- i. -The conviction be and is hereby quashed, sentence set aside and the appellant be set at liberty forthwith, unless otherwise lawfully held.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

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**C. KARIUKI**

**JUDGE**