



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL APPEAL NO. 49 OF 2017**

**BETWEEN**

**D A W.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. P. K. Rugut, SRM dated 12<sup>th</sup> September 2017 at Senior Resident Magistrate's Court at Tamu in Criminal Case No. 15 of 2016)*

**JUDGMENT**

1. The appellant, **D A W** was charged, tried and convicted on one count of rape contrary to **section 3(1)(a)(b) and (3)** of the ***Sexual Offences Act***. It was alleged that on 24<sup>th</sup> October 2016 at [particulars withheld] Village in Muhoroni Sub-County within Kisumu County, intentionally and unlawfully cause his penis to penetrate the vagina of CAO without her consent. Base on the same facts, the accused faced an alternative charge committing an indecent act with an adult contrary to **section 11(9)** of the ***Sexual Offences Act***.
2. The accused also faced a charge of deliberate transmission of HIV contrary to **section 26(b)** of the ***Sexual Offences Act*** in that at the same place and on the same day, having actual knowledge that he was infected with HIV, he made his penis penetrate the vagina of CAO which he knew was likely to lead to CAO being infected with HIV.
3. The appellant was convicted on the first count and sentenced to 10 years' imprisonment while on the second count he was sentenced to 15 years' imprisonment with the sentence ordered to run concurrently. He now appeals against conviction and sentence based on petition of appeal and written submissions.
4. In his petition of appeal and written submissions he stated that there was no medical evidence to convict him with the offence. That he was not subjected to a medical examination and that the trial court did not consider that there was a grudge between him and the child's mother. He submitted that the entirety of the prosecution evidence could not support a conviction on the ground that it was unreliable, speculative and lacked any probative value. The respondent's counsel supported the conviction and sentence and submitted that the prosecution had proved all the elements of the offence of defilement.
5. The case before the trial court was that on 24<sup>th</sup> October 2016, the complainant, PW 2, was at home when the appellant came and asked her for water. She testified that he took her into the house and proceeded to have sexual intercourse with her. Thereafter he gave her 50/-. PW 2 told the court that the appellant had promised to photograph her. She testified that she felt pain and bled in her pants.

Immediately thereafter she went to report what had taken place to her sister, PW 1. PW 1 recalled that PW 2 came to her with a 50/- note and told her that the appellant had accused her of giving dirty water and had followed her into the house and proceeded to sexually assault her.

6. PW 3, who was a neighbour to PW 1 and PW 2, testified that on the material day, the appellant had passed by her place to deliver some photographs to her husband. Thereafter she saw the appellant going to the PW 1's home where he requested water from PW 2 but when she brought the water he told her it was dirty and he poured it. He then saw the appellant follow PW 2 into the house. After a while, PW 2 came out and narrated to her what the appellant had done.

7. On the same evening, PW 1 and PW 2 went to report the incident at Songhor Police Post where they met PW 4, a police officer, who took their statements. They also informed him that they suspected that the appellant was HIV positive. PW 4 was directed to the appellant's home by PW 1. The appellant was arrested and in the course of the arrest, he gave PW 4 his ARV treatment card. Both PW 2 and the appellant were taken to Muhoroni Sub-District Hospital.

8. PW 5, a clinical officer at the hospital examined the appellant and PW 2. She did not detect any injuries on PW 2's genitalia. She also did not detect any spermatozoa and pus cells in the high vaginal swab. Although the hymen was missing, there were no lacerations on the labia. She also examined the appellant and did not detect any evidence of sexual intercourse with any person. She told the court that he was HIV positive.

9. In his sworn defence, the appellant denied that he raped the PW 2. He told the court that he was arrested while on the way home.

10. As this is a first appeal, the duty of the appellate court is to review all the evidence and reach an independent conclusion as to whether to uphold the conviction and sentence. In doing so, the court must make an allowance for the fact that it did not have or see the witnesses testify in order to assess their demeanour (see *Okeno v Republic* [1972] EA 32).

11. Having evaluated the evidence, I am satisfied that the prosecution proved penetration. PW 1's testimony as to what took place was clear and straightforward. Her credibility was enhanced by the fact that she immediately informed PW 1 and PW 3 after the incident. The fact that it is the appellant who did the act of penetration is supported by the testimony of PW 3 who saw him at PW 1's house with PW 2 before the incident. Further, the appellant was not a stranger to PW 2 and the other witnesses. She named him when she reported the incident to PW 1 and they all directed PW 5 to his home to arrest him.

12. PW 2 testimony was sufficient in terms of the proviso to **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* as it did not require any corroboration although there was sufficient corroborative evidence pointing to the appellant's presence at PW 1's house. This is notwithstanding the fact that PW 5 concluded that there was no evidence of penetration. Although the trial magistrate denigrated the evidence of the clinical officer on this account, she did not consider the fact that PW 2 has already taken bath and changed clothes before she went to the clinic as stated by PW 1.

13. The offence of rape is provided for under **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.

14. The key issue is for consideration is whether PW 2 consented to the act of penetration. It was the duty

of the prosecution to prove beyond reasonable doubt that PW 2 did not consent to the act penetration. There was evidence and it was suggested by PW 1 that PW 2 was mentally challenged. However, no medical evidence was led to confirm her mental state or condition. In fact and after a voire dire, she gave clear evidence and was cross-examined on what took place.

15. From the evidence, what emerged is that the act of penetration was not consensual. PW 3 saw the appellant create a ruse by accusing the appellant of giving him dirty water. He followed her into the house. There is no indication that PW 2 and the appellant had a prior relationship. What is clear is that the appellant went into the house and forced himself on PW 2. PW 2's statements to PW 1 and PW 3 confirm the fact that the appellant lied to her that he was going to take her photograph to gain access to her. His defence amounted to a mere denial and did not deal with the substance of the case against him but only his arrest. I accordingly affirm the conviction for the offence of rape.

16. As regards the second count, the only evidence is that treatment cards confirming that the appellant was taking HIV+ drugs were found in his house. PW 5 did not confirm that the appellant was undergoing treatment at the facility. There is no evidence that PW 5 conducted any test to confirm that the appellant was HIV+. The P3 form produced stated that he was "*known positive*". Was this based on the fact that she was informed of the condition? Moreover, the appellant's medical card was only marked for identification but was not produced in evidence. I find and hold that the HIV+ must be proved affirmatively to support a conviction under **section 26(b)** of the *Sexual Offences Act*. I find that the offence was not proved and I therefore quash the conviction on this count.

17. I allow the appeal to the extent that I set aside the conviction on the second count. I affirm the conviction and sentence on the first count. The result is that the sentence of 10 years' imprisonment is affirmed.

**DATED and DELIVERED at KISUMU this 30<sup>th</sup> day of January 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

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