



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 27 OF 2016**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**DICKSON NASIO MUKUBA.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. S. K. Ng'etich,*

*SRM dated 11<sup>th</sup> March 2016 at the Mumias Principal Magistrates*

*Court in Criminal Case No. 1262 of 2014)*

**JUDGMENT**

1. The appellant, **DICKSON NASIO MUKUBA**, was charged, convicted and sentenced to 10 years' imprisonment for the offence of rape contrary to **section 3(1)(a) and (b)** of the *Sexual Offences Act* ("the Act"). The particulars of the case against him were that on 16<sup>th</sup> December 2014 in Mumias Sub-County of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of PSO without her consent.

2. The appellant now appeals against the conviction and sentence on the ground that he was convicted on the evidence of only one witness and that the evidence against him was based on the fabricated evidence of PW 1 and which was uncorroborated. The State, through its counsel, supported the appeal on the ground that there was a contradiction in the testimony of PW 1 and PW 2 and no explanation was given by the prosecution why PW 1 remained in the appellant's house between 8.00am and 5.00pm.

3. Notwithstanding the concession by the respondent, I am required to analyse all the evidence afresh and come to an independent conclusion as to whether or not to uphold the conviction all the time bearing in and that I neither saw nor heard the witnesses so as to make a finding on their demeanour.

4. The complainant (PW 1) testified that on the morning of 16<sup>th</sup> December 2014, she went to hawk charcoal at **[particulars withheld]** before attending a religious conference. While she was at some rental houses, she met a lady and two men who were interested in buying the charcoal. She entered the appellant's house and he asked her to sit down as he was taking breakfast. He invited her to take tea. As she was preparing to measure the charcoal for him, she described what happened to her as follows;

*As I bent down to untie the sack, he closed the door and grabbed my neck. I fell down. He strangled me and threatened he would shout that I was a thief for people to injure me if I refused what he wanted. He pulled me to his bed he forcefully removed my pant and skirt. He tied my pant and told me to was a witch doctor. He did things I did not understand and told me I now give birth. He told me I would become thin like grass, he took my skirt and rubbed it with his hands and skit disappeared. I saw his mouth switched one he started spreading like bubbles. He spat on them. I felt as if I got drunk. I could not understand myself. I could not be able to talk as I lost my voice. Then all of a sudden, I fell asleep. I only woke up at 5.00pm and found I was sleeping on the bed alone. I found many people outside, I was barely naked as I only had my blouse on .....*

5. PW 1 told the court that the appellant inserted his penis into her vagina. After she had woken up, a lady came and helped her with a skirt and assisted to take her to the police station where she found the appellant being interrogated.

6. PW 2 testified that on the material morning she saw PW 1 enter the appellant's house to sell him charcoal. She did not see her leave until 6.00pm when was alerted by a passerby that there was screaming in the appellant's house. She went to the appellant's house and found the appellant standing outside. When the appellant saw her, he took off on his bicycle telling her that he was going to call the village elder. PW 2 entered the house and found PW 1, whom she had seen earlier in the morning, naked and standing by the bed crying. She gave the PW 1 a skirt to wear. PW 1 narrated to her what had happened and she decided to assist in taking her to the police station.

7. A village elder at [particulars withheld], PW 4, recalled that on the evening of the material day, he received information that members of the public wanted to lynch the appellant on suspicion of raping a girl. Since he knew the appellant, he went to the appellant's home and found the PW 1 standing outside the appellant's house. PW 1 narrated to him what happened and he escorted her to the police station.

8. PW 1's mother, PW 5, was alerted about what had taken place and went to the police station where she found PW 4 and PW 1 making the report. She took PW 1 to the hospital for examination where she was examined by the Clinical officer, PW 3. PW 3 told the court that he examined and treated PW 1 on 16<sup>th</sup> December 2014. According to the treatment notes, a high vaginal swab revealed red blood and epithelial cells. When examined her genitalia were normal, the hymen was torn and there were bruised on the perineum and the cervix had a colored discharge. He noted that PW 1 was distressed when he examined her. He concluded that PW 1 had been raped. The investigating officer, PW 6, confirmed that she received instructions from the Commanding Officer to investigate the incident of rape concerning PW 1. She recorded statement, visited the scene and proceeded to charge the appellant.

9. In his sworn defence, the appellant denied the offence. He told the court that on 16<sup>th</sup> December 2014, he went to the police station where he found PW 1's relatives who demanded that he vacate the area. He complained that he was being framed and that he did not know PW 1.

10. 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.*

11. The testimony of PW 1 was that she was subjected to sexual intercourse without her consent. From her evidence, she was drugged and subject to sexual assault. Her evidence on the act of penetration was corroborated by PW 3 who examined her on 16<sup>th</sup> December 2014 as evidenced by the treatment notes from Matungu Sub-County Hospital. In as much as PW 3 examined her on 18<sup>th</sup> December 2014, there was still evidence of penetration when he examined her. Further, the PW 1's testimony is supported by the fact that she narrated her ordeal to PW 2 and PW 4 before they took her to the police station.

12. PW 1 admitted that the appellant was a stranger to her hence the key issue for consideration is whether the appellant is the person who raped her. The testimony of PW 2 established that PW 1 entered the appellant's house at about 8.00am and she found her in his house in the evening. When she saw the appellant at his house in the evening, he stated that he was going to report the to the chief while leaving PW 1 in the house in a state of distress. Further, PW 4, who knew the appellant and his home, confirmed that he went there and found PW 1. This evidence points to the fact that PW 1 was in the appellant's house from about 8.00am to 6.00pm. From her own evidence, she was sexually assaulted and appeared to have been drugged and was there the whole time between 8.00am till evening when she was assisted by PW 2. Since PW 1 was in the appellant's house the whole time, he had the evidential burden of showing what could have happened to the appellant while she was in his house. He is the only one who could have explained what happened to PW 1 and what took place when she entered his house in the morning and why she found in the evening in a distressed state after he had left the scene when he saw PW 2.

13. The appellant's defence that he did not know PW 1 and that he was framed is mere moonshine in light of the totality of the evidence I have narrated above. His act of running away when he saw PW 2 coming to his house is evidence of his guilty state of mind. The case against him is watertight. I therefore reject the respondent's concession of the appeal as I am satisfied that PW 1 did not consent to the act of penetration by the appellant and such I affirm the conviction. I also affirm the sentence which is the minimum provided under the **Act**.

14. The appeal is dismissed.

**SIGNED at KISUMU**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KAKAMEGA this 16<sup>th</sup> day of April 2018.**

**R. N. SITATI**

**JUDGE**

Appellant in person.

Mr Ng'etich, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.