



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 12 OF 2018

(Being an appeal arising from conviction and sentence in Kapenguria Principal Magistrate's court Criminal case No. 404 of 211 delivered by R.M. Washika Resident Magistrate on 1/9/2011.)

PETER EREGAIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Rape contrary to Section 3(1) as read with section 3(3) of the Sexual offences Act No. 3 of 2006**. The particulars were that on the 15th day of May 2011 at around 2.00 am at [particulars withheld] in West Pokot County, did intentionally and unlawfully cause his penis to penetrate the vagina of M E S without her consent.
2. He was equally charged with the alternative charge of **Indecent act with an adult contrary to Section 11(a) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 15th day of May 2011 at around 2 am at [particulars withheld] in West Pokot County, intentionally and unlawfully touched the genital organs of M E S.
3. The appellant was sentenced and convicted . The initial appeal to this court ended up in the Court of Appeal which ordered a retrial of this appeal.
4. The appellant raised several grounds of appeal. The brief facts as presented during trial were that **PW1 Douglas Koech** produced the P3 form on behalf of Danson Litole who had seen the complainant. He concluded that the appellant had engaged herself in a sexual intercourse. The P3 form is dated 17/5/2011. He opined that penetration had occurred.
5. **PW2 the complainant** testified that at around 12.00 on the material day, he went to look for her husband who had taken long in coming back. She found him sitting at Miraa place with his friends. She came back home with him but on the way she was confronted by the appellant who was welding a knife. He demanded that she goes with her. She tried resisting and he threatened to stab her as well as her husband. He was joined by another person and together she was forcefully taken to the appellant's house.
6. The appellant proceeded to lock the door, tore her clothes and raped her till the following morning. The complainant managed to escape when the appellant left. She went to a neighbour who gave her clothes. On her way to report at the police station she met her husband. She went to the hospital where the P3 form was filled and was treated. She identified her clothes which she had worn that night. She recorded statement and the appellant later arrested.

7. **PW3 G S** the husband to the complainant stated that on their way home with his wife they were confronted by the appellant. He said that together with his friend , they forcefully took away his wife. His efforts to protect her were fruitless for the appellant was armed with a knife and that he was with another person.

8. He searched for her till the next day when he reported at Makutano police station. He said that he was able to recognise the appellant with the help of the streets lights.

9. **PW4 Anne Chepchirchir** testified that she was a neighbour to the appellant. That on the morning of 15/5/2011 he heard someone knocking the door at around 8.30 am. When she opened she saw the complainant who was nicknamed “Wamboi”. She was naked. She told her what Peter the appellant had done to her. She gave her her skirt and a T-shirt. The police arrived as they were talking. She said that she lived opposite the appellant and she even knew his father.

10. **PW5 P.C. Paul Kemboi** attached to Makutano police post testified that at around 11 am on 15/5/2011 the appellant came to the police post and reported that there were 4 people who were looking for him with the intention of killing him. He said that he had left his wife “Wamboi” in the house. Apparently PW3 had already reported the incident where his wife had been snatched that night. They went to the appellant house where they found three women who included the complainant. PW2 showed the witness the clothes that were on the floor which were torn and dust. She denied that the appellant was not her husband and that he had raped her. He arrested the appellant.

11. PW6 P.C. Joshua Mwau carried out the investigations and later preferred the charges against the appellant. He referred the complainant for medical attention as well as the filling of the P3 form.

12. When put on his defence the appellant gave unsworn evidence denying the charges. He narrated how he had worked on 15/5/2011 upto 11.30 pm in the home of the Mayor loading maize., His wife Rose Akai prepared food for him and was told that there were boys looking for him. They came at 2 pm. He reported at Makutano police that they wanted to attack him. He was placed in the cells for no apparent reasons.

Analysis and Determination.

13. This being a first appeal, this court is enjoined to reevaluate the evidence afresh and come up with a new finding or conclusion altogether. I have perused the lengthy submissions by the appellant. In his grounds of appeal the appellant has argued inter alia that there was no case of rape meted against the complainant as there was no spermatozoa found after being examined, that no description of the perpetrator was given to the police by the complainant and that there were no favourable circumstances for the complainant to have identified the assailants.

14. The offence occurred at night. The only evidence of identification is the presence of street lights. The witness especially the complainant and her husband PW3 , explained how they were attacked on their way home. From the reading of the entire evidence, I do not think and contrary to the appellant's submissions it was very difficult for the complainant and her husband to have identified the assailants. I am satisfied that the street lights on both sides of the road sufficiently lit the area for them even to have walked home that night. The appellant did not controvert this fact.

15. The time taken by the complainant in his house all the way till morning was sufficient enough to have enabled her identify her attacker. In any case, she woke up in his house as confirmed by PW5.

16. In the premises on this question of identity, I am persuaded that it was the appellant who sexually assaulted the complainant.

17. There was obviously force that was applied. Both PW2 and PW3 testified that the appellant threatened to stab then with the knife he was wielding. More importantly, it appear there was a second person who assisted the appellant.

18. Although there was nothing to show in the P3 form that penetration occurred, as the complainant an adult married woman had obviously engaged herself in sexual activity, the circumstances obtaining herein clearly showed that she had been raped. PW4 saw her naked that morning. She even gave her clothes. The complainant clothes were produced in court.

19. Clearly force was used by the appellant in raping the complainant. This is one of the ingredients under the provisions of Section 3 of the Sexual Offences Act.

20. The defence by the appellant in my view was a decoy. How could he report that the complainant was his wife and that she had left her at home. Infact by giving unsworn testimony, he denied the prosecution the opportunity to cross-examine him on the same. Moreover he did not provide any evidence that "Wamboi" was truly his wife.

21. In the premise there was no consent on the part of the complainant. The appellant did obtain sex by force which is described as rape. The charge was clearly proved.

22. I would have dismissed the appeal on that ground alone but on the issue of sentencing, it appears that the court sentenced the appellant on both the main count and the alternative count. This was procedurally wrong and this has been well captured and admitted by the learned state counsel.

23. Ordinarily, once the main charge is established then the court need not make any findings on the alternative charge. In this regard the trial court erred.

24. The minimum sentence provided on the main count is 10 years. I note the trial court sentenced him to 20 years. Again this was erroneous.

25. Consequently I shall dismiss this appeal. The sentence of 20 years imposed upon the appellant is however set aside. The appellant is hereby sentenced to 10 years imprisonment on the first charge which should run from 17/5/2011 when he was arrested taking into account that though he was granted bond he did not get out of custody.

Orders accordingly.

Delivered, signed and dated at Kitale this 11th day of April 2018.

H.K. CHEMITEI

JUDGE

11/4/2018

In the presence of:

Mr Kakoi for State

Appellant – present

Court Assistant – Kirong

Judgment read in open court