



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 19 OF 2017

SOLOMON MONGERI NYAGAKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Bomet's –PM's S.O. No. 13 of 2016 – Hon. P. Achieng – PM)

JUDGMENT

The appellant was convicted and sentenced to ten (10) years imprisonment for the offence of rape C/S 3(1) as read with S. 3(3) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 23rd day of May 2016 at 0100 hrs at Bomet Town, Bomet County he unlawfully and intentionally caused his penis to penetrate the anus of B.M without his consent.

As the first appellate court, I have a duty to re-consider and evaluate the evidence on record afresh so as to arrive at my own conclusion but the court has to bear in consideration that it did not have the opportunity of observing the demeanour of the witnesses. – Okeno –vs- R 1972 EALR

Brief facts

The prosecution called four witnesses in support of their case. the defence called three.

The complainant is a young man born in the year 1998. He told the court that he was a mechanic at Bomet Township.

On the 23rd day of May 2016 at midday he met the appellant outside his sister's hotel at Koma. The appellant had offered him a job as a shop attendant. He worked there till 9.00 p.m. The appellant told him that he could spend the night in his house and go to work the following day. They proceeded to his house, had a meal and watched television till midnight.

They went and slept in his bed. He suggested that as it was hot they remove their clothes and he agreed. He slept with his boxer pants on. The appellant produced a knife and threatened to stab him with it if he did not consent to the act of sodomy.

The appellant went and collected some oil and tissue, then applied the oil on his private parts and inserted his penis into the complainant's anus and he had sexual intercourse with him three times. in the morning, the appellant prepared water for the complainant and he bathed. He promised to buy a tablet for him if they had further sexual exploits. He left and reported the matter to Osoro and Evans who work with the prison department. The complainant was taken to Bomet Health Centre and later referred to Longisa Referral Hospital for treatment and filling of aP3 form. The appellant was later arrested by members of public.

During cross-examination the complainant conceded that there was a third person in the house that night but he stated that he slept in the sitting room.

The clinical officer Dr Richard Langat PW4 testified to have examined the complainant on 24th May 2016 for a history of sodomy. Upon examination of the anus he found a tear. There was nothing else unusual. He formed the opinion that the complainant had been sodomized.

In his defence the appellant testified that he had met the complainant on 21/5/2016 who told him that he was looking for money so as to join mechanical course. He told him that he was staying with his sister at Bomet Town. On 23/5/2016 at about 3.00 p.m a boy called him and told him that he was staying with his brother in town and had found the house locked. He told him that there was no problem he could spend the night in his house. He joined him with the complainant and they went to play pool.

Later he went to close his pool business. He went to his house with the complainant and another boy. He stays in one roomed house. they watched TV after he prepared them a meal and later he went to sleep with the two boys. He testified to have slept in the middle.

In the morning he woke up and prepared tea. The school going boy left for school. The complainant went and took a bath and asked for keys for one of the shops. He told him that they meet at 9.00 a.m. At 9.00 a.m he went and opened his shop. He could see the complainant in the video shop next door. At about 5.30 p.m. a lady went and informed him that there were plans to beat him on allegation that he had raped the complainant.

A crowd gathered and he decided to call police. He was arrested and detained by police. When he was released on bond he went and found that his shops had been looted due to business rivalry.

He further testified that one of the conspirators was a prison warden.

DW3 JI is a student at **[Particulars Withheld]** secondary school aged 17 years. On 23/5/2017 he went to Bomet from Kisii and found the appellant with the complainant. The appellant left them saying that he was going to attend to other shops. He returned at 4.00 p.m. and left to attend to other shops. He returned at 9.00 p.m. Later they decided to go and spent the night at the appellant's house. The appellant prepared supper for them. They went to watch television. Complainant said he was suffering from headache and proceeded to sleep. They later all went to sleep in the same bed with the appellant. The following morning they left with the complainant. Upon arrival at school, he was told to return with his parents. He went and told the appellant to contact his father. He was left at the shop.

In the evening he was told to close the shop as the appellant had been arrested for rape. He wondered how that could have happened as he was present the whole night with the two.

The law

S. 3(1) of the Sexual Offences Act provides:- "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
- (c) The consent is obtained by force or by means of threat or intimidation of any kind".

Analysis

In his evidence in chief, the complainant did not mention the presence of a third party on the fateful night that he was allegedly sodomized. He mentioned the boy during cross-examination by the appellant. He stated that the boy slept in the sitting room and left early in the morning.

The complainant further told the court that the appellant threatened him with a knife that night.

In the same breath he told the court that the appellant went and collected oil and tissue papers and proceeded to apply the oil on his private parts. It is questionable how the appellant could do all this without putting the knife away. He claims that the appellant had sexual intercourse with him three times.

The clinical officer who examined the complainant found a tear. Nothing else was found. Rectal swap taken did not show or provide any corroborative evidence.

This was a one roomed house. The complainant alleges that the appellant sodomized him three times. There is no way that the third person in the room that night would not have noticed that there was unfamiliar movements that night.

I find there was a deliberate attempt on the part of the complainant and the prosecution to obscure facts by refusing to acknowledge the presence of a third party in the appellant's room that night. That witness DW3 was conveniently left out by the prosecution.

The presumption is that his evidence would be prejudicial to their case. I am inclined to find that the prosecution case was not proved beyond reasonable doubt. The conviction was not safe. The conviction is quashed and sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 11th day of April, 2018 in open court and in the presence of learned counsel for the prosecution Mr. Barasa learned counsel for the defence Mr. Mugumya court assistant Rotich.

M. MU YA

JUDGE

11/4/2018

Court- Certified copies to be furnished to the parties.

M. MUYA

JUDGE

11/4/2018