

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCRA NO. 56 OF 2016

KELVIN MOSE ONDONG’L.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. J. Mwaniki – Senior Principal Magistrate delivered on the 14th day of September 2016 in Keroka PM CR No. 1023 of 2012]

JUDGEMENT

The appellant was convicted and sentenced to life imprisonment for gang rape contrary to Section 10 of the Sexual Offences Act. The particulars of the charge were that on 2nd August 2012 in Masaba North District with others not before court he intentionally and unlawfully caused his penis to penetrate the vagina of A M M without her consent.

The appellant pleaded not guilty to the charge. After hearing the evidence of three Prosecution witnesses and reviewing the medical evidence tendered as well as considering the defence put forth by the appellant, the trial magistrate found the offence had been proved beyond reasonable doubt, found the appellant guilty and convicted him.

Being aggrieved he filed this appeal against both the conviction and the sentence. His Counsel, Mr. Nyasimi argued the appeal based on the petition of appeal filed by the appellant personally as well as a supplementary petition of appeal filed by himself. The appeal was vehemently opposed.

I have considered the rival submissions carefully but as the first appellate court, I am entitled and indeed obligated to consider the evidence before the trial court to arrive at my own conclusions as to whether the offence was committed or not. I do so of course making provision for the fact that unlike the trial magistrate, I did not have the benefit of seeing the witnesses give evidence and so did not observe their demeanour.

The record shows that when the complainant was first called to the witness box to testify the trial magistrate observed that she was not coherent and that she took long to respond to questions. He therefore stood her down and made an order for a mental as well as age assessment. The record also shows that she was duly examined by a Clinical Officer at Kijauri Sub-District Hospital who came to the conclusion that she was twenty-one (21) years old and that she was of sound mind. He came to this conclusion after evaluating her appearance, thought contents and perceptual disorders. When the trial resumed the complainant narrated how on that fateful day she met with the appellant and they went to the house of one Enock where she together with the said Enock and one Kefa coerced her into having sexual intercourse with them. She testified that they did it one after the other and that they wore condoms. Throughout her examination-in-chief she was categorical that she had consented to the sexual intercourse with the appellant but not the other two. Indeed initially she denied that he had done anything to her on the material day. It would seem from her testimony that she had become hostile and was not saying in court what she had told the police in her statement and at some stage it was her testimony that it was her mother who had told her to report the matter to the police. She admitted that what she had told the police did not match what she was telling the trial court.

In court, it was her evidence that she walked to Enock’s house with the appellant and that she did so freely. However what she had told the police was that she was dragged to a kiosk by the three men. She was very inconsistent and told the court that ***“the accused at (sic) dock did not wrong me. I had consented to have sex with Kelvin but not the other two who are not present in court.... We had talked with Kelvin but not the others came (sic)....”***

It is my finding that the only time she alleged to have been forced to have sexual intercourse with the appellant was when she was examined by the court. Her reply was ***“that day I had not allowed the accused to have sex with me, he forced me.”*** It is instructive that this question was put to the complainant long after she had been cross examined and re-examined and the accused person had no opportunity to seek clarification from her. Be that as it may, the proviso to Section 124 of the Evidence Act provides that a court can convict on the evidence of the victim of the sexual offence alone ***“if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

It is my finding that the inconsistency in the testimony of the complainant raises some doubt as to her credibility. She herself admitted that she was not telling the court what she told the police. The benefit of her unreliability as a witness should have been passed to the appellant as stipulated by the law not to herself as was done by the trial magistrate. Unlike in a defilement case or in case involving victims with mental disabilities a court of law cannot extract evidence from a victim so as to convict the accused person before it as did the trial magistrate in this case. The victim herself must be willing to testify and to tell the court the truth. If even a whiff of untruth is discovered in her evidence, then it means she is not a credible witness and her evidence is not reliable and trustworthy.

I find merit in this appeal. The same is allowed, the conviction quashed and the sentenced of life imprisonment set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered at Nyamira this 27th day of September 2018.

E. N. MAINA

JUDGE