



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 74 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court in Sexual offence case No. 54 of 2016 delivered by M.I.G. Moranga Principal Magistrate on 26/9/2017)

JUMA KITIO MASAI ALIAS KATAKULA.....APPELLANT

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) (a) (1) as read with Section 3 of the Sexual Offences Act No. 3 of 2006.**
2. The particulars of the offence were that **on the 24th day of April, 2016 within Trans Nzoia County, intentionally and unlawfully caused his penis to penetrate the vagina of L.C.K. without her consent.**
3. He was equally charged with the alternative charge of **committing an 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 24th day of April, 2016 within Trans Nzoia County, intentionally and unlawfully caused the contact between his genital organ namely Penis and the genital organ namely vagina of L.C.K.**
4. The appellant after full trial was convicted and sentenced to 10 years imprisonment hence this appeal. Before looking at the grounds, it's worth to summarise the proceedings at the trial court.
5. After a long delay, **PW1 the complainant** who was said to be mentally challenged took the witness stand where a voir dire evidence was conducted. Despite what appeared to be a slow start she testified that she had taken her slippers to be repaired by the Appellant. She was able to identify the appellant in court.
6. She testified that the appellant then took her into his house and raped her. She thereafter told her aunt who took her to Marambachi clinic. She said that she knew the appellant who at some point was a herdsman. She further stated that after raping her she bled on her panty and she did not wear it again.
7. **PW2 Dr Mercy Oyeke** a dentist produced a dental age assessment which showed that the complainant was aged 18 years.
8. **PW3 John Koima** produced the P3 form on behalf of Kirwa Labatt where he found that she had not taken bath neither had she changed her clothes. There was creamish discharged on her underwear. There were no injuries on her labia and her hymen.
9. **PW4 P.C. Mary Omari** from Gender and Child Protection Unit carried out the investigation after one E C reported the incident. According to her the complainant reported that she had been sexually assaulted by the appellant one Katakula.
10. When placed on his defence the appellant gave sworn evidence denying the charge. He said that he was a panel beater and does wiring. He said that he was arrested at his place of work on 25/4/16 while replacing jikos for a nearby hotel. The Kenya police reservist who arrested him tied him with ropes and took him to Marambachi police post. He was accused of the allegations which he terms false.
11. On cross-examination he denied knowing the complainant or ever receiving goods from one E C.

Analysis and Determination

12. The court has perused both the submissions by the appellant as well as the respondent. The court has equally perused the P3 forms as

well as the treatment notes by the clinical officers.

13. What is not in dispute is that the complainant though able to explain herself was mentally retarded.

14. Under the Provisions of Section 3 of the Sexual Offences Act, for the offence of rape to be established the following ought to be demonstrated.

a) The intentional and unlawful penetration of the genital organ of a person by another.

b) The absence of consent

c) Where consent is obtained by force or by means of threat or by intimidation of any kind.

15. In this case, it is abundantly clear that the complainant did not have the capacity to consent.

16. As to whether she engaged herself in sexual activity, her evidence and that of the clinical officer affirms that.

17. The only question is whether it was indeed the appellant who raped her. There is no eye witness to the incident. What compounds this is the fact that the evidence of the complainant appears contradictory and at same point confusing.

18. The question however is whether there was a case of mistaken identity by the complainant. Although she was at some point shy as pointed by the court, her pieces of evidence though scanty seemed to point out that she could recollect what transpired.

19. She for instance recalls that she took slippers for repairs at the appellant shop. She identified the appellant well in court. She goes on to state that it was evening. She also recalls the appellants name to be "Katukula" and "Baba Shila". She went on to state,

" He did bad things manners "Alinirape" verbatim. He put me on the bed in had a mosquito net. He held my skirt. I was washing utensils. He called me to go when I did not want to disturb me. I told aunt to beat him up.

When he put me on the bed, he removed his thing he uses to urinate. He did "tabia". He removed my underpant. He put his "thing" inside where I urinate (points at crouch) to demonstrate".

20. On cross-examination she insisted that the incident occurred at the appellant place. She went on to state:

" You were cooking Ugali. You asked me to wash the utensils. I had not eaten"

21. The sum total of the above quotation does point to the fact that the complainant though mentally challenged would recall some salient features of the incident. This is buttressed by the fact that it appears that she knew that the appellant dealt with jikos a fact not strongly disputed by the appellant.

22. Against all the above evidence and taking into consideration that the complainant's aunt one C and her uncle failed to turn up in court, was there any malice on the part of the minor?

23. Reading the medical evidence produced, I find that indeed she was sexually defiled. Why then would the minor zero in on the appellant and no one else? Her aunt would have shed more light on several issues raised by the complainant for instance whether she had actually sent her to the appellant to get her slippers. If so at what time did the complainant come home and at what point did they discover that she had been sexually assaulted.

24. In my view therefore I find that the evidence of the complaint believable despite her mental status. She was able to graphically describe how she was sexually assaulted by the the appellant. She was able to state that she bled and looking at the P3 form its clear that her underwear was soiled.

25. Needless to say I do not see any malice on her part against the appellant. I do not see why she would be mistaken against her perpetrator.

26. Infact during cross-examination she insisted that she knew the appellant's son called Sila. She still told the police that it was Katakula who did bad manners to her.

27. For the foregoing reason I shall dismiss the appeal. The grounds raised by the appellant in his appeal in my view does not hold water. As stated above and as observed by the trial court, and the clinical officer it was clear that the complainant had mental challenge. Her evidence when one reads wholesomely does not correlate though its possible that whatever happened concerning the offence was clearly established. Infact under the proviso to Section 124 of the Evidence Act, her evidence was believable.

28. The ground of challenging the credentials of the Dentist who produced the age assessment report as well as the clinical officer does not in my view hold water. The same ought to have been raised during trial. In any case the same does not aid the appellant's appeal.

29. Having stated so I take notice of the fact that the appellant was in custody right from the date he was charged, that is 28/4/2016 to the

date of the judgment 26/9/2017 which was close to 1 ½ years. This therefore should be taken into consideration when computing the 10 years sentence meted by the trial court. In other words and for avoidance of doubt the 10 years term should run from 28/4/2016.

30. The appeal is otherwise dismissed.

Delivered, signed and dated at Kitale this 26th day of September, 2018.

H.K. CHEMITEI

JUDGE

26/09/18

In the presence of:

Mr. Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.