



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 35 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

MARTIN LOLIAKWE ABDULAHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R.G. Mundia,

SRM dated 23rd January 2018 at the Chief Magistrate's Court at Isiolo

in Criminal Case (SOA) No. 7 of 2017)

JUDGMENT

1. The appellant, **MARTIN LOLIAKWE ABDULAHI**, was charged and convicted of the offence of rape contrary to **section 3(1) (a)** as read with **section 3(3)** of the *Sexual Offences Act* ("the Act"). The particulars of the charge were that on 24th April 2017 at Isiolo County, he intentionally and unlawfully caused his penis to penetrate the vagina of CK without her consent.
2. The appellant was sentenced to 10 years' imprisonment and now appeals against conviction and sentence. Before I deal with the issues raised in this appeal, it is important to recall the principle that governs the exercise of this court's jurisdiction. As the first appellate court, I am required to re-analyse the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972]EA 32). In order to proceed with this task, I will set out the facts as they emerged before the trial court.
3. The complainant (PW 1) recalled that on 24th April 2017, she was attending a funeral. She wanted to go for a short call so she alighted at the main market and saw the appellant, who was cleaning the main toilet. The appellant told her that they could have sexual intercourse in the female toilet. He removed her clothes and also removed his. She tried to resist and fight him but he overpowered her. He also locked the toilet with a padlock so that she could not leave. She finally left the toilet and went home. She was in pain and could not sit so she told her employer about what had happened. She met PW 3 and told her what had happened.
4. PW 3 testified that she was going home in the evening when she met PW 1 at her gate waiting to see her daughter who was not at home at the material time. When her daughter came and spoke to PW 1, her daughter told her to listen to what PW 1 had to say. PW 1 then narrated to her what had taken place to PW 3. PW 3 noted that PW 1 could not sit and when she examined her vagina she observed that there was bleeding and a watery substance oozing. PW 1 told her she knew who had raped her. She then took PW 1 to her grandmother PW 2. PW 2 testified that PW 1 was brought to her home in the evening. PW 1 narrated to her what had happened. She took her to the hospital while she reported the incident to the Police Station.
5. PW 4, the clinical officer, testified that when she examined PW 1, she observed bruises on the labia minora, bleeding from her vagina and a hymen broken. He concluded that there was penetration. The investigating officer, PW 5, testified that the appellant was arrested by Administration Police Officers after being identified by PW 1.
6. In his sworn testimony, the appellant told the court that PW 1 was his girlfriend for 3 months and a dispute arose after another lady came to his place of work. He escorted her to his sister's place where he met PW 1 who then attacked the lady he was escorting. She threatened that he will pay for having another lover.

7. The appellant relied on amended supplementary grounds of appeal and written submissions. In his submissions, the appellant did not deny that he had sexual intercourse with PW 1 but asserted that she consented to the act before turning against him. He further submitted that the trial magistrate failed to note the appellant had a prior relationship with PW 1 and that the prosecution failed to prove the case beyond reasonable doubt.

8. Under **section 3(1)** of the **Act**, the offence of rape is established if:

- i. The accused intentionally and unlawfully commits an act which causes penetration of the victim's genital organs,
- ii. The other person does not consent or,
- iii. The consent is obtained by force or by means of threats or intimidation of any kind.

9. The appellant admitted that he knew PW 1 and alleged that they were in a previous relationship hence this was not a case of meeting a stranger or mistaken identity. PW 1 gave clear testimony on how the appellant forcefully locked her in the toilet and proceeded to have sexual intercourse with her. That the act of penetration was by force is confirmed by her own testimony of how she tried to fight the appellant and how she was locked in the toilet. Her testimony is corroborated by what she told PW 2 and PW 3 after the incident. They saw her in a state of distress and examined her vagina which was injured as a result of forceful penetration. This was further confirmed by the medical evidence of PW 4. All this evidence points to non-consensual sexual intercourse.

10. The appellant's defence was a sham. He alleged that he had been in a relationship with PW 1 but this issue was not put to PW 1 or PW 2 in cross-examination. The appellant alleged that he met PW 1 when escorting his new girlfriend but this, again, this was not put to the witnesses in cross-examination.

11. There was a suggestion that PW 1 was mentally challenged but this did not affect the fact that she did not consent to sexual intercourse. As the trial magistrate who heard the matter appreciated, PW 1 was lucid about the sequence of events and her evidence was and corroborated by other evidence. The totality of the evidence is that PW 1 raped PW 1. I affirm the conviction.

12. As the sentence of 10 years' imprisonment provided by **section 3(3)** of the **Act** is the minimum provided by law, I affirm it.

13. The appeal is dismissed.

DATED and DELIVERED at MERU this 25th day of October 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.