



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 37 OF 2018

BETWEEN

FELIX MOREGA OINO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J.K Mutai – RM

dated 23rd March 2018 at the Principal Magistrate’s Court

at Ogemboin Sexual Offence Case No. 87 of 2017)

JUDGMENT

1. The appellant, **FELIX MOREGA OINO**, is charged with the offence of rape contrary to **section 3(1) (a) (c) and (3)** of the Sexual Offences Act. The particulars of the offence are that on 24th December 2017 within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of AKP by use of force.
2. The appellant was convicted and sentenced to serve 12 years imprisonment. He now appeals against conviction and sentence on the grounds set out in the petition of appeal and his written submissions. He contends that the offence was not proved, that the complainant’s evidence was unreliable and was not corroborated by independent evidence.
3. As this is a first appeal I am required to re-appraise all the evidence afresh and reach a conclusion bearing in mind that I neither heard or saw the witnesses testify. It is for this reason that I shall now outline, albeit briefly, the evidence that emerged from the trial court.
4. The complainant (PW 1) testified that she owned a bar and on the night of 23rd February 2017, she and her employee, PW 2 were with the appellant, a motor bike rider, in Kisii town to watch an Ohangla live band in Kisii. After enjoying themselves, they all left together. PW 1 boarded the appellant’s motorbike and as she was waiting for PW 2 to board, the appellant left PW 2 behind and sped off. He told her he was taking her to Nyamarambe Police Station but he stopped suddenly at his home. She described what happened as follows:

“He told me it was his uncle’s home. They did not open the house but put on the lights. He forced my pants trying to tear them. When he tried removing my clothes, I shouted but he pulled me into the house. He hit me on the face and mouth and I bled. In the house, he ordered me to remove my clothes and he removed a rungu and a panga. He would slap me when I slowed down. I removed all the clothes. He hit me with the panga. He told me that he would kill me that night. Two old men came and they asked him what happened, I shouted and the old men intervened. I moved out, naked and held onto one of the old men but he threatened them with a panga and they left. He then pulled me by my hair back to the house and ordered me into the bed. He then came and forced himself on me. He inserted his penis into my vagina without my consent. He threatened to kill me if I did not do it.”
5. On the next morning, she was rescued by the area Chief (PW 3). She was taken to the police station and then to Nduru District Hospital where she was treated.
6. PW 2 recalled that on the material night he was with PW 1 and the appellant in Kisii. He recalled that as they were leaving, PW 1 boarded the motorbike and sped off. He hired another motorbike and gave chase. He tried to tell the appellant to leave PW 1 alone but the appellant

switched off the headlights and he lost their trail. He reported the incident to PW 1's husband. On the next morning, he found PW 1 at the Chief's office in a state of distress. PW 1 had also been arrested and was at the Chief's office.

7. PW 3 testified that he was told by a confidential informer that a woman had been stranded in difficulty at the appellant's house. He went to the appellant's house and found the appellant and PW 1. PW 1 was naked on bed. She had blood on her lips and was in a state of distress. He stated that PW 1 cried when she saw him. He took both of them to the Chief's camp and then to Nyamarambe Police Station. PW 4, the investigating officer, issued the P3 form and produced PW 1's clothes which were blood stained in evidence. He also produced the treatment notes, laboratory request form and the P3 medical report as evidence.

8. According to the P3 form, PW 1 had sustained facial swelling and bleeding from the mouth and upper lip. The examination of the vagina and private parts was unremarkable and the laboratory test were negative for major tests.

9. In his unsworn statement, the appellant denied the offence. He told the court that on the date before the incident, he had asked his brother in law to find him a wife. He went to PW 1's bar and after talking they proceeded to Kisii town together. He stated that his brother in law managed to convince PW 1 to accept him whereupon he went with her to his home and she stayed with him overnight whereupon he was arrested in the morning by the Chief. He claimed that after his arrest, PW 1's relatives demanded money to secure his release.

10. Based on this evidence the trial magistrate was satisfied that the appellant had committed the act of rape. Under **section 3(1)** of the **Act**, the offence of rape is established when:

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

11. I am satisfied from the clear testimony of PW 1 that she was subjected to sexual intercourse by force and without her consent. The manner in which the appellant rode off with PW 1 and locked her in his house displaces his defence that he went with her to his house voluntarily and that he was innocent. The fact that he intended to rape PW 1 is corroborated by the testimony of PW 2 who saw him ride away with her. The fact that she was injured was confirmed by PW 3, who rescued her and PW 2 who saw her at the Chief camp that morning. That her clothes were blood stained is also inconsistent with the fact of consensual sexual intercourse and imply the use of force.

12. I note that the Clinical Officer who prepared the P3 form was not called as a witness but I do not think that this is fatal as the testimony of PW 1 was sufficient to support the fact of penetration without consent. Medical evidence would only be corroborative of the other evidence. The trial magistrate correctly pointed out the P3 form signed and stamped by medical experts at Nduru District Hospital could be produced in evidence by the investigating officer under the provisions of **section 77** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. The trial magistrate relied on the case of **Stephen Mutuku Makau and Another v Republic [2017]eKLR** where quoting the relevant provisions, the court noted that;

Although generally expert documents should be produced by their makers, Section 77 of the Evidence Act allows any other person to adduce an expert document such as medical, analyst, document examiner's and geologist reports so long as the authenticity of the documents is not disputed. The Section provides as follows;

77 (1) In criminal proceedings any document purporting to be report under the hand of a government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

13. All in all, I am satisfied that the prosecution proved that the appellant was the person who raped PW 1. I therefore affirm the conviction.

14. As regards the sentence, the minimum sentence for the offence of rape under section 3 of the Sexual Offences Act is 10 years' imprisonment. The trial magistrate enhanced the sentence by 2 years given the magnitude of force used including the assault. I do not find any misdirection in the sentence. It is accordingly affirmed.

15. The appeal is dismissed.

Dated and delivered at Kisii this 29th day of November 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.