



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 88 OF 2017

JAMES CHERUIYOT *alias*

DAVID HASSAN MATHOYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. E. Kigen (RM))

delivered on 20th August, 2017 in Eldoret Chief Magistrates' Court

(Sexual Offences Case No. 237 of 2016)

JUDGEMENT

1. The appellant was convicted with the offence of rape contrary to section 3 (1) (a) and (c) as read with section 3 (3) of the Sexual Offences Act No. 3 of 2016 and assault causing actual bodily harm contrary to section 251 of the Penal Code and sentenced to serve 30 years imprisonment and 2 years imprisonment with the sentences running concurrently. He appeals against the same of grounds that:

- a) That the sentence imposed is inconsistent to the spirit of 2010 Constitution under Article 50 (2) (p) and section 3 (3) of the CPC.***
- b) That the alleged penetration is a nullity and was not proved beyond reasonable doubt.***
- c) That the mentioned exhibits left on the appellant's house are non-existing and thus not produced for identification.***
- d) That the substance and every element of rape were a sham.***
- e) That crucial witnesses were not called to testify.***
- f) That section 36 of the Sexual Offences Act was not complied with.***
- g) That the appellant's right of representation by counsel were not explained.***
- h) That the defence case was not considered.***

2. This is a first appeal and this court has warned itself of its duties to reconsider and re-evaluate the evidence afresh with a view to arriving at its own independent conclusion bearing in mind that it did not have the benefit of seeing the witnesses' demeanor.

3. The prosecution case was that IC (PW1) was from the farm on 7th October, 2016. As she passed through a short cut the appellant suddenly hit her on the neck and told her to go to his house. He dragged her into his house and placed a machete on the table and proceeded to rape her. He then told her that he wanted to marry her but she told her that that was impossible since she was married. The appellant offered her tea. He then told her to remove her clothes but she refused. He strangled her every time she mentioned her husband. He raped her repeatedly and served her tea indicating that she should take it as an oath. He told her that she could not leave him and that he would kill her at 3 am as he had done to others previously. He strangled her and he fell. When he released her hand, she screamed occasioning her to pass urine on herself. The appellant kicked her, raped her and told her to leave. She left her maize, jembe, shoes and cap in his house. She later narrated to

a neighbour the ordeal. Ezekiel Libwana (PW2) stated that on 8th October, 2016 at 6.00 am he was from work when he met a crowd and asked them whether they heard screams from the appellant's house. They entered the house and found the appellant who told them that he had caught a thief stealing his maize. He called the chief and the village elder and investigations were commenced. PW1 came and informed them of the incident and the police were called and arrested the appellant. Robert Koech (PW3) heard screams on the material day at around 3.00 am. He said that he heard someone call his name. He went outside and ascertained that the screams were from the appellant's house. His neighbour by the name Harry also came and they agreed to wait until morning. The appellant chased them away from his home with a panga and on asking him about the screams he claimed that he had caught a thief stealing his maize. That the thief was a woman and he had beaten her up. PW1 came that morning and narrated what had happened. The chief called the police who arrested the appellant. David Kipkorir (PW4) was at PW1's house until 11.00 pm and went to his 1st wife's house when PW1 did not return home. He found PW1's missed calls. She later that morning called him crying and told him that she had been kidnapped and raped by the appellant. Constable Michael Atsango (PW5) stated that he was on patrol on 8th October, 2016 at around 10.00 am with Contable Tanui and Chepkonga when he received a call from the OCS asking him to rush to Bindura and contact the area chief. He and his colleagues went to Bindura where they found the appellant already arrested by the area chief and members of the public. PW5 was informed by the chief that the appellant had raped PW1. He interrogated PW1 who informed him that while she was heading home on the material day, the appellant waylaid her and raped her until late hours. He took the appellant and PW1 to the police station and recorded statements. He issued PW1 with a p3 form to take to Moi Teaching and Referral Hospital (MT& RH). He stated that on interrogating the appellant, he informed him that he and PW1 had consented sex and only blew out the promise when she delayed to go back to her house and her husband knew what happened. Dr. Philip Rono (PW6) attached to MT & RH produced the p3 form in respect of PW1 on behalf of Dr. Temet who was away for studies. He stated that upon examination, PW1 was found to have injuries on her genitalia. He stated that PW1 had injuries on the neck, fresh marks on upper lips and her neck was swollen.

4. The appellant was put on his defence. He stated that on 6th October, 2016 he was at work and went back home on 7th October, 2016. That while preparing to go to church he was told to stay for the chief's meeting. That somebody had been heard screaming at night and they did not know what had transpired. The chief handcuffed him and told him that he will know the offence when he reaches the police station. He denied that he committed the offence.

5. I have considered the evidence and the submissions by the parties. The issues that are for determination are:

- a) Whether or not rape was proved to the required standard.*
- b) Whether or not section 36 of the Sexual Offences Act was complied with.*
- c) Whether or not the sentence imposed was unconstitutional.*
- d) Whether or not a crucial witness was not called to testify and the effect thereof.*
- e) Whether or not the appellant's right to legal representation was violated.*
- f) Whether or not the appellant's defence was considered.*

6. Section 3 (1) of the Sexual Offences Act provide as follows:

“A person commits the offence termed as rape if-

- a. He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;*
- b. The other person does not consent to the penetration; or*
- c. The consent is obtained by force or by means of threats or intimidation of any kind.”*

It follows therefore that for a conviction of rape to stand, the prosecution must prove beyond reasonable doubt that a complainant was penetrated without consent or that the consent was forcefully obtained or was obtained by means of threats or intimidation. PW1's evidence was that she was forced into the appellant's house and that the appellant assaulted her and raped her repeatedly. PW1's evidence was corroborated by PW2 and PW3 who heard screams coming from the appellant's house at the material time. Her evidence was further corroborated by PW6 who stated that she had injuries to her neck and upper lips. The p3 form filled by Dr. Temet reveal that PW1 was found to have a swelling on anterior part of the neck with tenderness and bruises and bite marks on upper lips. She was also found to have fresh hymenal tear at the posterior fourclefts with erythema and old healed hymenal remnants. She had whitish vagina discharge. Further, PW1 revealed the appellant's identity to the people she reported the incident to among them PW1, PW2 and PW5 and I find that she recognized the appellant and was therefore properly identified. See: **Maitanyi v. Republic [1986] KLR 198** where it was held as follows:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants, to those who came to the complainant's aid or to the police...”

In the circumstances, I find and hold that the prosecution proved rape beyond reasonable doubt.

7. Section 36 of the Sexual Offences Act provides:

“Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing including a DNA test, in order to ascertain whether or not the accused person committed the offence.” [Emphasis mine]

8. It is clear that the provision herein is not in mandatory terms. Under the circumstances of this case, I do not find that the appellant was in any way prejudiced by the trial court’s failure to order for a DNA test. Further, the evidence of PW1, PW2 and PW3 placed the appellant at the scene of crime and the failure to order for a DNA test cannot lead to the quashing of the conviction. That ground fails.

9. On the next issue, section 3 (2) of the Sexual Offences Act provides that a person charged with the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. Bearing in mind the aggravation coupled with the rape and which was corroborated by the evidence in the p3 form and PW5’s evidence, I find that the sentence of 30 years is constitutional and lawful and causes no injustice to the appellant rather it acts as a deterrence. Further, the evidence in respect of assault was corroborated by PW5’s evidence and I find that PW1 was subjected to assault. In the circumstances, I find that the sentences was lawful.

10. The prosecution is under no obligation to bring a particular number of witnesses but rather it should bring witnesses that prove the case as was done in the case at hand. In the circumstances, I find that the failure to bring a witness did not weaken the prosecution case or prejudice the appellant. That ground fails.

11. Article 50 (2) (g) and (h) of the Constitution stipulates as follows:

“(2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;...

12. Article 50 (2) (h) was interpreted by the Court of Appeal in **David Njoroge Macharia v. Republic** [2011] eKLR. The Court pronounced itself as follows:

“Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

13. The Court of Appeal held the opinion that the State ought to provide legal representation to accused faced with capital offence. Further, the same can be availed through a case by case basis i.e. where there exists complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. It is my considered view that the appellant’s case is not one such a case for the reason that he understood the charge and the case in particular and was able to conduct his case. I find and hold that he was not prejudiced by lack of representation. That ground therefore fails.

14. PW1’s case was corroborated by the other prosecution witnesses and was cogent unlike the appellant’s defence which was a mere denial and did not cast doubt on the prosecution case. For that reason, I find no merit in this appeal. The trial court’s conviction and sentence is hereby upheld.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this **22nd** day of **November, 2018.**

O. SEWE

JUDGE