



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 9 OF 2015

(An appeal from the Judgment of the Resident Magistrate, Embu in CMCR. Case No. 1089 of 2014 dated 23/01/2015)

H M.....APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

1. The appellant lodged an appeal against the judgment of the Embu Resident Magistrate in Criminal Case No. 1089 of 2014 where he was convicted of the offence of Acts which caused penetration or indecent act committed within the view of a family member, child or a person with mental disability contrary to Section 7 of the Sexual Offences Act (SOA). He was sentenced to serve forty (40) years imprisonment.

2. In his petition, the appellant relies on the following grounds:-

- (a) That the evidence was inconsistent and uncorroborated;
- (b) That the evidence was not sufficient to sustain a conviction;
- (c) That the appellant was not medically examined;
- (d) That witness statements were not provided;
- (e) That his defence was rejected on weak reasons; and
- (f) That the sentence of 40 years imprisonment was harsh and excessive.

3. Mr. Njeru Ithiga represented the appellant while Ms. Nandwa was on record for the Respondent. This appeal was argued by way of written submissions.

4. The prosecution's evidence was made up of six (6) witnesses. PW1 the complainant testified that on 11/07/2014, the appellant called her to go with him to a coffee plantation in a neighbour's farm where he removed her clothes and had sexual intercourse with her. The appellant gave the complainant Shs.10/= after the incident.

5. PW1 said that she had left her father PW3 at home and that he followed her to the scene and called her name loudly. She answered to her father's call and went to where he was. The appellant left and went to

another direction. PW3 noticed that PW1 who was mentally unstable had wet legs but did not suspect any foul play.

6. On arrival at their home PW1 went to the shop and bought some doughnuts. Her father enquired as to where she had gotten the money. She told him that the appellant had given her Shs.10/= after sexually assaulting her. PW3 noticed that the complainant's clothes were soiled. He called PW2 a neighbour to go to the home of the appellant to find out what had happened.

7. In the presence of his parents, the appellant admitted having sexually assaulted the complainant. The matter was reported to the Assistant Chief PW4 and later to the police. The complainant was medically examined at Embu Level 5 hospital where a Post Rape Care (PRC) report was prepared by Dr. Njiru.

8. The appellant argued that no medical evidence was adduced to support the charge or to confirm that the complainant was mentally retarded. Dr. Njiru was not trained to assess mental retardation or disability. It was further argued that Section 7 of the SOA under which the appellant was convicted required corroboration of medical evidence.

9. It was further argued that it was wrong for the trial magistrate to find that there was a confession made to PW2 where there was no valid confession recorded in accordance with the law. The appellant further argued that his mitigation was not considered and that the sentence of 40 years imprisonment was illegal and ought to be reduced.

10. The respondent submitted that the case was proved beyond any reasonable doubt and that the mental capability of the complainant was not in issue during the trial. It was confirmed by PW1, PW2 and PW5 that the complainant was sexually assaulted by the appellant. The PRC report was sufficient to prove penetration and that the failure to produce the P3 form was not fatal to the prosecution's case.

11. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **KARIUKI KARANJA VS REPUBLIC [1986] KLR 190** that:-

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

12. Although the appellant claimed that the evidence of the prosecution was inconsistent, no particulars of such inconsistencies were brought out in the submissions. It is not a legal requirement in a case of rape for an accused to be medically examined. It is sufficient to examine the complainant with view of establishing penetration which is an important ingredient of the offence.

13. It was one of the grounds of appeal that the appellant was not provided with witness statements. On perusal of the record, there is no evidence to suggest that the statements were not provided. No application was made by the appellant requesting for supply of the statement and it is appropriate to conclude that the supply of the statements was not an issue during the trial. The appellant did not deal with the issue in his submissions.

14. The appellant argued that there was no corroboration of medical evidence. The PRC report produced by Dr. Njiru noted that the complainant was mentally retarded. The doctor may not be specialized in psychiatry but being a general practitioner he was possessed of the expertise to determine whether a patient is mentally retarded or not. Considering the evidence on record, I am in agreement with the respondent that mental retardation of the complainant was not an issue in the trial.

15. The PRC report showed that the complainant had bruises on the vulva and that the hymen was freshly torn which is evidence of penetration. The doctor noted that PW1's clothes were soiled which confirms the evidence of PW3. The trial magistrate noted that the P3 form had not been filled or produced at the time he was preparing judgment.

16. It is not in dispute that the PRC report was filled and produced by a qualified medical practitioner and that it is a valid medical record. The absence of the P3 form is not fatal to the prosecution's case. It is my considered opinion that the medical evidence in the report is sufficient to prove penetration. The doctor also produced treatment notes of the complainant's out-patient number [Particulars Withheld] which was accompanied by laboratory examination results. The totality of this evidence is sufficient to support the prosecution's case on the charge of rape.

17. In his defence the appellant said that there was a grudge between him and PW3 because he had refused to work for her. The magistrate found no substance in the allegation based on the fact that PW3 would have procured alternative labour. It is noted that the appellant had left PW2's employment about six months before the incident. Even assuming that the appellant had differed with PW2 the passage of time must have dissolved the tension. The allegation that PW2 framed the case against the appellant was dislodged by the evidence of PW1, PW2, PW5 and PW6.

18. The appellant said that he had travelled to Kivwe on the material day and returned to his home three days later. This was disapproved by the evidence of PW2 who found him in his parent's home on the material day when she was sent there by PW3.

19. The appellant was charged with the offence of rape contrary to Section 3 of the SOA. The trial magistrate in his judgment said that the prosecution had established that the appellant had committed an offence under Section 7 of the Act and proceeded to convict him accordingly.

20. The ingredients of the offence of rape are set out under Section 3 of the Act as follows:-

(1) A person commits the offence termed rape if—

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

21. Having found that the PRC report establishes that the complainant was mentally retarded, it follows that she was not capable of giving consent. Section 43 explains the meaning of the words "intentional", "unlawful" in an act of rape as follows:-

(2) The coercive circumstances include:-

(a) asleep;

(b) unconscious;

(c) in an altered state of consciousness;

(d) under the influence of drugs, alcohol, medicine or other substance;

(e) mentally impaired; or

(f) a child.

22. The Black's Law Dictionary, 8th Edition defines "rape" as follows:-

Unlawful sexual intercourse committed by a man with a woman, not his wife through force and against her will.

23. The ingredients of the offence are commission of the unlawful sexual act intentionally causing penetration of the male organ into the female organ. Being mentally retarded, the complainant was incapable of consenting to the sexual act. The appellant was a close neighbour of the complainant whom she said that she knew him very well. He was therefore in a position to know the incapacity of the complainant.

24. I find that the trial magistrate erred in convicting the appellant of an offence under Section 7 whereas the ingredients had not been established. The offence of rape contrary to Section 3 of the Act had been proved.

25. The appellant faulted the magistrate for rejecting his defence on weak reasons. The magistrate dealt with the allegation that the appellant had been attacked by PW3 and PW4 as he was returning home from Kivwe and found it untrue considering that the appellant never raised it during cross-examination. He also dealt with the alleged grudge to be existing between the appellant and PW2 for his refusal to work for PW3 which he found to be a fabrication. I find no basis regarding the ground that the defence was rejected for weak reasons. I find that the trial magistrate adequately considered the defence of the appellant in details and found it not plausible.

26. Both Sections 3 and 7 carry similar sentence being not less than ten (10) years imprisonment. However, Section 3 gives the leeway for enhancement to imprisonment for life.

27. The appellant was a first offender and there were no exceptional circumstances to justify sentencing him to forty years imprisonment.

28. Consequently, I hereby quash the conviction and set aside the sentence of the offence contrary to Section 7 of the Act. The appellant is accordingly convicted of the offence of rape contrary to Section 3 of the Act. Based on the mitigation on record and the fact that he was a first offender, he is hereby sentenced to serve ten (10) years imprisonment.

29. The appeal is hereby dismissed.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MARCH, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Ithiga for Appellant

Ms. Manyal for State

Appellant present