



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.58 OF 2016

WAKO JATTANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 418 of 2016 of the Principal Magistrate's Court at Isiolo by Hon. J.M Irura – Senior Resident Magistrate)

JUDGMENT

The appellant, **WAKO JATTANI**, was convicted for the offence of rape contrary to section 3(1)(a)&(c) (sic) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 19th September 2015, at [particulars withheld] location Merti District of Isiolo County, intentionally and unlawfully caused his penis to penetrate the vagina of **B G** without her consent.

The appellant was sentenced to serve twenty years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Ms. Thibaru, learned counsel. Five grounds of appeal were raised and which can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by not informing him of his right to be represented by an advocate.
2. That the learned trial magistrate erred in law and in fact by sentencing him to a harsh sentence.
3. That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

On the material day, the complainant was alone in the manyatta. The appellant approached her from behind, held her by the hands and then proceeded to tie her hands using a rope. He then made her to lie on the ground and raped her.

The appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972 EA] 32**.

The charge was erroneously framed. It ought to have read contrary:

" to section 3(1) (a)..."

I have however noted that this did not prejudice the appellant for, from the proceedings he understood the charge and fully participated in the trial. The error is curable under section 382 of the Criminal Procedure Code.

Article 50(2) (g) &(h) of the Constitution of Kenya Requires an accused person to be informed of his right to be represented by an advocate of his choice and the right to be assigned an advocate at the expense of the state where substantial injustice would occur. The section states:

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;

These issues were adequately dealt with in the case of **DAVID MACHARIA NJOROGE vs. REPUBLIC [2011] eKLR** where it was held:

State funded legal representation is a right in certain instances Article 50 (1) provides that an accused shall have an advocate assigned to him by the State, at the States expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

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. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a retrial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly, every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.

In the instant case the appellant was not facing a capital punishment. He was not therefore entitled to free legal representation.

The complainant testified that the appellant approached her from behind and held her hands. He then tied her hands with a rope. At the time she was alone in the Manyatta. The appellant then proceeded to rape her. She gave a graphic explanation of how the offence was perpetrated. From her evidence, the complainant identified the appellant by name. This is a person she testified she used to see, though not well known to her. Her husband's evidence confirmed that the appellant was known to the complainant. With respect to the learned counsel, I do not find any contradiction in the evidence of this couple.

The minor contradictions, that are not material may only be attributed to the lack of formal education.

For the offence of rape to be proved against an accused, three ingredients need to be proved. One, that there was penetration into the genitalia of the complainant (if the complainant is a female) or penetration in the genitalia of the accused (if the complainant is a male), two, without the consent of the complainant and three, the perpetrator was the accused.

The medical evidence supported the complainant that she had sexual liaison against her will.

The learned trial magistrate believed the complainant under the proviso to section 124 of the Evidence Act. It provides as follows:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

There is nothing on record to make me arrive at a different finding; the appellant was recognized as the perpetrator.

There was an issue that the sentence was harsh.

Section 3(3) of the Sexual Offences Act provides as follows:

A person guilty of an offence under this section 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.

In the circumstances of this offence, I do not find the sentence harsh.

The upshot of the foregoing is that the appeal is dismissed.

DATED at MERU this 27th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE