



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL CASE NO. 78 OF 2015

[Arising from judgment of F. Kyambia [Principal Magistrate] in Sirisia PM's criminal case No. 825 of 2014 delivered on 11th May, 2015]

VICTOR MASAI CHESETO..... APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant **Victor Masai Cheseto** was arraigned in court in criminal case **No. 825 of 2014** and charged with 3 counts as follows;

1st count: Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of this count were that on the 28th day of August, 2014 in Bungoma county being armed with a dangerous weapon namely knife robbed **E C N** her mobile phone Nokia 1600 valued at kshs 4,000/= and immediately after the time of such robbery wounded the said person.

2nd count: Defilement contrary to section 8 (1) (4) of the sexual Offences Act No. 3 of 2006. Particulars of the offence were that on the said date the 28th of August, 2014 in Bungoma county intentionally cause his penis to penetrate the vagina of **E C N** a girl aged 17 years.

3rd count: Assault causing bodily harm -contrary to Section 251 of the Penal Code. The particulars were that on the said date and same place he assaulted **Beatrice Chemutai** occasioning her actual bodily harm.

2. The accused was found guilty of all the offences by the trial court. He was sentenced to death for the first count, 10 years and 3 years for the 2nd and 3rd counts respectively. The sentence on the 2nd and 3rd were kept in abeyance.

3. Being dissatisfied with the entire judgment the appellant appealed to this court on the grounds that the trial court relied on uncorroborated evidence; contradictory evidence the court misinterpreted the law; the proceedings violated the rights of the appellant and the sentence was harsh and excessive.

4. The appellant's written submissions may be summarized as follows; the charge sheet was defective; evidence before court was not genuine, no independent (neighbours) witnesses were called; recognition of the assailant were not positive; arrest was 13 days after the incident and no reason given why it took long yet the witness claimed to have known the appellant; and the prosecution evidence did not establish any case against him; the P3 form indicated **PW1** was attacked by an unknown person yet she indicated she knew the appellant; court should have not solely relied on the evidence of **PW1 & 2** but considered

circumstantial evidence; further the age of **PW1** was not established as no birth certificate nor age assessment was produced in court and P3 form was filed much later and no explanation given.

5. The State opposed the appeal on the grounds that, **PW1** was known to the appellant and she recognized him at the time of the attack, so did **PW2**; the charge sheet before court was proper as Section 134 of the Criminal Procedure Code was complied with, and evidence of **PW1 & 2** was consistent. The State urged the court to uphold the conviction and sentence.

6. Having considered the grounds of appeal and the submissions by both parties, the issue before court is whether the accused defiled **PW1**, assaulted **PW2** and violently robbed **PW1**.

This being the first appellate court, It has the duty to re-consider the evidence afresh, examine and analyze see **Okeno vs. Republic [1973] E.A. 322.**

7. 1st count- robbery with violence. The evidence of the two witnesses **PW1 & 2** is that they were both able to recognize the appellant as their neighbor Masai and both conversed with him. They saw him with the aid of solar light and a torch. He was armed with a torch, a kitchen knife and wore a red Marvin.

PW3 stated that his investigations revealed defilement, assault and **PW1** lost her phone. He went to the scene found a door panel broken, he recovered a torn panty, a knife and when arresting the appellant they recovered a muffin which the appellant is said to have worn at the time of the attack. This evidence corroborates the evidence of **PW1 & 2** that the appellant entered into the house having broken a glass door, he was armed with a knife and had a torch and in the process he robbed **PW1** of her phone. The ingredients of robbery with violence were proved and I do concur with the finding of the trial court. The sentence meted out was mandatory and I therefore do not fault the trial court.

Count II- Defilement.

8. The testimony of **PW1** is that the appellant broke into their house, went to her bedroom took her outside their house, tore her panty and defiled her. She saw him and recognized him by the aid of electricity, moonlight and a torch, he also spoke and she recognized him as their neighbor. Evidence of defilement was corroborated by **PW4** who produced a P3 form filled by his colleague who upon examination found that the victims hymen was broken, she walked with difficulty, had injury on the neck region, had laceration on libia minora suggesting sexual assault, he also assessed her age at 17 years. The court believed the evidence of **PW1 & PW4**. Their evidence was not in any way dislodged by the defence. The victim was said to be 17 years. In this regard also I am in concurrence with both the conviction and sentence and will not interfere with the same.

9. Count III Assault causing actual bodily harm – PW1 & PW2 testified that the appellant assaulted **PW2**, slapped her severally and hit her with a spade. **PW4** confirmed the assault and injuries sustained. The prosecution no doubt proved this count to the required standard. I agree with both the conviction and sentence.

10. The appellant failed to establish violation of the Constitution as alleged, or mis-interpretation of the Law and this ground of appeal fails.

11. The sentences were all within the law and cannot be described to have been harsh or excessive in the circumstance the appeal fails and is dismissed.

Delivered and Dated this 26th day of May, 2016.

ALI-ARONI

JUDGE.