



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 137 OF 2015

BETWEEN

R O OAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Wechuli, RM dated 2nd March 2015 at the Senior Principal’s Magistrates Court at Nyando in Criminal Case No. 1129 of 2013)

JUDGMENT

1. The appellant **R O O** was charged with the offence of rape contrary to **section 3(1) and (3)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 14th August 2013 at [Particulars withheld] Sub-location in Nyakach District of Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of M A without her consent. The appellant was convicted and sentenced to 10 years’ imprisonment. He now appeals against conviction and sentence.
2. As this is a first appeal, the duty of this court to evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction bearing in mind that I did not see or hear the witnesses (see ***Njoroge v Republic [1987] KLR 19***). In order to deal with this obligation, I now proceed to set out the evidence as it emerged at the trial.
3. The complainant, M A (PW 1), recalled that on 13th August 2013, while she was asleep in her house, the appellant, who was her cousin, came into her house at about 1.00 pm. She could see him as the lamp was flickering but was very low. He suddenly held her by the neck, undressed her and started having sexual intercourse with her. He left at 5.00am. PW 2 recalled that on the same morning at about 6. 30 am, PW 1 came to his house crying and when he inquired from her what had happened, she told him that the appellant had raped her. He noticed bruises on her neck. He took PW 1 to Katito Police Station where she reported the matter and was referred to Pap Onditi Hospital for examination and treatment.
4. PW 4, the clinical officer who completed the P3 form, told the court that on 14th August August 2013, PW 1 came to the hospital and reported that she had been assaulted. Although her clothing was intact, her panties were torn and her inner thighs had tender swellings. There were bruises on the labia minora. He opined that there was forced penetration.
5. PW 3, a police officer at Ahero, confirmed that PW 1 made a complaint of rape at the police station on

the morning of 14th August 2013 and named the appellant as the person who entered her house and raped her. He told the court that the suspect remained at large and was only arrested on 15th November 2013 by members of the public. PW 3 also told the court that the P3 form was issued to PW 1.

6. In his unsworn statement the appellant denied the charges. He told the court he was arrested in the morning of 15th November 2012 after being accused of stealing his mother's radio. He denied that charges against him and alleged that he was being framed because of land dispute.

7. The appellant relied on his petition of appeal and written submissions. He contended that the evidence against him was contradictory and unreliable. He submitted that there was no independent evidence to implicate him in the offence. He submitted that since the complainant had mental illness, there was a chance of mistaken identity which the court did not consider. He also complained that his defence was not considered by the trial court.

8. Counsel for the respondent submitted that conviction was proper as the PW 1 knew PW 2 and she described what happened to her clearly. The fact that there was penetration was confirmed by the testimony of PW 4 and that the prosecution satisfied all the elements of the offence of rape.

9. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the ***Sexual Offences Act, 2006***;

A person commits the offence termed rape if

(a) He or she intentionally or 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.

10. PW 1 gave testimony on how the appellant came into her home and forcefully had sexual intercourse with her. Her testimony was clear and consistent and remained unshaken in cross-examination. Although she admitted that she was suffering from epilepsy, there is no evidence that she could not understand what was happening to her. Under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** the court may convict a person of a sexual offence without corroboration where the court believes the complainant. Although the testimony of PW 1 did not require corroboration, there was in fact, sufficient evidence to support her testimony. On the very next morning she told PW 2 what had happened to her and was taken to hospital. PW 2 observed her state of distress and took her to report the matter to the police. This evidence lends credibility to her testimony. The medical evidence by PW 4 confirmed that she had injuries on her thighs which is consistent with forceful penetration. I therefore find and hold that the facts establish that PW 1 did not consent to the sexual act and that penetration was by force.

11. As to the issue of identity of the assailant, I agree with the respondent that this was a case of recognition rather than identification of a stranger. Even in cases of recognition, the guidance given by the Court of Appeal has been that the trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction to avoid cases of mistaken identity (see ***Wamunga v Republic [1989] KLR 424*** and ***Anjononi & Others v Republic [1980] KLR 59***). The appellant and PW 1 knew each other and on the material night there was a lamp albeit with low light with which she recognised the appellant and was even able to name him as her assailant when she reported to PW 2 the next morning.

12. The appellant's defence, in light of the prosecution evidence, was thin and properly dismissed. His guilt was further established by the fact that he disappeared from the village after the incident and was only arrested after about 4 months. Further, during the proceedings, he asked for forgiveness for what he had done.

13. The totality of this evidence is that there is no possibility of mistaken identity nor falsity in the charges against the appellant. I find and hold that it is the appellant who committed the felonious acts and was properly convicted of the offence of rape. I affirm the conviction.

14. The sentence of 10 years' imprisonment is the statutory minimum under **section 3** of the ***Sexual Offences Act***. It is lawful and I affirm it.

15. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 20th day of December 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.