



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 35 OF 2016

KENNETH KING'ORI MOGUTE..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case No.770 of 2015 of the Senior Resident Magistrate's Court at Githongo by C.A Mayamba– Senior Resident Magistrate)

JUDGMENT

The appellant, **KENNETH KING'ORI MOGUTE**, was charged and convicted for the offence of rape of a person with disability contrary to section 7 of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on diverse dates between the 13th July 2015 in Meru Central District of Meru County intentionally caused his penis to penetrate the vagina of **RN**, a person with mental disability without her consent.

The appellant was sentenced to serve 25 years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and fact by failing to rely on expert evidence.
2. That the learned trial magistrate erred in law and fact by relying on facts other than what was stated in charge sheet.
3. That the learned trial magistrate erred in law and fact by dismissing the defence of the appellant.

The state opposed the appeal and was represented by Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

When the complainant was cutting some napier grass, the appellant went and tripped her. He thereafter defiled her and then fled.

On his part the appellant contended that he was falsely implicated by the complainant's aunt.

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 expert evidence was adduced by Sebarina Kamaithiri (PW4), a clinical officer. She testified that her examination revealed that the vulva and the vaginal orifice were inflamed. Red blood cells were also observed after high vaginal swab was taken. according to her this was evidence of penetration.

There was an expert report in respect of the complainant that was produced. Dr. Mwikamba who examined her opined that she suffered intellectual disability with epilepsy and that she was not fit to testify.

The learned trial magistrate factored the experts' evidence in his judgment.

For a case to be proved, evidence is usually called to support the charge. The charge is a statement of offence and not evidence in itself. The complaint by the appellant is therefore ill advised.

In his defence the appellant said he only helped the complainant to cut some napier grass. He contended that the complainant's aunt is the one who falsely implicated him. This was not supported by the evidence on record.

Section 7 of the Sexual Offences act provides as follows:

A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

This was a wrong section to charge the appellant with. He was not accused of committing the offence in view of other persons. Had the complainant been described as an idiot or imbecile, then section 146 of the Penal code would have been the right section to charge him. It states:

Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.

Now that this is not the case, the appellant ought to have been charged under Section 3(3) of the Sexual Offences Act which provides:

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.

Since no prejudice will be caused to the appellant, I set aside the conviction under section 7 of the Sexual Offences Act and substitute the same with a conviction under section 3(3) of the Act. The sentence will not be disturbed.

From the foregoing analysis of the evidence, I find that the appeal must fail. The same is dismissed.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE