



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL APPEAL NO. 31 OF 2014
TIMOTHY MUNIALO LUSWETI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

[An appeal against Judgment conviction and sentence of

Hon. S.K. Ngetich (Senior Resident Magistrate)

at Kitale delivered on 28th February, 2014

vide Kitale CMCR. No. 864 of 2013]

J U D G M E N T

1. The appellant, **Timothy Munialo Lusweti**, appeared before the Senior Resident Magistrate at Kitale, charged with rape, contrary to Section 3(3) of the Sexual Offences Act, in that on the night of **8th/9th April, 2013**, in Trans-Nzoia County, he sodomized **JWW**, without his consent. There was an alternative count of indecent Act with an adult contrary to Section 11 (A) of the Sexual Offences Act.
2. After a full trial, the appellant was convicted on the main count and sentenced to **ten (10) years** imprisonment. He was dissatisfied with the outcome and preferred the present appeal on the basis of the grounds in his petition of appeal dated 5th March, 2014. He appeared in person at the hearing of the appeal and relied on his written submissions. He urged this court, to allow the appeal and set him free.
3. **Mr. Kakoi**, the Learned Prosecution Counsel, opposed the appeal on behalf of the Respondent and submitted that the complainant's evidence was clear on what happened to him to the effect that he was taken to the appellant's house and sodomized. That, although the complainant was the sole witness, his evidence was credible and unshaken. That Section 124 of the Evidence Act applied in the circumstances such that the complainant's evidence did not require corroboration.
4. Learned Prosecution Counsel, further submitted that there was confirmation from PW4 that the complainant was sodomized and that the offence was proved against the appellant. Learned Prosecution Counsel, urged this court to dismiss the appeal.
5. The rival submissions have been given due consideration by this court whose duty is to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

6. In that regard, the evidence by the four (4) prosecution witnesses was considered against that of the appellant in his defence.

The complainant, **JWW (PW1)**, indicated that on the night of 8th/9th April, 2013, he was in the house of the appellant who had invited him so that they could discuss about the sale of his (complainant's) land. He arrived there at 2.00 pm and found the appellant drinking "changaa". He was thereafter invited by the appellant for a meal at a hotel and it is then that he was convinced to sleep at the appellant's house as it had rained.

7. The two walked into the appellant's house and arrived at 6.30 pm after which they had dinner and slept on one bed while the appellant's daughter slept in another house and his son in a separate room.

The complainant further indicated that it was while they were sleeping that he felt some load over him and realized that the appellant was on top of him and had placed a sword and a metal rod at the head of the bed. The appellant threatened him after which he oiled his penis and also oiled his (complainant's) anus. The appellant then inserted his penis into his (complainant's) anus. Thereafter, he (complainant) went to the sitting room.

8. On the following morning, the complainant went to a dispensary for examination and was told to report to the police. He reported at Saboti Police Station and was given a P3 Form which was completed at Kitale District Hospital.

An artisan, **Patrick Barasa Wafula (PW2)**, was on his way to work on the 10th April, 2013, when he heard from people that the appellant had defiled the complainant who had gone to the local dispensary. He (PW2) went to the dispensary and met the complainant who confirmed that he had been defiled by the appellant.

9. **Cpl. Benedict Ingosi (PW3)**, received the necessary report on the 10th April, 2013 at 4.00 pm and issued the necessary P3 Form to the complainant. He recorded statements from the complainant and his witnesses and later arrested the appellant.

Peter Masake (PW4), a clinical officer, produced the P3 Form (P. Exhibit 1) completed and signed by his colleague and which confirmed that the complainant had been sodomized.

10. In his defence, the appellant in a sworn statement indicated that on the 16th April, 2013, he passed near Saboti Police Station at about 3.00 pm and was called by a police officer who told him to sit on a bench outside. He was later locked in the police cells for a night and on the following day was escorted to Kitale Police Station after which he was arraigned in court with the present charge which was strange to him. He indicated that the complainant was known to him from the 29th May, 2011, when they traded in maize and the complainant borrowed his bicycle.

11. The appellant further indicated that his bicycle was never returned by the complainant nor did he (complainant) supply the maize that had been paid for. That, the two never met again until this matter came to court.

The appellant contended that the complainant never slept in his house and that he (appellant) did not live in Lukhosi area which is two (2) kilometres apart from Lukhome area. He produced an agreement (D. Exhibit 1) entered between him and the complainant for the sale of a bicycle.

12. From all the foregoing evidence, the learned trial magistrate concluded that the complainant's evidence was credible in as much as it indicated that the appellant committed an act which caused a penetration of his penis into the anus of the complainant. Apparently, the prosecution case against the appellant depended on the credibility of the witnesses and in that regard, the learned trial magistrate believed the complainant and disbelieved the appellant.

13. Indeed, under Section 124 of the Evidence Act, where in sexual offences the only evidence is that of

the victim, the same may be received and be acted upon to convict the accused person if the court is satisfied that the victim told the truth. The evidence of the victim does not therefore have to be corroborated by any other evidence.

Herein, the learned trial magistrate, found the complainant to be a credible witness and acted on his evidence to convict the appellant.

14. An appellant court cannot interfere with the findings by a lower court based on the credibility of witnesses unless no reasonable tribunal could make such findings or it was shown that there existed errors of law [see, **Republic -vs- Oyier (1985) KLR 353**]. Herein, the learned trial magistrate had the advantage of seeing the witnesses and was therefore most suitable to make findings based on the credibility of the witnesses. It is not for this court to interfere with those findings which ultimately led to the conviction of the appellant.

15. In any event, this court having re-visited the evidence is satisfied that there was ample evidence proving that the complainant was sodomized without his consent and if the consent was obtained, then it was so obtained through duress and threats to the complainant's life. The evidence by the clinical officer (PW4) confirmed that there was penetration of a male genital organ into the anus of the complainant.

16. The evidence by the complainant confirmed that that act of penetration was committed by the appellant who misled him (complainant) to sleep in his house and in one bed.

The evidence by Patrick (PW2) showed that he saw the complainant in the company of the appellant on the 8th April, 2013 in a hotel. Indeed, the complainant confirmed that he was invited to the hotel by the appellant for a meal on that day.

17. The appellant denied the allegations against him and implied that he was framed by the complainant after a sour deal involving a bicycle and maize. However, the learned trial magistrate found that line of defence lacking in credibility in view of the complainant's evidence which was found to be more credible.

18. There being no good reason to interfere with the findings of the learned trial magistrate, this court would agree with those findings and hold that the ingredients of the offence of rape were fully established against the appellant. His conviction by the learned trial magistrate was proper and the sentence meted out was lawful.

In the upshot, this appeal is not merited and is hereby dismissed.

J.R. KARANJA

JUDGE

18/6/2106

{Delivered and signed this **18th** day of **June, 2015**}