



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRA NO.54 OF 2011

(Appeal arising from the Conviction and Sentence of D. W. Nyambu in MLD Cr. No.31 of 2011)

A I..... APPELLANT

VRS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(4) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on the night of 5/7/2010 in Malindi District intentionally caused penetration of his male organ into the female genital organ of L F K, a girl aged 17 years. The appellant was convicted of the offence of rape as the complainant's age was assessed to be over 18 years old. The appellant was sentenced to serve 12 years imprisonment.

The grounds of appeal are that he was framed and the evidence of PW1 was fabricated, that he was not furnished with witness statements, that the Doctor's evidence did not prove the offence, that crucial witnesses were not called to testify and that his strong defence was disregarded. He filed written submissions in support of his appeal. The submissions are mainly medicating factors and the appellant pleads with the court to have mercy on him. He submits that he is a first offender, an orphan and he is remorseful. The sentence is harsh and excessive. He has already served almost a third of the sentence. He is asthmatic, suffers from tuberculosis and he is also HIV positive. He pleads with the court to substitute the sentence with a lessor sentence such as being put on probation.

The State opposed the appeal and relied on the record of the trial court.

The record of the trial court shows that five (5) witnesses testified for the prosecution. PW1 was the complainant. She had been employed by the appellant's sister(PW2) as a househelp. On 5/7/2010, she was in the house and they took dinner. She went to sleep and left other family members watching television. After sometime, she heard the footsteps of somebody walking and upon switching on the lights, she saw the appellant in the room. He asked her to go with him to the sitting room and walked with her to the corridor. The appellant threw a lasso around her neck and held her mouth. He then took her to a bed and defiled her until she lost consciousness. She woke up at 6.00 a.m and found the appellant on the bed. The appellant prepared tea and they took together. PW1 left and went to Watamu Police Station where she reported the matter. She heard pains all over the body and was taken to hospital for treatment. She then went with the police to arrest the appellant. The appellant saw them and started running but he was arrested. Her age was assessed and was found to be 18 years. She did not know when she was born.

When she was being defiled, she screamed and a neighbour by the name Omar (PW4) heard her screams.

PW2, Harya Wangechi Yosiri is a sister to the appellant. On the 5/7/2010, she travelled to Mombasa and left the appellant with PW1. When she returned on 6/7/2010, she did not find PW1 at home. The appellant informed her that PW1 had gone to visit her sister. She sent the appellant to the shop and shortly police officers went to her house. The appellant saw them and started running but was arrested. PW1 was with the police and she informed her that, the appellant had raped her.

PW3, Cpl Bonice Tonui was based at the Watamu Police Station. The complainant reported the matter at about 1.00 p.m and she had pains on her neck, eyes and back. She was referred to hospital and later led the police officers to arrest the appellant. The appellant saw the police vehicle and started running but he was arrested. PW1's age was assessed and she was found to be over 18 years. PW4, Omar Ali is a neighbour to PW2. On the 5/7/2010 at about 2.00 a.m he heard screams from PW2's house. After sometime the screams stopped.

PW5, Ibrahim Abdullahi is a clinical officer who was based at Malindi District Hospital. He examined PW1 on 9/7/2010 and filled her P3 form. Her eyes were swollen and were red. She complained of pain on the neck and between the breasts. Her hymen was broken and she had a lot of pain when the vaginal examination was done. He concluded that there was penetration.

In his sworn defence, the appellant testified that there was a title deed that was registered in his name. His sister PW2 wanted to transfer the land into her name so that she could sell it. Her sister went to Mombasa and they denied raping PW1. He was arrested by the police and charged with the offence. He further testified that, there were other people sleeping in the house but they were not called to testify. It is his sister who is framing him so that she can take the land. He is HIV positive and that the complainant was tested after sometime and she was HIV negative.

The main issue for determination is whether the appellant raped the complainant or in other words whether the prosecution proved its case beyond reasonable doubt. Although the appellant was charged with the offence of defilement, he was convicted of the offence of rape as the complainant was over 18 years old. The evidence of PW1 is that it was the appellant who raped her throughout the night. She had worked for PW1 for about a month. She knew the appellant and there was light in the house from electricity. According to PW4, he heard screams from PW2's house at about 2.00 a.m. PW5 confirmed that PW1 was raped. The defence evidence did not explain what happened that night. The trial magistrate carefully evaluated the defence and concluded that the allegations of framing by PW2 were not true. The trial court correctly held that when PW1 went to report to the police, PW2 was not at home. PW1 was an employee of PW2 and had no grudge with the appellant.

From the evidence on record, it is established that PW1 was raped. The evidence also proves that it was the appellant who raped PW1. The trial court correctly evaluated the evidence on record and concluded that the fact that PW1 was HIV negative does not disprove the prosecution evidence. I entirely agree with the finding of the trial magistrate. PW1 knew the appellant and the incident occurred in the house. The allegations that the appellant was being framed are not established. The appellant was sentenced to serve 12 years imprisonment. Under section 3(3) of the Sexual Offences Act, the minimum sentence for the offence of rape is 10 years and can be enlarged to life imprisonment. The sentence herein is not excessive. The appellant knew that he was HIV positive but proceeded to rape the complainant. He cannot use his HIV status as a defence to disprove the allegations against him. The evidence is direct and I do find that the prosecution proved its case beyond reasonable doubt.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 29th day of October, 2015.

SAID J. CHITEMBWE

JUDGE

