



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.173 OF 2013

(An Appeal arising out of the conviction and sentence of HON. OCHENJA – AG.CM delivered on 13th August 2013 in Kibera CM. CR. Case No.3208 of 2011)

COLLINS ISALANO MAGADA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Collins Isalano Magada was charged with the offence of **rape** contrary to **Section 7** of the **Sexual Offences Act**. The particulars of the offence were that on the 23rd August 2011 at 10.00 a.m. in Kileleshwa within Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M M C H (the complainant) without her consent. The complainant is a person with mental disabilities. He was alternatively charged with **committing an indecent act with an adult** contrary to **Section 11(6)** of the **Sexual Offences Act**. The particulars of the offence were that on 23rd August 2011 at 11.00 a.m. in Kileleshwa within Nairobi County, the Appellant intentionally and unlawfully **committed an indecent act** by placing his male genital organ (penis) on the surface of the female genital organ (vagina) of M M C H, a woman aged 31 years without her consent. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count of rape. He was sentenced to serve twelve (12) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of insufficient evidence adduced by the prosecution witnesses. He took issue with the fact that he had been convicted of the offence yet the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. He was aggrieved that he had been convicted yet the trial magistrate had not considered his defence. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to acquit him. Ms. Aluda for the State opposed the appeal. She made oral submission to the effect that the prosecution had established its case on the charge brought against the Appellant to the required standard of proof. She submitted that the complainant lacked the mental capacity to consent to a sexual act. According to Ms. Aluda, the evidence of the complainant was

corroborated by that of PW2 and PW6. She urged the court to dismiss the appeal.

What are the facts of this case?

The complainant in this case is M M C H. It was alleged that the complainant was a thirty one (31) year old mentally retarded girl. The complainant was at the material time living with her sister and brother in law, PW1 E W. PW1 had employed PW3 Violet Njeri Kisuya and one Grace Ndegwa to take care of the complainant and his children. The complainant was able to testify during trial. She recalled that on 23rd August 2011 at about 10.00 a.m. she had gone to hang her towels at the roof top where there are hanging lines. The complainant testified that she met the Appellant at the roof top. The Appellant was employed as a caretaker for apartments where the complainant lived. The Appellant asked her to remove the towels from the hanging lines and place them on the floor. He then asked her to remove her trousers and lie on the floor to which she complied. She testified that the complainant also removed his trousers and wore a condom before he had sexual intercourse with her. The complainant was vivid in her testimony as she recalled that she saw blood on the towel. She felt pain. When the Appellant had finished, he asked her to continue hanging her towels while he went about his work.

PW3 was in the house at the time and was the one who had send the complainant to hang the towels. She testified that she noticed that the complainant had taken long to hang the towels. When she went outside to look for the complainant, she saw the Appellant cleaning the staircase. PW3 proceeded to the roof top where she found the complainant hanging her towels. She asked the complainant why she had taken long to hang the towels to which the complainant responded “*You don’t know?*”. She took the complainant back to the house. The complainant went and sat on the bed. PW3 testified that she noticed that blood was streaming from the complainant’s legs. When she inquired from the complainant what had happened, the complainant told her that the Appellant had sexual intercourse with her. A report was made to Kileleshwa Police Station resulting in the arrest of the Appellant.

The complainant was taken to Nairobi Women Hospital where she was examined by Dr. Thuo. A medical report was produced by PW2 Dr. Daniel Nguku on behalf of Dr. Thuo. The medical report was produced as ***Prosecutions’s Exhibit No. 1***. On examination of the complainant’s genitalia, Dr. Thuo noted that the complainant’s hymen was freshly broken and was bleeding. She had a tear at the posterior end of the vagina. The doctor concluded that the complainant had been sexually assaulted. The complainant was put on treatment. The doctor also recommended that she be counselled. The complainant and the Appellant were also seen by PW6 Dr. Zephania Kamau based at the police surgery. This was on 26th August 2011. PW6 saw nothing remarkable on the Appellant. He filled a P3 for the Appellant which was produced as ***Prosecution’s Exhibit No. 6***. When PW6 examined the complainant, he observed that she was mentally retarded. He noted that the complainant had bruises on the lateral aspect of the middle part of the right bum caused by a blunt object. He also noted that the vaginal opening had two oozing tears and that her hymen was torn and was oozing with blood. He filled a P3 form for the complainant which was produced as ***Prosecution’s Exhibit No. 7***.

The complainant was seen by PW4 Dr. Esther Wanjiku Kariuki, a clinical psychologist on 1st September 2011. She examined the complainant and prepared a report which was produced into evidence as Prosecution’s ***Exhibit No. 5***. In her assessment, PW4 concluded that the complainant is mentally retarded. She noted that although the complainant’s actual age was thirty one (31) years, her mental age was that of a child of below nine (9) years. Her findings were based on the fact that the complainant’s speech although audible, was not articulate. Her thoughts were also simplistic and lacked adequate coherence. The case was investigated by PW5 Cpl. Margret Namunyak. A towel was recovered at the roof top where the complainant is said to have been raped. PW5 also obtained the clothes the complainant’s wore at the time. The items were produced as ***Prosecution’s Exhibits No. 2, 3 and 4***. After concluding her investigation, she reached the conclusion that indeed a case had been made for the Appellant to be charged with the offence for which he was convicted. When the Appellant was put on his defence, he denied committing the offence. The Appellant testified that the complainant voluntarily had sexual intercourse with him. He claimed that the complainant gave him some condoms and undressed herself before they had sexual intercourse.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding their demeanor (See **Njoroge –vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution established the charge of rape against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has evaluated the facts of this case. The Appellant was charged with the offence of **rape** under **Section 7** of the **Sexual Offences Act**. **Section 7** of the **Sexual Offences Act** reads 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 disability is guilty of an offence as is liable upon conviction to imprisonment for a term which shall not be less than ten years.”

However, the particulars of the offence in the Appellant’s charge sheet and reads as follow;

“ COLLINS ISALANO MAGARA:- on the 23rd August 20 at 10.00 a.m at [particulars withheld] Apartments along Ring Road in Kileleshwa within Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M M C H without her consent, a person with mental disabilities.”

From the provisions of **Section 7** of the **Sexual Offences Act**, it is clear that the charge against the Appellant has been laid under the wrong provisions of law. This is an error which was not addressed by the trial court. The charge should have been framed under the provisions of **Section 3(1)** of the **Sexual Offences Act**. In determining the validity of the Appellant’s conviction and sentence on the basis of the defective charge sheet, this court shall be guided by the provisions of **Section 382** of the **Criminal Procedure Code** which provides;

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

This test is provided for under this section is whether the error occasioned a failure of justice upon the Appellant. At this point what is important is whether the Appellant understood the charge he was facing to properly defend himself. From the records, it is clear that the substance of the charge and every element thereof was read to the Appellant who upon being asked whether he admits or denied the truth of the charge responded **“not true”**. From the defence put forward by the Appellant, it is clear that he understood the offence that he was charged with. The trial magistrate proceeded with a trial for the offence of rape as can be seen from this excerpt from his conviction of the Appellant which reads; ***“From the circumstances of the case, I find that the prosecution has proved its case to the required standard of proof. The accused is found guilty for rape contrary to Section 7 of the Sexual Offences Act number 3 of 2006. I make no finding on the alternative charge.”*** For this reason the error did not occasion any injustice on the Appellant.

For the prosecution to establish its case, there are three elements of the charge the prosecution is required to establish. Under **Section 3** of the **Sexual Offences Act**, a person is said to have committed the offence of rape if ***“he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; the other person does not consent to the penetration; or the consent is obtained by***

force or by means of threats or intimidation of any kind.”

Under **Section 3(1)** of the **Sexual Offences Act**, the prosecution was required to first establish that there was penetration. **Section 2(1)** of the **Act** defines penetration as ***“the partial or complete insertion of the genital organs of one person into the genital organs of another person”***. In the present case, the prosecution established that indeed the complainant, the victim of the sexual assault was penetrated. The medical evidence produced by PW2 and PW6 established to the required standard of proof that the complainant was penetrated. The complainant’s hymen was freshly broken and was bleeding. She had a tear at the posterior end of the vagina and was oozing blood. The second element that the prosecution is required to prove is the identity of the perpetrator. The complainant testified that the Appellant had sexually assaulted her. The Appellant was known to the complainant. He was employed as a caretaker for the apartments where the complainant lived. In his defence, the Appellant admitted that he had sexual intercourse with the complainant with the complainant’s consent. Therefore, there was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault.

The third element that the prosecution is required to prove is whether the penetration was committed without the consent of the Appellant. **Sections 42** and **43(1)** of the **Sexual Offences Act, 2006** are relevant in this case and they provide as **follows**;

“42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

43. (1) An act is intentional and unlawful if it is committed—

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

(3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person—

(a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;

(b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or

(c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmittable disease.

4. The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act—

(a) asleep;

(b) unconscious;

(c) in an altered stated of consciousness;

(d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;

(e) mentally impaired; or

(f) a child.

In the present appeal, it was alleged that the complainant was mentally retarded. The onus was therefore on the prosecution to prove that the complainant was mentally retarded. The evidence of PW4 Dr. Esther Wanjiku Kariuki, a clinical psychologist established that the complainant was mentally impaired. In her assessment that although the complainant's actual age was thirty one (31) years, her mental age was that of a child of below nine (9) years. PW4 was of the opinion that the complainant was incapable of giving consent.

From the evidence adduced by the prosecution, it would be obvious to any person that the complainant was not normal due to the manner in which she conducted herself. The Appellant knew the complainant. He ought to have known or actually knew that she was mentally retarded and not able to give consent. He took advantage of the complainant's mental illness to sexually assault her. Considering the evidence presented by the prosecution, it is clear that the complainant was unable to give consent. This court finds that there was no consent and on that basis, the Appellant's appeal on conviction must fail.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. He shall serve the sentence that was imposed by the trial court. The sentence was legal. It so ordered.

DATED AT NAIROBI THIS 29TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE