

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.28 OF 2013

(Appeal from the conviction and sentence by Hon. E. M. Kagoni in Kilifi SRM Cr. No.93 of 2013)

JACOB TEMBO DECHEAPPELLANT

VRS

REPUBLICRESPONDENT

JUDGMENT

The appellant was charged with the offence of kidnapping/abducting to confine contrary to section 259 of the Penal Code. The particulars of the charge were that the appellant on the 11/3/2013 in Mombasa, intentionally caused R M W to be secretly and wrongly kidnapped knowing that she was 18 years. There was a second count of rape contrary to section 3 (1) and 3 (3) of the Sexual Offences Act No.3 of 2006. The particulars were that the appellant on the 13/3/2013 in Kilifi County raped R M W. There was an alternative count of indecent act with an adult contrary to section 11(a) of the Sexual Offences Act. The appellant was also charged with stealing a mobile phone worth Kshs.2,000/- contrary to section 275 of the Penal Code. He was also charged with the offence of stealing stock (a goat) contrary to section 275 of the Penal Code. The two offences of stealing occurred on the same date of 13/3/2013.

The appellant pleaded guilty to all the charges. He was sentenced to serve 5 years imprisonment for the offence of kidnapping, 30 years imprisonment for the offence of rape, 2 years for the offence of stealing a mobile phone and 3 years for the offence of stealing stock. The grounds of appeal are that he was not informed of the consequences of pleading guilty, that he was kept in custody for more than the prescribed period, that he was not given adequate time to reflect on his plea, that those who arrested him coached him to plead guilty and would be acquitted and that the trial court did not evaluate whether he was fit to take the plea. He also contends that the charge sheet was defective and the sentence is excessive. The appellant filed written submissions and submits that since the count for kidnapping and the other counts were committed on different dates and places, then the charges ought to have been separated. This was contrary to the provisions of section 135 (3) of the Criminal Procedure Code. The appellant contends that the 30 years imprisonment for the offence of rape is excessive and he was not informed of the consequences of his plea of guilty.

The State opposed the appeal. Ms Mathangani, prosecution counsel, submitted that the record of the trial court is clear. The charges were read to the appellant in Kiswahili. The appellant initially pleaded guilty but changed his plea. He later changed his plea and pleaded guilty. The facts were read to him after a period of two days and he pleaded guilty. He had time to reflect and even meditated. The sentence is lawful and safe.

The record of the trial court was that the appellant was arraigned before the trial magistrate on 20/3/2013. The charges were read over to the appellant in Kiswahili. The appellant pleaded guilty to count 4 which involved the offence of stealing stock. The prosecution informed the court that they required time to read the facts. The matter was adjourned until 2.30 p.m and the appellant informed the court that he wanted to change his plea. The four counts were read over again to the appellant in Kiswahili language and he pleaded guilty to all the counts. The prosecution informed the trial magistrate that they had only prepared for the facts of count four and required time to prepare the facts for the other counts. The matter was adjourned to 22/3/2013. The facts for all the counts were read to the appellant and the appellant informed the court that all the facts were true. The appellant was given time to mitigate but he said nothing. The trial court proceeded to sentence the appellant.

A summary of the facts of the case are that the complainant for the offence of kidnapping and rape had been sent to Kongowea market to purchase vegetables and 2nd hand clothes. She met the appellant who informed her that his boss, a white man, was looking for a house girl. The salary was Ksh.9,000/- per month. The complainant had dropped out of school and was jobless. She offered to take the job. The appellant informed her that the interview was to be conducted that day. They took a vehicle up to Kilifi and alighted near Pwani University at 6.00 p.m. They started walking along the murram road heading to Ganze and reached Arabuko Sokoke forest. The complainant was tired and became suspicious. The appellant informed her that the white man lived not far from the forest. They spent the night in the forest. This was on the 11/3/2013. The following morning they started walking again. The complainant knew that she had been duped and started inquiring about the prospective employer. The appellant pulled a knife and threatened to kill her if she were to run away. He informed her that there was no job and all what he wanted was sex. They spent the 2nd day in the forest. On 13th March, 2013 the appellant demanded sexual intercourse and threatened the complainant. They had sex the whole night in the forest until the 14/3/2013. They stayed there until 16/3/2013 while they were feeding on fruits. On 16/3/2013, they walked to Dida market in Vitengeni where the appellant stole the mobile phone. They went to a place where the appellant's sister was married and he stole the goat. The two started walking towards Kilifi. On the way, the appellant sold the mobile phone in order to get money for transport. They walked up to Mnarani in Kilifi with the goat. The complainant saw a neighbour and alerted him. The neighbour raised alarm and the appellant was arrested by members of the public.

The grounds of appeal are that the appellant was not warned of the consequences of pleading guilty. It is also alleged that he was couched by the officers who arrested him to plead guilty and he would be released. The record shows that the appellant had ample time to reflect on his plea. Those who arrested him left him in the hands of the prison officers after the plea was taken. It appears that the plea was taken on a Wednesday and the matter was adjourned to Friday, 22nd March, 2013. The facts were read over on that date and the appellant confirmed the facts to be true. Given the record of the trial court I do find that the plea was unequivocal. The appellant understood the charges he was facing and knew that admitting the charges had the consequences of being convicted. He could not have expected to be released after having kidnapped and raped the complainant. There is no evidence that he was couched to plead guilty. The record of the trial court is quite clear and the language used was Kiswahili. The appeal on conviction is hereby disallowed.

The appellant maintains that the sentence is excessive. The facts of the case shows that the appellant had planned to commit the offence. He subjected the complainant to inhuman acts by kidnapping her and even threatened to push a bottle into her private parts if she was to decline his sexual moves. He kept the complainant in the forest from 11/3/2013 to 16/3/2013. These were heinous acts. It shows that the appellant is a man of bad character. I do agree with the sentiments of the trial magistrate that the appellant has no regard to human life and should be kept away from the society for a long time. Under section 3(3) of the Sexual Offences Act, the minimum sentence for the offence of rape is 10 years. The sentence can be enlarged to life imprisonment. I do hereby set aside the 30 years imprisonment for the offence of rape and replaced it with 15 years imprisonment. The sentences for the other counts shall remain the same and shall run concurrently.

In the end, the appeal on conviction is disallowed. The 30 years imprisonment sentence on count 2 for the offence of rape is set aside and replaced with 15 years imprisonment. In effect therefore, the appellant shall serve 15 years imprisonment.

Dated, signed and delivered at Malindi this 26th day of October, 2015.

SAID J. CHITEMBWE

JUDGE