



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 194 OF 2012

JOHN NDWIGA NJAGIAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case Number 273 of 2008 in the Senior Resident Magistrate's court at Gichugu – HON. B.J. Ndeda –(SRM)

JUDGMENT

The appellant **JOHN NDWIGA NJAGI** was tried in the lower court and convicted of the offence of Rape contrary to **Section 3(1) (a) of the Sexual Offences Act (the Act)**.

The particulars of the offence as stated in the charge sheet alleged that on the 14th day of March 2008 at Karumandi location in Kirinyaga District of the Central Province, the appellant unlawfully had carnal knowledge of **AWM** without her consent.

Upon his conviction, the appellant was sentenced to ten years imprisonment.

Being aggrieved by the conviction and sentence, he filed this appeal relying on seven grounds of appeal which in my view raised two major complaints namely:-

That the trial magistrate erred in law and in fact by convicting him on the basis of insufficient evidence; that the learned trial magistrate failed to consider his defence which according to him was not shaken by the prosecution.

Briefly, the prosecution case as narrated by the complainant **AWN** who testified as PW1 is that on 14th March 2008 in the afternoon, she had just finished plucking tea in the company of two other ladies who instructed her to take the tea basket to one Ngomongo's house for safe custody. On getting to Ngomongo's house, she found the appellant and after hanging the basket presumably on a wall, the appellant pulled her to the bedroom and threatened to cut her up with a panga if she screamed. He then pushed her to a bed, tore her under pant, removed his trousers and had sexual intercourse with her without her consent. PW1 recalled that when she tried to resist his actions, the appellant once again threatened to cut her to pieces with a panga and bury her body in the house before fleeing to his home in Meru.

From the record, it is apparent that after the appellant was through with her, he left the house and locked it from the outside. The complainant was forced to escape from the house by jumping out of the window. After her escape, she reported the matter to Kianyaga Police station and went to Kerugoya District Hospital for examination. The appellant was subsequently arrested upon identification by the

complainant. He was thereafter charged with the offence for which he was tried and convicted.

In his defence, the appellant elected to give a sworn statement and did not call witnesses. He admitted having had carnal knowledge of the complainant on the date alleged but omitted to specify whether it was with or without her consent.

He however asserted that the complainant had been his girl friend for a long time implying that she had consented to the sexual intercourse.

When the appeal came up for hearing, the appellant abandoned his appeal against conviction and informed the court in his oral submissions that he was only interested in pursuing his appeal against sentence. He urged the court to review his sentence and set him free as he was suffering in prison.

On behalf of the state, Mr Sitati learned state counsel opposed the appeal and urged the court to confirm the sentence as it was lawful.

This being the first appellate court, considering that the offence with which the appellant stands convicted attracts a minimum sentence of ten years, I find that even though the appellant abandoned his appeal against conviction, it is imperative for this court to re-evaluate the evidence on record in order to find out whether or not his conviction was valid because the success or failure of his appeal against sentence is dependent on whether or not he had been properly convicted.

Having re-examined the evidence tendered before the trial court, I find that it was not disputed that the complainant and the appellant engaged in sexual intercourse on the date alleged and the only issue that was in dispute was whether the sexual act was done with or without the complainant's consent.

My evaluation of the evidence leads me to the conclusion that the sexual intercourse between the two happened without the complainant's consent. This is because the complainant denied in her evidence on cross examination having been the appellant's girl friend at that time or at any other time and she consistently maintained that the appellant threatened her with physical harm in order to compel her to succumb to his unlawful act. The fact that force was used on the complainant at the material time is evidenced by the production in evidence of the under pant she had worn that day as exhibit 2 which according to the court record was torn suggesting that it had been removed by force as opposed to peacefully or voluntarily as expected when two adults engage in consensual sexual relations.

Secondly, if indeed the complainant was the appellant's girl friend and had engaged in consensual sex with him, it would not have been necessary for him to lock her inside the house from outside and she would not have felt the need to flee from the house by jumping out of the window. The fact that she did so and her immediate port of call was a police station where she reported that the appellant had raped her leaves no doubt that the sexual intercourse between them happened without her consent.

It is therefore my considered view that the learned trial magistrate properly evaluated the evidence before him and arrived at the inevitable conclusion that the prosecution had proved the guilt of the appellant as charged beyond any reasonable doubt. Consequently, my finding is that the appellant was properly convicted in this case. And as the appellant upon conviction was sentenced to ten years imprisonment which is the minimum sentence prescribed by the law for the offence, I find that the sentence imposed on him by the learned trial magistrate was lawful. There is therefore no basis for this court to interfere with the sentence. Accordingly, the appeal against sentence is not merited and it is hereby dismissed.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 17TH DAY OF JANUARY 2014 in the presence of:-

The appellant

Mr Sitati for the state

Mbogo Court clerk