



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 159 OF 2011

DAVID KALELA APPELLANT VERSUS

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 331 of 2008 of the Resident Magistrate's Court at Wundanyi – Hon. Munyi - RM)

JUDGMENT

DAVID KALELA hereinafter referred to as the Appellant was Convicted and Sentenced to twelve (12) years imprisonment for the offence of rape contrary to section 140 of the Penal Code.

The particulars being that :-

“On the 24th day of August, 2008 in Taita Taveta County, unlawfully had carnal knowledge of K K without her consent”.

In his amended grounds of appeal the appellant maintains that there was no proper identification.

Secondly, that he Conviction was against the weight of evidence on record.

Thirdly, that the learned trial magistrate did not consider his defence.

This case went to full hearing and determination. The prosecution called seven Witnesses in support of their case whereas the defence called one.

Being the first appellate Court its my duty to evaluate and reconsider the evidence on record bearing in mind that I did not have the opportunity to hear the evidence and observe the demeanour of the Witnesses who testified in the subordinate Court. See **Okeno – Vs- Republic 1972 EALR.**

Identification

The Complainant is dumb and deaf. On the 24th day of August, 2008 she went to the local posho mill while in the company of one D M N (PW 1).

The time was around 7:00 pm while on the way home, they were accosted by the appellant who proceeded to have Sexual intercourse with the Complainant without her consent.

This is what PW 1 told the Court, at page 5 line 1 of the record of proceedings,

“David pushed K into a thicket. It was close to the road. By then I was six metres from her, I knew David, who is my neighbour, there was moonlight”.

The Complainant herself at page 8 line 20 had this to say,

“ A person appeared with a spot light and he lit the place where I was lying and found the Accused on top of me. When Accused saw the torch and the crowd of people he disappeared”.

Darius Mvoi Litando did testify at page 11 line 22 thus,

“ I was at home when I heard screams from the road the “Bubu anauliwa, “Bubu anauliwa” (the dumb one is being killed) Since I am the village elder I went out armed with a whistle and started blowing it, until I reached where they were, when I reached there, I saw D (PW 1) with K (PW 3). We asked them as to what had happened and D M told me that David Kalela had held K and had started raping her”.

This is not a case for identification but one of recognition. The appellant was known to PW 1 DMN. She was in the company of the Complainant at the time of this incident and she clearly saw the Accused who she says is her neighbour and was known to her. Though the time was 7:00 pm she did tell the Court that there was moonlight at the time and the Accused was ahead of them. The Witness (PW 1) proceeded to tell the Court that the Appellant stopped and sat down. Rose and started moving towards them. Sensing that his intentions were not honest she indicated by sign language to the Complainant that they run away but the Accused butted the Complainant who fell down and he proceeded to have Sexual intercourse with her. I find that PW 1 knew the Accused before as he was their neighbour. She had ample time to observe him as he was ahead of them decided to stop, sat down and later rose to confront them. The Complainant who is dumb and deaf did not seem to have known the Accused before but did testify to have been raped by him on the material day.

Consent

This is what the Complainant told the Court (at page 8 line 11),

“I met a man, when I tried to give him away at a junction, the man came from the opposite direction. There was a bush on the left side. My daughter was a few meters ahead. He pulled me into the bush. He pushed me to the ground and raped me. When he took me to the bush he kicked me on my stomach and I fell on my back. We struggled for twenty (20) minutes He removed my pants and raised the dress. When he finished with the bad act he left”.

The clinical officer who examined the Complainant noted that she had a torn multicoloured Lesso, which was dirty and blood stained, she had a torn white dress and a torn white pullover. Upon examination she had bruises on her labia majora and labia minora. She had a whitish discharge present on the labias blood stained with no physical venereal infection. She complained of pain on the neck.

It is clear from the above that the Complainant did not consent to the act. The appellant used force by felling her physically, tore her pants, lesso and dress, inflicted injuries on her body and her genitalia before and during the act.

I am satisfied that there is overwhelming evidence to the effect that the appellant had Sexual intercourse with the Complainant without her consent. The trial magistrate had proceeded to convict the appellant on the main Count of rape and on the 2nd Count which is that of sexual assault contrary to section 5(1) (a) of the Sexual offences Act. The particulars which were that he had used part of his body namely fingers to penetrate the genital organs namely vagina of K K.

A perusal of the record of proceedings does not indicate anywhere that the Appellant used his fingers.

The evidence before the Court was that he had used his male organ namely penis to penetrate her vagina.

The Conviction on the 2nd Count cannot stand and is quashed and Sentence set aside.

As regards the 1st Count the Conviction was safe and there is no need of disturbing it. The appellant intentionally and unlawfully committed the act which caused penetration with his genital organ.

The Complainant did not consent to the act.

Section 3(3) of the Sexual Offences Act provides for an imprisonment term of not less than ten (10) years for the offence of rape.

The Appellant was Sentenced to twelve (12) years imprisonment. That Sentence is not harsh or excessive in the circumstances of this case. The Sentence is legal and there is no reason to disturb it.

The upshot is that this appeal has no merit and its dismissed.

Judgment delivered dated and signed in open Court this **28th** day of **October, 2014**.

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M. MUYA

JUDGE

28TH OCTOBER, 2014

In the presence of:-

Learned Counsel for the prosecution Mr. Jami

The appellant present

Court clerk Musundi