



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 134 OF 2012

DICKSON MBOLOI MBITHI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. Sd. M.A Ochieng' (Mrs) Resident Magistrate delivered on 25/6/2012 in Kajiado Principal Magistrate Criminal Case No. 386 of 2012)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Mboloi Mbithi**, was charged as follows:- Rape contrary to **section 3 (1)** of the **Sexual Offences Act of 2006**.

The particulars of the offence were that “on the 28th March 2012 in **Kajiado County**, within **Rift Valley Province** intentionally caused his penis to penetrate the vagina of **LL**.

2. When the Applicant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

3. The case for the prosecution was that at the material time, the complainant, PW1 **NL** was grazing goats near her home. The accused went to where the complainant was and inquired where to buy alcohol and drugs. The Appellant then threatened to arrest the complainant and asked her to accompany him to the police station. The Appellant then fell the complainant down, unzipped his trousers and raped her then the Appellant left. The complainant went home and informed her family and neighbours what had transpired. After the complainant gave out a description of the Appellant, a search team went out looking for the Appellant. The Appellant was arrested and escorted to Namanga Police Station. The complainant was issued with a P3 form and treated at **Namanga Health Centre**. A medical examination carried out confirmed that penetration had taken place. The Appellant was subsequently charged.

4. When placed on his defence, the Appellant gave sworn evidence. The witness was called. The Appellant denied the offence and stated that he had planned with the complainant to meet on the material day. That they had met the previous day when they did not have sex but he had given the complainant Kshs.200/=, leaving a balance of Kshs.100/=. That when they had sex on the material day he gave her the Kshs.100/= balance but the complainant declined to take the same and left.

5. The Appellant was thereafter arrested by three men after about 2 km. That the men started beating

him up asking for the money he was to give the complainant. The Appellant explained what had happened but the three men lead him to the forest where they relieved him of his cell phone, money and shoes and **Tanzanian** cash 8,000/= and Kshs.17,000/= then took him to **Namanga Police Station** where he was charged. The Appellant contended that the complainant was his lover whom he got to know when he was constructing a house at **Jorkins home** where the complainant used to fetch water. The Appellant further testified that he resided in **Namanga** where the complainant whom he did not know was married used to sell milk. According to the Appellant, that was not the first time he had sex with the complainant.

6. The trial court found the prosecution case proved beyond reasonable doubts. The Appellant was convicted and sentenced to 20 years imprisonment. The Appellant was aggrieved by both the conviction and the sentence and appealed to this court on grounds that can be summarized as follows:-

- a. **That the charge sheet was defective.**
- b. **The prosecution evidence was contradictory and inconsistent.**
- c. **The prosecution case was not proved beyond reasonable doubts.**
- d. **The Clinical Officer was not competent to give medical evidence.**
- e. **The sentence was harsh and excessive.**

7. During the hearing of the appeal, the Appellant relied on his written submissions which I have duly considered. The learned counsel for the State submitted on the sufficiency of the prosecution case and further stated that the sentence was within the law.

8. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32.**

9. The complainant (PW1) testified that the Appellant raped her. Her evidence is that the sex was not consensual. The complainant stated that she was felled down and that her *khanga/lesso* and the other clothes that she was wearing torn off. That her neck was strangled by the Appellant. That the Appellant then unzipped his trousers and forcefully inserted his penis into her vagina and held the complainant's mouth and neck when she screamed. The complainant produced the torn *khanga/lesso*, skirt and pants as exhibits.

10. The complainant's evidence that she had injuries and torn clothes was corroborated by that of PW2 **NP** who is her sister in law. PW3 **KL** who is a brother in law to the complainant further corroborated the complainant's evidence. According to PW3, he received the report from the complainant and observed that her neck was swollen and the clothes torn. PW5 **Tetee Tarayia** and PW6 **Sinkiyian Paulalri** who are neighbours to the complainant also corroborated the complainant's evidence. According to PW5 and PW6 they heard the screams and on following up the matter heard that the complainant had been raped. PW5 further added that he saw the complainant's clothes and noted that the same were torn.

11. PW3, PW5 and PW6 were among the people who looked for the Appellant using the description given by the Appellant and arrested him about two kilometers from the scene. The evidence of PW7 **PC Roselyne Aula** confirmed the report and the arrest. The evidence of the Clinical Officer, PW4 **Ann Kinyua** confirmed that the complainant had bruises on her neck and on her female genitalia. The Clinical Officer concluded that there was penetration.

12. A Clinical Officer is a competent witness to give medical evidence. In the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the **Court of Appeal** stated as follows:-

“Under section 2 of the Clinical Officers Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act states:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.”

13. The Appellant in his defence case did not deny that he had sex with the complainant on the material day. The Appellant’s assertion is that it was consensual sex. However, his evidence that the disagreement concerned the amount of money that he was to pay the complainant cannot be believed. This is because of the strong evidence from the prosecution witnesses that establish otherwise. The complainant’s evidence that she screamed was corroborated by PW5 **Tetee Tarayia** and PW6 **Sinkiyian Paulalri**. Virtually all the prosecution witnesses testified that the complainant’s clothes were torn and that the complainant had injuries. The evidence of the complainant’s screams coupled with the evidence of the torn clothes and bodily injuries are not consistent with consensual sex.

14. The Appellant was charged under **section 3 (1)** of the **Sexual Offences Act**. Although the charge sheet does not state “as read with **section 3 (3)** of the **Sexual Offences Act**”, this is an error that did not prejudice the Appellant. The error is curable under **section 382** of the **Criminal Procedure Code**. The sentence is within the law.

15. Having evaluated the evidence afresh, I am satisfied that the conviction was based on sound evidence. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 25th day of November 2014.

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B. THURANIRA JADEN

JUDGE