



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 17 of 2009

SIMON MBOGO NYAGAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 293 of 2009 at the Principal Magistrate's Court at Siakago by HON. S.M. MOKUA – SRM on 9/2/2009

J U D G M E N T

SIMON MBOGO NYAGA the Appellant herein was charged with the offence of attempted rape contrary to section 4 of the Sexual Offences Act. The particulars as set out in the charge sheet were as follows;

SIMON MBOGO NYAGA: On the 5th day of April 2008, at Gitiburi sub-location in Mbeere District within the Eastern Province, intentionally and unlawfully attempted to have sexual intercourse of ROSELINE WANYAGA.

The matter proceeded to full hearing and the Appellant was convicted and sentenced to serve seven years imprisonment.

He was aggrieved by the Judgment and filed this appeal citing the following grounds;

- 1. THAT the learned trial Magistrate erred in both law and fact by relying on the evidence of P.W.2 and P.W3 which was surrounded with a lot of doubts.**
- 2. THAT the learned trial Magistrate erred in both law and fact by convicting the Appellant without due consideration that there was a grudge between the Appellant and the parents of the complainant (PW1).**
- 3. That the learned trial Magistrate erred in both law and fact by failing to consider that P.W.2, P.W.3 and P.W.4 did not mention the Appellant in this case.**
- 4. That the learned trial Magistrate erred in both law and fact by convicting the Appellant putting reliance on P.W.3's evidence which was uncorroborated by the evidence of P.W.4.**
- 5. That the learned trial Magistrate erred in both law and fact by rejecting the defence of the Appellant without sufficient reasons.**

However when the appeal came before me for hearing the Appellant abandoned his appeal on conviction. He said he only wanted to pursue the issue of sentence. He asked the Court to reduce the sentence for him as he was due for release on 18/10/2013. The State had no objection to his plea on sentence. The law mandates this Court as a 1st appeal Court to re-evaluate and re-consider the evidence adduced and arrive at its own decision. I am alive that I did not see or hear the witnesses. In this I rely on the cases of;

1. NGUI -V- REPUBLIC [1984] KLR 729

2. AJODE -V- REPUBLIC [2004] KLR 81

3. KOECH & ANOTHER -V- REPUBLIC [2004] 2 KLR 322

The Prosecution called **five** witnesses. P.W.1 testified that on 5/4/2008 at 6pm she alighted at Jikaze heading home. She decided to go to her grandfather's home. Immediately she crossed the river the Appellant emerged and held her. She was alone. He pulled her out of the road and told her he wanted to have sex with her. She screamed as he struggled with her and tore her dark blue skirt (EXB 1). She injured her right leg and nose as he covered her mouth. Her screams attracted several people who came to her rescue. Some were P.W.2 and P.W.3. The Appellant hurled abuses at them threatening to rape and sodomise them. He had no choice but to run away when the crowd swelled.

The matter was reported and she also sought medical treatment. P.W.5 produced a P3 form (EXB 2) confirming the injuries. The appellant was arrested by members of the public.

The Appellant elected to remain silent when placed on his evidence. The evidence of P.W.1 – P.W.3 is evidence of eye witnesses. P.W.2 and P.W.3 came to the scene and found P.W.1 and Appellant in the bush. P.W.5 confirmed that P.W.1 had injuries. I am satisfied that the conviction is safe. The Appellant has served most of the sentence. The sentence for rape under Sexual Offences Act is a sentence not less than 5 years. The Appellant has served **four** years and one month of the **seven** years. With remission considered he says he is due for release on 18/10/2013. I believe he has learnt his lesson. Had he been given a lesser sentence as per the statute he would have finished serving. The State supports his request, and it is lawful.

I therefore **reduce his sentence to the period already served**. The appeal succeeds to that extent only. He will be released unless otherwise lawfully held.

DATED AND DELIVERED AT EMBU THIS 28TH DAY OF MARCH 2013.

**H.I. ONG'UDI
J U D G E**

In the presence of;

Mr. Miiri for State

Appellant

Njue – C/c