



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 100 of 2012

ALBANUS KIOKO MUUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 341/2011 by Hon.

J. Karanja, PM on 9/7/2012

JUDGMENT

1. The Appellant, **Albanus Kioko Muumbi** was charged with the offence of rape contrary to section 19(1) (a) of the Sexual Offence Act No. 3 2006. Particulars of the offence are that on 14th August, 2011 at 1.00pm at *{particulars withheld}* in Makueni District within Eastern province, he unlawfully and intentionally caused penetration with his genital organ (*penis*) to that of **A. N. N.** a person with mental disability.
2. In the alternative he faces a charge of indecent assault with a woman contrary to section 11(1) of the sexual offences Act No. 3 of 2006. The particulars thereof being that on the 14th day of August, 2011 at 1.00pm at *{particulars withheld}* in Makueni District within Eastern Province he unlawfully indecently assaulted **A. N. N.** by touching her private parts.
3. The appellant was tried, convicted and sentenced to 10 years imprisonment.
4. Being aggrieved by the conviction and sentence the appellant appealed to this court. In his petition of appeal the appellant relied on grounds that;-
 - His conviction was based on unsound evidence
 - The trial magistrate erred both in law and fact by failure to evaluate the evidence and by relying on unreliable evidence.
5. At the hearing the appellant relied on his written submissions.
6. The state counsel **Mr. Mukofu** conceded to the appeal on the ground that the appellant was charged with rape contrary to section 19(1) (a) of the Sexual Offence Act, which does not define rape as stated in the charge sheet. The charge was therefore fatally defective.

7. Briefly the facts of the case were that the complainant was physically and mentally challenged. On the 14th August, 2011, **P. M. M.** got the information about a person making noise at the chicken house. He went to check on what was happening only to find the appellant lying on the complainant, his sister with his pants lowered to his knees. They arrested him.

8. The complainant was subjected to medical examination. She had congenital malformation mentally and physically. She had no tear or injury to the vagina. The vagina had normal redness and could accommodate three fingers as she had two (2) previous deliveries. There was no discharge or blood.

PW3, **Joshua Kieti Muya** the clinical officer could not see any damage occasioned.

9. In his defence the appellant denied having committed the offence. He narrated how he encountered **Peter Muia** who was with a village elder. They went with him to Mavindini. While at the hotel they even bought him tea. They took him to the police station. They assaulted him forcing him to admit having committed the offence. He declined, hence the case.

10. As a first appellant court, I am mandated to re-evaluate and re-consider the evidence adduced by witnesses in support of the charge. It is upon me to scrutinize the evidence bearing in mind that I did not hear or see witnesses. (*see Njoroge versus Republic [1987] KLR 19*).

11. The appellant was charged with the offence of rape contrary to section 19 (1)(c) of the Sexual Offence Act No. 3 of 2006 which provides:-

“A person who, in relation to a person with mental disability, for financial or other rewards, favour or compensation to such person with mental disability or to any other person, intentionally –

(a) Commits any offence under this Act with such person with disability”

12. This section is in regard to prostitution of persons with disabilities. The particulars of the offence do not support the charge. The principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in clear and unambiguous manner so that the accused may be able to plead so that he can understand. It will also enable an accused person to prepare his defence (*see Sigilani versus Republic [2004] 2 KLR 480*).

13. It is obvious that evidence led by the prosecution sought to prove an offence other than what was specified in the charge. The charge disclosed could not have given the appellant an opportunity of preparing appropriately for his defence.

14. Secondly, the evidence adduced by the prosecution did not support even the charge of rape. There was no evidence of penetration following findings of the clinical officer.

15. In the result, I find that the prosecution failed to prove their case. The conviction that followed was misdirection on the part of the trial magistrate. The appeal is therefore meritorious and is allowed.

16. I do quash the conviction, set aside the sentence. The appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 27TH day of MAY 2013.

L.N. MUTENDE

JUDGE