



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 278 of 2011

(From Original Conviction and Sentence in Criminal Case No. 261 of 2010 of the

Senior Resident Magistrate's Court at Mariakani – D. M. Machage (SRM))

ELIAKIM MWAWASI.....APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was convicted and sentenced to 15 years imprisonment for the offence of rape contrary to Section 3(1) (a) (b) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 16th day of November 2010 at [.....] in Kaloleni, Kilifi County, unlawfully and intentionally committed an act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of K.K. a girl aged nineteen years.

In her evidence in chief the complainant told the Court that she did not know when she was born but she was aged 15 years. She dropped from school when she was in Standard one on account of being epileptic.

On the 16th day of November 2010 she was at Mariakani selling firewood when she was approached by the Accused who said that he wanted to buy firewood but did not have money with him at the time. He convinced her to follow him into his house so as to be given the money but on the way he grabbed her threatened her not to call for help and proceeded to have sex with her without her consent. Afterwards he let her go and went his way. She decided to report the matter to three men who she had met on the way but upon return to where she had left him he had already disappeared.

Later when she saw him passing by she reported this to members of public who went and arrested the Accused. He was found still in possession of her lesso. He had not changed the clothes he was wearing. PW2 knew the Accused before. On the 16th day of October 2010 he was on his way to work when he found members of public beating the Appellant on allegation that he had raped the complainant. He arrested and took him to police station.

The Clinical Officer who examined the complainant gave the estimated age as 19 years. She found fresh lacerations with mild bleeding on the labia minora at six o'clock position. There was no hymen.

In his judgment the learned trial Magistrate did observe the demeanour of the complainant and found her a

trustworthy witness. He also noted that the incident took place in broad daylight and hence she had the opportunity of observing his features keenly such that when she saw him passing by moments after the act she reported this to members of public who got hold of him and beat him before a good Samaritan (PW2) rescued him and took him to police station. She had gone to Hospital the same day within a span of six hours.

In his defence the Appellant had testified that he was going to the shops when he met a lady and the complainant who said that he was the one. They screamed for help and this attracted members of public who proceeded to beat him up for something that he did not do. The trial Magistrate considered his evidence and found it unbelievable and proceeded to find the Appellant guilty of rape as charged.

Though the complainant did not seem to know her age it was estimated at 19 years. That explains why the Appellant was not charged with defilement. I am satisfied that the complainant's evidence was corroborated by that of the Clinical Officer. I find that the conviction was safe. On sentence, the offence carries imprisonment term of not less than ten years and it can be enhanced to life imprisonment.

The Accused was meted some punishment by members of public after they arrested him. He had been treated as a first offender. His imprisonment sentence is reduced from 15 years imprisonment to ten years. He will now serve ten years imprisonment from the time of conviction and sentence.

To that extent only does this appeal succeed.

Dated and delivered at Mombasa this 23rd day of May, 2013.

M. MUYA
JUDGE

Dated and delivered in open court in the presence of:-

Mr. Ayodo for State

Appellant - present

Court clerk – Mr. Musundi

M. MUYA
JUDGE