



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.45 OF 2008

JEREMIAH NDUNGU MUCHAI.....
APPELLANT
VERSUS
REPUBLIC.....
.....RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.1073 of 2007 by Hon T. Matheka, Senior Resident Magistrate, dated 11th March, 2008)

JUDGMENT

The appellant was charged in the court below with **rape** contrary to section 3(1) (a) (b) as read with Section 3(3) of the Sexual Offences Act. In the alternative, he was charged with **indecent act with an adult** contrary to **Section 11A** of the **Sexual Offences Act**.

In the particulars of the offence it was alleged that on 16th May, 2007 at Njoro Location, the appellant intentionally and unlawfully committed an act which caused penetration to the vagina of L.N without her consent. At the end of the trial, the court below found that the offence of rape has been proved and upon convicting the appellant, sentenced him to ten (10) years imprisonment.

That finding and the sentence aggrieved the appellant who has challenged the decision in this appeal only on two grounds namely that his mitigation was not considered and that the sentence was harsh.

The complainant whose age was given as 41 years, was described variously as “*not very mentally stable*” by **P.W.2, Mercy Mugeni Karimi**, “*mentally retarded*” by **P.W.3 Lewis Mwangi** who also said she was of “*limited intelligence*” and as “*a psychiatrist patient*” by the clinical officer, Njoro, **P.W.5, Jacob Chelimo**. The complainant testified before the trial magistrate, who also observed that she appeared disturbed. Her evidence itself was disjointed.

In her evidence in chief, she stated that the appellant twice had both normal and anal sex with her in someone’s house. It is her answers in cross examination that are confusing. She said:

“We had agreed - when I realized you would hurt me then I raised alarm. Then you came again at your own time. We did it on the chair. The second time I screamed.I refused. I asked you how you would do that in someone’s house. We did not agree because I had not agreed we do it in someone’s house. I agreed to listen to you. I came to where you were. Then you followed me. I had left the baby on the seat.”

She went further to state in re-examination that:

“I had agreed to talk to him. I went to where he was to talk. I had agreed we would do it upon coming from work but he forced me into the house and did it to me.”

According to **Section 3(1)** a person commits the offence of rape if:

- i) there is an intentional and unlawful act of penetration with genital organs;
- ii) the other person does not consent to the penetration; or
- iii) if consent is obtained by force or by means of threat or intimidation.

From the complainant’s evidence that I have reproduced above, it is not clear whether there was no consent. In one breath she asserted that they had agreed and in another she claimed that she refused. It would appear from her evidence that she only objected to having sex in someone’s house.

Secondly, the complainant was treated at the Rift Valley Provincial General Hospital immediately after the occurrence and was on 18th May, 2007 (two days later), examined by Jacob Chelimo, a clinical officer at Njoro Health Centre who noted that other than a foul smelling discharge there were no injuries to the genitalia.

Both the report from the Rift Valley Provincial General Hospital and Njoro Health Centre are not conclusive that there was recent penetration that could be attributed to the alleged rape of 16th May, 2007.

The learned trial magistrate failed to evaluate the evidence presented before her including the appellant’s defence that there was a grudge.

For these reasons, this appeal succeeds and is allowed. The conviction is quashed and sentence set aside. The appellant will be set at liberty forthwith unless lawfully detained.

Dated, Signed and Delivered at Nakuru this 20th day of February, 2012.

W. OUKO
JUDGE