



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 18 of 2009

JOSEPH DIWANI MANDANO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Joseph Diwani Mandano (the appellant) was convicted on a charge of rape contrary to section 3(1) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve ten (10) years imprisonment.

The charge was premised on particulars that on the 19th day of October 2008 within Malindi District, he raped M.R.W a woman aged 58 years old.

Initially the appellant pleaded not guilty to the offence and the trial proceeded with the complainant M.R, testifying as PW1. She told the trial court that on 18-10-08 at around 7.30pm, she was on her way from G Centre having alighted from a matatu. Her home is quite a distance from where she alighted and as she was walking she heard “binja” but all was silent. As she approached a river, she felt like someone was following her. She turned to look and saw someone – a young man who passed her and stood on her way. He asked for the way to M’s home. PW1 recognised him well as she had known him since childhood; she pointed the way to M’s – he touched her and PW1 asked him what he wanted and begun screaming. He told her to shut up or he would cut her throat. He grabbed her on the waist and dragged her to the bushes and raped her after removing her pants. After finishing, he stood up and left and PW1 went home. She told those at home that Joseph had raped her and mentioned all his three names as Joseph Diani Mandano. So appellant was arrested, PW1 was examined at the hospital and a P3 form filled. Appellant cross-examined PW1 who said:

“I knew you very well, you have grown up in the village, you touched me and spoke to me.”

Later on when the matter came up for mention appellant changed his plea after requesting the trial court to read the charge to him. So the charge was read over and explained to him in Kiswahili and he replied thus:-

“it is true”

The matter was set for mention the next day for facts to be read – whereupon the prosecutor informed the trial magistrate:

“I wish to go by the evidence of PW1, the complainant and wish to produce the P3 form as an exhibit.”

In response the appellant stated:

“The complainant’s testimony is true”

So a plea of guilty was entered and after his plea in mitigation, he was sentenced to serve ten (10) years imprisonment.

The appellant challenged the findings on grounds that:

- (1) He pleaded guilty because the prosecutor had promised to talk to the trial magistrate to set him free
- (2) He was held in police custody for over 24 hours
- (3) The sentence is harsh considering he is only twenty years and being a first offender.

Appellant relied on his written submissions in which he explains that he decided to plead guilty due to the harsh prison conditions and the police officers had promised to talk to the prosecution to intervene and have him set free.

He urges the court to consider his plea in mitigation especially his age, saying the ten year sentence will ruin his life.

Further that he was arrested on 19th October 2008 and only taken to court on 21st October 2008, thereby violating his constitutional rights as envisaged by section 72(3) (b) of the Constitution of Kenya.

The appeal is opposed, and Mr. Ogoti submitted on behalf of the State that appellant was convicted on his own plea and given the minimum sentence so the appeal lacks merit and should be dismissed.

From the record, the plea was unequivocal, appellant confirmed to the trial court that what PW1 had told the court in her evidence was true and he cannot now begin to harp about some promises made for his freedom – there is nothing to support these claims.

As regards violation of his rights

- a) It never formed one of the grounds of appeal and is only raised in the submissions.
- b) If he was arrested on 19-10-08, then the earliest date he could be taken to court was 21st October 2008 because 20-10-08 was a Public Holiday in Kenya and courts do not sit on public holidays and so there was no violation whatsoever.

As regards the sentence, for an offence under section 3(1) of the Sexual Offences Act, the minimum sentence is ten years – although it may appear harsh – it is legal and this court finds no legal basis to interfere with the sentence and I therefore confirm the sentence.

The appeal has no merit and is dismissed.

Delivered and dated this 16th day of February 2010 at Malindi.

H. A. Omondi
JUDGE