



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 173 OF 2007

(From Original Conviction and Sentence in Criminal Case No. 3930 of 2006 of the Chief Magistrate's Court at Kibera)

DAVID SIMIYU WAKHUNGU.....APPELLANT

VERRSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with Rape under Section 140 of Penal Code and convicted and sentenced to 10 years for Rape of girl below 18 years old. He appeals and has stated grounds of appeal

- (1) The Trial Magistrate erred by not calling the investigating officer to testify.
- (2) Trial Magistrate by basing the conviction on side of doctors report.
- (3) Trial Magistrate erred in law by accepting the complainant's brother to testify in the case. He brought the arresting officer he may have come a different residence.

The complainant PW1 L.K.M told the court she was aged 18 years old. She was working while at her place of work her employer held her neck and threw her on the bed. He removed her pant and raped her just once. She started bleeding. She said she had never had sex before Appellant found her in the sitting room. Later wife of employer came and she told her not to tell anyone since they are church people. There was much pain on 12/7/2006 she called her brother. He came with police Appellant was arrested.

Complainant was taken to Women Hospital Nairobi. PW2 was a sister of the complainant he received a report of rape from complainant and to police officer and to her place of work. The accused was arrested. Accused was taken to hospital.

PW3 was Police Officer on duty crime standby. He got report of a complainant of rape. Then there was Doctor Zephania Kamau Police Surgeon. On 17/7/2006. He examined the complainant who complained of rape, she had no injuries in the external genita. I was normal vulva had a small tear she had no discharge no exhibits were recovered. She was seen at Nairobi Women Hospital. He completed P3 form. He did not know weapon causing injury.

Prosecution called Doctor from Nairobi Women Hospital. Doctor testified on her examination of the Appellant she found the Appellant's hymen had a tear no bleeding, no spermatozoa. Complainant was treated with antibiotics. PW6 Margaret Wangoi Police Officer. She was investigating officer in this case. At that stage she was placed on his defence. The Appellant stated the charge was a lie. On the day of alleged offence he went to work very early. I had sacked complainant on 12th. He saw a police come and demanded for Shs. Shs. 80,000/=.

DW2 was Defence witness. He only heard of this case when police came to arrest the Appellant. DW3 was a student. She said the charges were lies. When police came and that the complainant was not raped.

I have considered the proceedings and evidence of the witnesses. The medical evidence is supported. The case of penetration was clear and supported by medical evidence. It will be noted that the Appellant pleaded "it is true" to court only to change his mind later.

The Appellant has written submissions which I have read. He complains of violation of Section 72 (3) 77 and 84 of constitution. Single inconclusive evidence corroborated evidence proof be low standard Violation of Section 169 (1) of Criminal Procedure Code.

The complaint of the delay is being taken to court for prosecution are each separately referred to where facts are similar. This case is with regard to different circumstances.

It is my view that the Trial Magistrate read the charge sheet where the charge was rape and noticed the complainant was

I see no defect in the proceedings. The conviction was based and supported by sufficient evidence. I therefore uphold the conviction and sentence I dismiss the appeal. The appeal has a remedy under Section 72 (6) of the Constitution. The Appellant can claim damages even now.

I do not find any merit in the other grounds. I do find the appeal without merit and I dismiss the same.

Dated and delivered at Nairobi this 13th day of October 2010.

J. N. KHAMINWA

JUDGE