



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 34 of 2004

From Original Webuye SRMCCR C. No. 514 of 2002

MESHACK MUSEE KHAEMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Meshack Musee Khaemba was tried and convicted for the offence of rape contrary to Section 140 of the Penal Code. It is said that on the 5th day of August, 2002 within Bukujangabo village Webuye Location, in Bungoma District, within Western Province, unlawfully had carnal knowledge of JK without her consent. He was then sentenced to serve 10 years imprisonment hence this appeal.

The facts leading to the appellant's conviction were that on the 5th day of August 2002, the complainant JK was at a circumcision ceremony where her nephew was getting circumcised. At around 5.00 p.m. she was heading to a nearby river where the initiates had been taken. She had been sent to carry clothes to her nephew. She was in the company of one Mary Zachariah and another small girl. They walked for about 250 metres following the crowd who were accompanying the initiates when she was grabbed by the appellant whom she knew very well as a distant relative. The appellant pulled her to the nearby bush comprising of grass and sugarcane plantation where he forcefully removed the complainant's pair of trouser and had carnal knowledge without her consent. The complainant attempted to scream but she was threatened with death. He even attempted to strangle her by the throat. She reported the matter to local administration. She later went to Hospital where she was examined, stitched and given medication. The appellant was apprehended about 10 days after the incident.

On his part the appellant denied committing the offence and raised the defence of alibi. He claimed he had gone to Webuye about 15 Kms away from the scene of Crime with his mother to purchase cabbages to supply to Milo Secondary School. On appeal the appellant argued that the prosecution did not prove its case before the trial court to the required standard of beyond reasonable doubt. It was argued that the soiled and blood stained clothes were not produced in evidence to establish that indeed the offence of rape took place. The Appellant also averred that he was not examined by the doctor so as he could be connected with the offence. The appellant further argued that there was no positive identification and that there was a possibility that he was mistaken. The appellant pointed out that there was contradictory evidence which created doubt which should have been given in favour of the appellant.

The stated opposed the appeal. It was stated that the appellant had the opportunity to commit the offence.

The senior state counsel pointed out the fact that the appellant was conspicuous at the circumcision ceremony and the fact that there was evidence of penetration.

The prosecution lined up five witnesses to support its case before the trial court. At the same time the appellant summoned the evidence of two independent witnesses to support his defence.

The complainant testified as prosecution witness no. 2. She told the trial court that the appellant emerged from a nearby sugarcane plantation and pulled her from behind and then slapped her to subdue. This made the two girls she was with to run away in fear. She attempted to scream but her screams were drowned by the circumcision songs taking place ahead of her. She said the appellant held her by the throat. She told the court that she identified the appellant who was well known to her as a distant relative. She identified him by recognition and by his voice. She said it was still bright. The appellant in fact confirmed the fact that he is related to the complainant and that they know each other very well. He even stated that there was no grudge between the duo. Mary Zachariah who testified as P.W 4 told the trial court that he saw the appellant on the material day pulling the complainant towards the sugarcane plantation after slapping her. She had even seen him at the ceremony. The record shows that the trial senior Resident magistrate took considerable amount of time to analyse the issue of identification and came to the conclusion that the appellant was properly identified. I have re-evaluated the evidence of identification. I find that it was still bright enough for one to recognize a person when the incident took place. There was no possibility of error in the circumstances of this case. The appellant was known to the complainant and he was also seen at the ceremony by P.W.4. Consequently I think the defence of alibi was properly rejected.

The complainant gave detailed account of what the appellant did to her while under the cover of tall grass and sugarcane plantation. She was able to show that the appellant penetrated her through the sides of her pants which had not been removed after he forcefully put her legs a part. She walked with difficulty after the incident and visited hospital 5 ½ hours after the incident. She was examined and treated by Wafula Wadua a clinical officer who testified as P.W 1. Upon examination he found that the complainant had a fresh tear measuring 1 inch on the perenium region and the vagina was full of blood due to trauma. He stitched the tear and gave her antibiotics. He formed the opinion that the complainant was raped. This corroborated the evidence of the complainant that there was penetration. The appellant has said that since he was not examined by the doctor there was no nexus between him and the offence.

What comes out clearly is that no medical examination on the appellant was done. In this respect then the court can only rely on circumstantial evidence. To begin with the appellant was alone as per the evidence of P.W.2 and PW 4. He was known to the complainant which fact was not disputed. It is also not denied that there was no grudge between P.W.2 and the appellant. There was therefore no reason at all for the complainant to frame the appellant in this matter. Mary Zachariah, P.W 4 says she saw the appellant at the scene grabbing the complainant. The appellant admits that P.W 4 could not harbour a grudge against him because he was not known to her. The sum total of these pieces of evidence is that the appellant had the opportunity of committing the offence. The circumstantial evidence corroborated the direct evidence of P.W.2. The direct and circumstantial evidence received proved that the appellant was connected and indeed committed the offence of rap. He had the opportunity to do so.

After perusing the evidence on record I find that there was no material contradiction in the evidence tendered by the prosecution.

The final ground argued by the appellant is that the sentence slapped on him is harsh and excessive. The learned senior state counsel did not address me over this issue. I have perused the provisions of section 140 of the Penal Code. I notice that the law provides for a life imprisonment with hard labour. The learned Senior Resident magistrate sentenced the appellant to serve 10 years imprisonment. The appellant did not give any meaningful mitigating circumstances but the trial magistrate took into account factors though not raised which were relevant. This court can only interfere with the trial court's discretion on sentence if it is shown that the sentencing court took into account immaterial fact or it failed to consider certain important factors or that the sentence is manifestly excessive. I am convinced that no good reasons have been advanced to enable interfere with the sentence.

The sentencing court did not pronounce the element of hard labour which is mandatory under section 140 of the Penal code. I will exercise my discretion under section 354 of the criminal procedure code to correct the lapse.

The final result is that the appeal is ordered dismissed. The appellant should serve the sentence and in addition with hard labour.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE