



**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. 31 OF 2020**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**ALFRED ATINO KWENDO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. C. A. Otieno-Omondi, PM***

***dated 21<sup>st</sup> June 2018 in Criminal Case No. 4333 of 2013 at the Magistrates Court at Thika)***

**JUDGMENT**

1. The appellant, **ALFRED ATINO KWENDO**, was charged and convicted on a count of rape contrary to **section 3(1)(c)** of the **Sexual Offences Act, 2006** ('the Act'). The particulars of the offence were that on 14<sup>th</sup> July 2013 at [Particulars withheld] area within Kiambu County, he intentionally and unlawfully caused his penis to penetrate the vagina of MNK. He was sentenced to 10 years' imprisonment.
2. The appellant now appeals against conviction and sentence. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and to come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**). In order to deal with the issues raised in the appeal, it is important to outline the evidence presented before the subordinate court.
3. The complainant, MNK (PW 1), recalled that at around 1:00pm on 14<sup>th</sup> July 2013, she went to visit her aunt in the company of EF (PW 3) but they did not find her. The Appellant approached her and introduced himself as a pastor. He requested them to go to his house. At the house, the Appellant sent PW 3 to buy bananas. The Appellant started to undress her and told her that he would rape her and make her his wife. He then gave her some medicine and she felt weak, he then took her to bed and penetrated her. After he was done, he dressed her up and she fell asleep. PW 3 returned when it was getting dark and they went home. PW 1 told the court that she told PW 3 what had transpired but she never told her mother, PW 2, as the Appellant had threatened to kill her if she reported.
4. PW 1 told the court that PW 3 informed a teacher of what had happened and that on a Wednesday after the incident, she was confronted by a teacher and sent home. PW 3 had told her mother, PW 2, that she had been raped. PW 1 took PW 2, her cousin and brother to the Appellant's house where he was apprehended and taken to the Police Station. She was later taken to hospital by her mother, PW 2, where she was examined. PW 1 informed the court that she did not know the appellant before the incident.
5. The complainant's mother, PW 2, recalled that on 31<sup>st</sup> July 2013, PW 3 informed her and her husband that PW 1 had been raped. She sent her sister in law to inform the village elder but she did not find him. PW 1 and PW 3 led them to the Appellant's house. When they knocked on the door a man opened but PW 1 stated that he was not the one who had raped her. The man returned in the house and the Appellant emerged from the house and was identified by PW 1. The appellant tried to settle the matter but PW 2 refused. The Appellant then tried to escape but was apprehended by members of the public and escorted to the Police Station. PW 2 later took the complainant to the hospital where she was treated and issued with treatment notes and the P3. PW 2 told the court that PW1 was born on 26<sup>th</sup> June 1994.
6. PW 3, told the court that on 14<sup>th</sup> July 2013, PW 1 asked her to accompany her to her aunt's place. At the gate, they met the Appellant who sent her to buy bananas. When she returned she did not find PW 1 and the Appellant. She went home. PW 2 told the court that the next day the complainant informed her that she had been raped and asked her to inform the teacher on her behalf. PW 2 told her teacher who in turn told her to inform PW 2 which she did. She testified that she escorted PW 1 and PW 2 to the appellant's house where they found him alone and he was apprehended.

7. PW 4, the investigating officer, testified that on 31<sup>st</sup> July 2013 she perused the OB and found that she had been minuted to her to investigate the case. She took the witness statements, proceeded to the scene of the incident and visited the complainant's school. She recalled that the Appellant had been apprehended and escorted to the police station by members of the public. She produced the complainant's birth certificate which showed she was 19 years old at the time of the incident.

8. PW 5 produced the P3 form and the PRC and treatment forms on behalf of the doctor and the clinical officer who examined PW 1 respectively. The Clinical Officer noted that PW 1's external genitalia was normal. The hymen was broken and although there was blood on the examining finger, she did not see any discharge.

9. In his unsworn statement, the appellant denied the offence. He termed the allegations against him as false. He alleged that the medical evidence did not prove that the complainant was defiled on 14<sup>th</sup> July 2013 and that he was never examined. He told the court that the investigating officer only relied on what he was told and that none of his neighbours saw the complainant in his house.

10. The Appellant contests the conviction primarily on the ground that the prosecution failed to prove its case and that the evidence was contradictory and inconsistent and that he was not identified as the assailant. He also contends that the prosecution failed to call vital witnesses and that his defence was never considered. The respondent failed to file their submissions.

11. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the **Act** as follows:

*A person commits the offence termed rape if –*

*(a) He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.*

*(b) The other person does not consent to the penetration; or*

*(c) The consent is obtained by force or by means of threats or intimidation of any kind.*

12. From the evidence I have outlined, I find that the prosecution proved the essential elements of rape. The testimony of PW 1 was direct, clear and consistent on her ordeal on the material afternoon. She narrated how the appellant lured her into his home and drugged her with medicine before subjecting her to penetration by force and without her consent. Her testimony on this aspect of penetration was corroborated by medical evidence indicated that the complainant's hymen was missing and blood on the examining finger. The Appellant submitted that it is possible that the hymen would have been ruptured by any other activity as was held in **PKW v Republic HCCRA NO. 31 of 2008**. However, in this case, there was the totality of the evidence points to an act of penetration committed by the appellant. PW 3 left PW 1 in the company of the Appellant and that the following day the complainant informed her of the incident.

13. As to whether the Appellant was the assailant, the evidence is that the incident took place during the day at the Appellant's house. PW 3 left PW 1 in the appellant's company when he sent her to buy bananas PW 1 and PW3 led PW 2 and other people to the appellant's house and he was later positively identified him

14. The Appellant did not give an account of what transpired on 14<sup>th</sup> July 2013 or on the day of his arrest. He never disputed the fact that he met the complainant and PW3. He focused his defence on trying to discredit the medical evidence and the investigations. This defence amounts to a mere denial and does not detract from the prosecution case.

15. The Appellant argued that crucial witnesses such as the villager elder was not called to testify in the matter. **Section 143** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** provides that no particular number of witnesses is required for the proof of any fact. PW 2 informed the court that the village elder was not found and in any case he would not contribute to the prosecution case as he never witnessed the offence. From the totality of the evidence, I find that the prosecution proved all the elements of the offence of rape.

16. The mandatory minimum sentence for the offence of rape under **section 3(3)** of the **Sexual Offences Act** is not less than 10 years which may be enhanced to life imprisonment. It is now clear that mandatory minimum sentences are unconstitutional following the decision of the Supreme Court in **Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR** and subsequent decisions of the Court of Appeal among them **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR**.

17. I have considered the circumstances of the offence. Although the Appellant was a first offence, I have taken into account the age of the complainant, the fact that the appellant lured her to his house, drugged her and threatened her as aggravating circumstances. I do not consider the sentence of 10-year imprisonment harsh or excessive.

18. The appeal is dismissed.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT KIAMBU THIS 4TH DAY OF FEBRUARY 2021.**

**M. KASANGO**

**JUDGE**

Appellant in person.

Ms Ngesa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the Respondent.