



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 17 OF 2018

(From original Conviction and Sentence in Nanyuki CM Sexual Offence Case No 45 of 2016 – E Ngigi, SRM)

DKN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **DKN**, was convicted after trial of **attempted rape** contrary to **section 4** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of the charge that on 15/10/2016 at *Umande Trading Centre in Laikipia County*, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of one **PM** without her consent. On 13/04/2018 he was sentenced to five (5) years imprisonment. He has appealed against both conviction and sentence.
2. The conviction is challenged upon the following main grounds –
 - (i) That at the time of commission of the offence the Appellant had a mental problem.
 - (ii) That the Appellant was unfit mentally to stand trial.
 - (iii) That attempted penetration was not proved to the required standard.
 - (iv) That the Appellant was not positively identified as the perpetrator.
3. The Appellant was not defended at his trial. He was also unrepresented at the hearing of his appeal. This being a first appeal, I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.
4. The Appellant is an old man who was born in 1941 (his national identity card says so). At the hearing of the appeal he was thus about 79 years old. As the alleged offence was committed in October, 2016 he was then about 75 years old. He informed this court that he had an accident in the year 2010 as a result of which he lost his memory, and that therefore he just could not remember if indeed he did the deed that he was charged with.
5. The record of the trial court shows that the Appellant took plea on 17/10/2016. His trial commenced on 16/01/2017 when the complainant (PW1), her daughter of very tender age (PW2), PW1's husband (PW3) and another witness (PW4) testified. Apart from the child (PW2), the Appellant fully cross-examined the witnesses.
6. On 06/03/2017 when the case came up for further hearing, the Appellant told the trial court that he was unwell and mentally unstable. The court therefore directed that he be medically assessed for mental fitness. On 10/04/2017 a medical report was laid before the trial court. It confirmed that the Appellant was mentally ill and "unfit to plead". The trial court then committed him to *Mathari Mental Hospital* for "treatment and management."
7. The Appellant remained in hospital until he was produced in court on 03/11/2017 with a medical report that indicated he was now capable of making his defence. The charge was then put to him afresh. He denied the charge. The court asked him if he wished for the case to start again afresh or continue from where it had reached before he was taken to hospital. He chose the latter. The last prosecution witness (PW5) subsequently testified.
8. The Appellant was put to his defence. He gave an unsworn statement and did not call any witness. He stated that in the year 2010 he was involved in a road traffic accident and that from then on he developed memory loss; he was placed under medication but was not healed and

could not understand himself. He lived like that until the trial court intervened and ordered that he be taken to the mental hospital for treatment. Upon prolonged treatment he regained his mental fitness but continued under medication. He then sought leniency as, he said, he did not know that he had committed the offence.

9. As has been seen, it has been a constant theme in this court as well as in the trial court that the Appellant suffered some kind of injury to his head in a road traffic accident in the year 2010 that led to his having mental problems, including loss of memory. These mental problems necessitated his being hospitalized for over six (6) months in a mental hospital for treatment in the course of his trial.

10. So, the question arises – what was the Appellant’s mental state at the time of commission of the alleged offence? What was his mental state during the first and main part of his trial (when 4 out of 5 prosecution witnesses testified) before he alerted the trial court that he was not at all well mentally? As already seen, his complainant was not idle. He was medically found unfit to stand trial and was put under treatment for over 6 months! Why had the trial court not noticed before that the Appellant was not well mentally before it embarked upon the trial?

11. I am alive to the fact that the trial court acted properly when the Appellant raised the issue of his mental competency and sent him off for medical examination. The court also acted properly after he was certified fit to defend himself after the long treatment by asking him if he wanted his trial to commence afresh or if he wanted to proceed from where it had reached before his treatment.

12. This court is however unable to get out of its mind the nagging possibility, despite all that, that the Appellant was indeed unfit for trial for most of the trial, something that the trial court did not notice because he appeared to cross-examine the witnesses sensibly and at length. It is also possible, despite the trial court’s finding that the Appellant did not establish on balance his defence of insanity, that at the time of commission of the offence he did not understand what he was doing, or that it was wrong, on account of the effect that his 2010 injury to the head had on his mental status.

13. I am not satisfied that the Appellant received a fair trial on account of his mental status. I hereby declare a mistrial. His conviction and the sentence passed on him are hereby set aside.

14. I have considered if the Appellant should be tried again. His advanced age and the fact that he has now served nearly three (3) years of his sentence dictate otherwise. He shall therefore be set at liberty forthwith unless he is otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 3RD DAY OF FEBRUARY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 4TH DAY OF FEBRUARY 2021