



**Boru v Republic (Criminal Appeal E021 of 2022)
[2021] KEHC 12529 (KLR) (17 May 2021) (Judgment)**

Neutral citation: [2021] KEHC 12529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E021 OF 2022**

JN NJAGI, J

MAY 17, 2021

BETWEEN

KOTE BORU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Collins Ombija,
Resident Magistrate, in Marsabit CM's Court Sexual Offence Case No.10 of 2020)*

JUDGMENT

1. The appellant was convicted of the offence of rape contrary to section 3(1) (a) (b) (3) of the *Sexual Offences Act* No.3 of 2006 and was sentenced to serve 10 years imprisonment. The particulars of the offence were that on the 16th of February 2020 at [Particulars Withheld] area in Marsabit Central Sub-County he intentionally caused his penis to penetrate the vagina of JR without her consent.
2. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal on the grounds that:
 1. The learned trial magistrate erred in law and fact by failing to note that the sentence was harsh and excessive in the circumstances of this case.
 2. The learned trial magistrate erred in both law and fact when he failed to note that the appellant was not identified at the scene of crime.
 3. The learned trial magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.



4. The learned trial magistrate erred in both law and fact by failing to note that the investigators of this case failed to investigate the case to the required standard by law.
 5. The learned trial magistrate erred in law and fact by failing to take into account the period spent in custody as envisaged in section 333(2) of the [Criminal Procedure Code](#) Chapter 75 Laws of Kenya section.
 6. The learned trial magistrate failed to consider the appellant's mitigation.
 7. The learned trial magistrate erred in matters of law and fact by failing to consider the appellant's defence.
3. The case for the prosecution was that the victim in the case was mentally challenged. That the appellant had been given some work by the mother of the victim. He was then given a place to sleep in the same house with the victim but on different beds. The mother to the victim PW1 was in the same house. As they slept PW1 heard some noise on the bed of the victim. She flashed a torch on the bed and saw the appellant on top of the victim while in the process of raping the victim. She locked the door and called neighbours. A neighbour, Boru Wako PW2 responded and went into the house of PW1. He found the appellant standing inside the house of PW1 with his pants down. Pw1 was holding a torch and standing at the door as she tried to restrain the appellant from leaving the house. He, PW2, called the area Assistant Chief PW4 who went to the place. They restrained the appellant till morning when they handed him over to the police.
 4. The case was investigated by PC Wafula PW5. A P3 form was issued to the victim. The victim was examined by Dr. Ahmed PW3 at Marsabit County Hospital. He found the victim with normal genitalia but there was white discharge from the vagina. A specimen of the discharge was taken for laboratory examination that upon examination revealed presence of spermatozoa. The doctor found that the victim had a long medical history of being mentally challenged. He formed the opinion that there was likelihood of rape having occurred. The appellant was charged with the offence. During the hearing the doctor PW3 produced the P3 form as exhibit, Pexh.1.
 5. In his defence the appellant stated in a sworn statement that he had worked for the complainant for about one year and there was no issue between them. He later quit the work and stayed away for one month. They called him back to help in weeding their farm. He went. He slept in their house. At night the mother of the victim raised an alarm claiming that he had raped her daughter which was false. That it was a set up for the reason that his employer was not happy that he had stopped working for them. That he was aware that the victim was mentally challenged and there was no way that he could rape her.

Submissions -

6. The appeal proceeded by way of written submissions. The appellant submitted that the case was a frame up by the complainant's mother who held a grudge against him because he had stopped working for them and that he was at their home to help them in weeding their farm. That he was sleeping in the same room with the complainant but on different beds.
7. The appellant submitted that the evidence of the prosecution witnesses was uncorroborated. That the Investigating Officer did not provide any evidence, such as a DNA evidence, that he had committed the offence.
8. It was submitted that the appellant was convicted on mere suspicion, yet suspicion cannot be the basis of a conviction of an offence. The appellant in that respect cited the case of [Sawe v Republic](#)



(2003)eKLR where it was held that suspicion however strong cannot be the basis for inferring guilt as that must be proved by evidence.

9. The appellant faulted the trial court for failing to consider the period the appellant had spent in custody before it sentenced him as required by section 333(2) of the *Criminal Procedure Code*. The appellant in this respect relied on the case of *Abamad Abolfathi Mohamed & Another v Republic* (2018)eKLR.
10. The appellant further submitted that the trial court failed to consider his defence and mitigation.
11. The Senior Principal Prosecution Counsel Mr. W. Ochieng submitted on behalf of the state that the case against the appellant was proved beyond reasonable doubt. That the victim's mother PW1 found the appellant in the act of raping the victim. That the evidence was corroborated by a neighbour, Pw2 who responded to the distress call and found the appellant still at the scene while half dressed. That the appellant in his defence did not deny that he was arrested at the scene.
12. It was submitted that the evidence of penetration was corroborated by the testimony of medical doctor who carried out an examination on the victim and led evidence that there was presence of spermatozoa in the vagina of the of the victim. It was submitted that the victim was mentally challenged. That she was presented before the court which confirmed that her congenital mental state as she was unable to talk. That the doctor confirmed the victim was mentally unstable. That the trial court rightly determined that she had no capacity to give consent to sexual intercourse.
13. The prosecution counsel submitted that the appellant's defence did not discount the charges levelled against him. That his defence that the case was a frame up was baseless.
14. It was finally submitted that the offence was committed against an extremely vulnerable person and the court had the obligation to protect her. That the offence carried a life sentence but the court in consideration of the appellant's mitigation and the time spent in custody imposed a sentence of 10 years. The prosecution counsel submitted that the sentence was fair. He urged the court to dismiss the appeal in toto.

Analysis and determination –

15. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusions while keeping in mind that the trial court had the advantage of seeing and hearing witnesses testify– see *Okeno v Republic* (1972) EA 32.
16. The trial court considered the evidence adduced against the appellant and found that there was sufficient evidence from the prosecution witnesses to sustain a conviction for the offence of rape. That the victim was mentally challenged and therefore that she lacked capacity to give consent to sex. That there was no reason for the family of the victim to conspire to frame up the appellant with the offence.
17. The appellant challenged the prosecution evidence on the ground that it was uncorroborated. This is however far from the truth as the fact of rape on the victim was corroborated by the evidence of the doctor PW3 that laboratory examination revealed presence of spermatozoa in the vaginal discharge of the victim. This coupled with the evidence of the victim's mother that she caught the appellant in the act was conclusive evidence that the appellant raped the victim.
18. The appellant alleged that the evidence for the prosecution was contradictory. He could however not pin-point any contradictions in the case. I find no material contradictions in the evidence of the prosecution.



19. The appellant contended that he was not identified to have been at the scene of crime. The appellant however admitted that he was found inside the house of the victim's mother. He therefore placed himself at the scene of the crime.
20. The appellant further argued that the trial court did not consider his defence. However, the court record shows that the trial court considered the appellant's defence that the charges were a frame up and found no truth in the defence and thus dismissed it. It is worthy of note that the appellant did not cross-examine the victim's mother PW1 on there having existed a grudge between them. It is incomprehensible that PW1 would have recalled the appellant to do some work for her if she had any grudge against him. The defence must have been an afterthought and a made-up story. The trial court was right in dismissing the defence.
21. From the record of the trial court the victim was presented before court and the court observed that she was mentally challenged and that she could not communicate and lacked capacity to comprehend events.
22. The appellant contended that the investigations were not to the standard required in proof of a criminal case. The standard of proof in a criminal case is that of beyond reasonable doubt.
23. The charge against the appellant was rape contrary to section 3(1) (b) (3) of the *Sexual Offences Act*. The section Provides as follows:
 1. A person commits the offence termed rape if –
 - (a)
 - (b) The other person does not consent to the penetration;
 - (c)
 - (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.
24. Section 3 (2) of *the Act* states that-
 In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of *this Act*.
25. Section 43 in turn provides as follows:
 1. An act is international and unlawful if it is committed -
 - a. In any coercive circumstances;
 - b. Under false pretences or by fraudulent means; or
 - c. In respect of a person who is incapable of appreciating the nature of an act which causes the offense.
 2. The coercive circumstances, referred to in subsection (1) (a) include any circumstances where there is-
 - a. Use of force against the complainant or another person or against the property of the complainant or that of any other person



- b. Threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
 - c. Abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.
3. False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person –
- a. In respect of whom an act is being committed, is led to believe that he or she is committing such an act with particular person who is in fact a different person;
 - b. In respect of whom an act is being committed, is led to believe that such an act is something other than that act; or
 - c. Intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life threatening sexually transmissible disease.
4. The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in sub section (1) include circumstances where such a person is, at the time of the commission of such act –
- a. Asleep;
 - b. Unconscious;
 - c. In an altered state of consciousness;
 - d. Under the influence of medicine, drug, alcohol or other substance to the extent that the person’s consciousness or judgement is adversely affected;
 - e. Mentally impaired; or
 - f. A child.
5. This section shall not apply in respect of persons who are lawfully married to each other.
26. The evidence that the victim is mentally challenged was given by her mother PW1, their neighbour PW2 and PC Wafula PW5. That aspect of the evidence was corroborated by the doctor who examined the victim, PW3. The appellant admitted that he knew that the victim was mentally impaired. There is then no doubt that the victim was incapable of appreciating the act of penetration with a penis due to her mental status.
27. In view of the above, I find that there was overwhelming evidence against the appellant. The appellant was found in the act of raping a mentally impaired person whom he knew to be mentally challenged. The conviction is therefore upheld.
28. The appellant mitigated before the trial court that he was a father of 3 children of whom he was the bread winner. That his parents were elderly and his father blind. That they relied on him.
29. In sentencing the appellant to 10 years imprisonment the trial magistrate said that he had considered the mitigation and also considered that the appellant had been in custody for one year. The court there upon imposed the minimum sentence of 10 years as stipulated by section 3(3) of the [Sexual Offences Act](#). A minimum sentence that is provided by the law cannot be said to be excessive or harsh.



30. The appellant argues that the trial court did not comply with the provisions of section 333(2) of the Criminal Procedure Code that obligates a sentencing court to take into account the period spent in custody whenever sentencing an accused person who has been in custody during trial. In Abamad Abolfathi Mohammed & another v Republic [2018] eKLR the Court of Appeal held the following on the provisions of the section:

By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012.

31. The appellant was arraigned in court on the 18/2/2020 and was sentenced on 2/2/2021. This means that he was in custody for close to a period of one year. In imposing the minimum sentence of 10 years without any indication as to when the sentence was to commence, it was not clear whether the trial magistrate really took into account the period spent in custody. There is reason for this court to interfere with the sentence and order that the sentence of 10 years imprisonment is to commence from the date of plea which is on 18th February 2020.
32. The upshot is that the appeal is dismissed but it is ordered that the sentence imposed by the trial court is to commence from 18th February 2020.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 17TH DAY OF MAY 2021.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Respondent

Appellant Present in person

Court Assistant- Peter

14 days R/A.

