



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCRA NO. 22 OF 2019**

**NELSON KIMATHI MUCHIRI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*Being appeal from original conviction and sentence in the Chief Magistrate's Court*

*at Chuka SO No.14 of 2015 delivered by HON. NJOKI KAHARA -*

*(Senior Resident Magistrate (S.R.M) on 17<sup>th</sup> October, 2018).*

**J U D G E M E N T**

1. The Appellant herein, **NELSON KIMATHI MUCHIRI** had initially been charged with the offence of defilement with an alternative charge of indecent act with a minor. Later the charge was amended to rape contrary to **Section 3(1) (a) and (b)** as read with **Section 3(3)** of **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on 23<sup>rd</sup> July 2014 he caused penetration of his penis into the vagina of one DW aged 20 years without her consent. He also faced an alternative charge committing an indecent act with an adult contrary to **Section 11(A)** of the same Act. He denied the charge but after trial he was found guilty of the main charge, convicted and sentenced to serve **10 years** imprisonment.

2. He felt aggrieved by both the conviction and sentence and filed this appeal raising the following grounds namely:-

*i) That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution's case was not proved beyond reasonable doubt.*

*ii) That the evidence tendered by the prosecution's witnesses were not consistent and not collaborated(sic).*

*iii) That the trial court erred by failing to note that the complainant had a vendeta against him.*

*iv) That there were no independent witnesses to verify the facts and clear doubts.*

*v) That the defence was rejected without reasons.*

3. In summary the prosecution's case relied on the evidence of the complainant (PW1) and medical evidence. The complainant told the trial court that on 23<sup>rd</sup> July 2014 at around 7 pm while walking home from school (particulars withheld] Primary School) she was waylaid by the Appellant who forcefully took her to his house where he threatened her with a knife before raping her repeatedly.

4. The evidence of the complainant was corroborated by her mother, **SN (PW2)**. She informed the trial court that her daughter went missing in the material date (23<sup>rd</sup> July 2014) as she did not report back home after school as she used to. After trying to trace in school in vain the following day she was called back home where she found her daughter having been raped. She told the trial court that her school uniform was blood stained at the back and her daughter was bleeding from her vagina. She took her to Chuka Hospital and reported the incident upon which the accused was arrested and charged.

5. **HILLARY KANGICHU**, a Clinical Officer from Chuka General Hospital tendered evidence (P3) on behalf of Dr. Mwende with whom he had worked with since 2009 and as per the medical report the complainant had been raped.

6. When placed on his defence, the Appellant denied raping the girl stating that he did not even know the girl and only saw her in court. He added that the case was fabricated but denied having any differences with either the complainant or the parents as he came to know the parents in court. According to him, he was at his place of work at Rubate on the material date and did not see the girl on that day.

7. The trial court found that from the evidence tendered penetration had been proved and noted that the complainant's vagina was bleeding with the hymen broken. The court also noted that the bruises on the complainant's thigh could be as a result of a struggle and believed the complainant when she stated that the Appellant had threatened her with a knife. The trial magistrate found the defence to be mere denial and found him guilty of the crime charged.

8. In this appeal, the Appellant has contended that identification was not concrete because the incident occurred at 7 pm. He has faulted the trial court for not analysing the source of light used to identify him and that identification was not free from error.

9. The Appellant has faulted the prosecution for not calling the complainant's father who found her to come and testify -and for not producing the stained dress the girl was wearing. He further claims that there was no DNA evidence to ascertain that there was sexual contact between the Appellant and the complainant.

10. The State has opposed this appeal and supported the finding of the trial court. It has submitted that their case against the Appellant was proved beyond doubt as the witnesses called were candid and clear on the occurrence of the offence.

12. This court has considered this appeal and the submission made by both the Appellant and the Respondent. The Appellant as observed above was charged and convicted of rape and **Section 3 of Sexual Offences Act** define rape as follows:-

### **3. Rape**

**(1) A person commits the offence termed rape if—**

**(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.**

**(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.**

**(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.**

The provisions of Section 43 of the SOA states;

### **43. Intentional and unlawful acts**

**"(1) An act is intentional and unlawful if it is committed—**

**(a) in any coercive circumstance;**

**(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 offence"**

From the above provisions of the law it is clear that for the offence of rape to be established the following elements must be proved:-

i) Penetration

ii) Lack of consent or prove that the act was perpetrated through, force, coercion, intimidation, or use of undue influence using drugs etc.

iii) Identification

13. The Appellant has stated that prosecution witnesses contradicted themselves, were not consistent and there was no corroboration. In the first place this court has gone through the evidence tendered by the prosecution's witnesses, and contrary to what the Appellant alludes, the witnesses were very candid concise and clear on what happened to the victim. The evidence of witnesses were consistent as to the series of events and the Appellant has not stated where the inconsistency arose contradiction.

14. This court finds the Appellant's contention that failure by the police to carry out DNA test or analysis weakened its case to be unfounded. As I have highlighted above the prosecution was required to establish and prove the 3 highlighted necessary ingredients of the offence of rape. The first element of penetration was established and proved by the evidence of the complainant(PW1) and corroborated by

the medical officer (PW3) although in sexual offences corroboration is not a necessity as observed by a Court of Appeal in Fabbyton Mutuku Ngui -vs- Republic [2014] eKLR stated that;

1 . “Section 124 of the Evidence Act as amended by Act No. 5 of 2003 and Act No. 3 of 2006 provides as follows:

*“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

***Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” (Emphasis added)*** . This means that evidence of a victim of rape on its own can found a conviction if the trial court finds the evidence credible enough.

15. Secondly the element of violence or threat of violence was established by the evidence of the complainant (PW1) who stated that the Appellant used a knife to threaten her. The doctor's finding recorded the presence of bruises on the thighs of the complainant indicated that there was a struggle and hence corroborated the complainant's account that she was raped by force and without her consent.

16. The Appellant's defence that that the complainant could have been mistaken is mitigated by the fact that he was known to her and spent the whole night with her. He even prepared and gave her food and this weakens any contention that he was not positively identified. Furthermore, the girl was from school and says it was 7 pm. At that hour the sunlight though diminishing is still sufficient to identify a person at close range. This court finds that contrary to the Appellant's assertion, the prosecution's case against him was water tight. There was proof beyond any doubt that he had raped the complainant after way laying her as she headed home from school.

17. The Appellant has pointed out that the stained dress seen by the complainant's mother and worn by the complaint was not tendered by the police and that DNA was not conducted to prove that there was sexual contact between him and the complainant. As observed above, there is no legal requirement that DNA test must be conducted before conviction can be found. As I have observed above to establish and prove the offence of rape the prosecution is required to prove the stated elements. Those elements may be proved by any evidence and not necessarily DNA results. In Fappyton Mutuku Ngui -vs- Republic (supra) - the court observed that;

**1. “The appellant’s second major ground was that there was no tangible medical evidence adduced to link him with the defilement of PW2. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2’s testimony which was trustworthy as to the person who had defiled her.”**

18. It is also true that the prosecution should have done better by tendering the blood stained dress as evidence during trial but the omission in my view did not negatively affect the weight of the prosecution's case.

19. The Appellant's claim that he was fixed or that the evidence was a fabrication is not well founded. Infact his evidence was that he had no differences with either the complainant or her parents.They therefore had no motive to conspire to fix him. The Appellant has not shown any motive.

20. In his defence he stated that he was herding livestock at Rubate but did not call evidence to show that he was working at that hour of the evening and the entire night when the victim was raped. I have re-evaluated his defence and find that the trial court was right to dismiss it as mere denials.

In the end, this court finds no merit in this appeal. The conviction was safe and the sentence meted out was the minimum sentence prescribed. The Appellant has not established any basis for this court to interfere with the same. The appeal is therefore disallowed.

**Dated, signed and delivered at Chuka this 19<sup>th</sup> day of February 2020.**

**R.K. LIMO**

**JUDGE**

**19/2/2020**

Judgment dated, signed and delivered in the open court in present of the Appellant in person and Maari for State.

**R.K. LIMO**

**JUDGE**

**19/2/2020**