



IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 114 OF 2019

CORAM: D. S. MAJANJA J.

BETWEEN

JAMES MWITHIA MARETE..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P. M. Wechuli, SRM at the Magistrates Court at Tigania dated 27th June 2019)

JUDGMENT

1. The appellant, **JAMES MWITHIA MARETE**, was charged and convicted on a count of rape contrary to **section 3(1) (a) and (c)** and **(3)** of the ***Sexual Offences Act, 2006*** ('the Act'). The particulars of the offence were that on 10th May 2014 in [particulars withheld] District within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of RK by use of force. He was sentenced to 10 years' imprisonment.
2. The appellant was also charged and convicted of the offence of assault causing actual bodily harm contrary to **section 251** of the ***Penal Code (chapter 63 of the Laws of Kenya)***. The particulars were that on the same day, at the same place and time, he unlawfully assaulted RK by grabbing her thereby causing her actual bodily harm. He was sentenced to 3 years imprisonment.
3. Both sentences were ordered to run consecutively. 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.
4. The complainant, RK (PW 1), was declared a vulnerable witness under section 31 of the Act as she was deaf and testified through an intermediary. She recalled that in the afternoon of 10th May 2014, while she was working as a casual worker, the appellant confronted her, held her hand, took soil and put it in her mouth, tore her panties and proceeded to penetrate her forcefully. She screamed for help but no one answered. After he was sated, he gave PW 1 kshs. 50/- which she rejected. He left with the jembe. PW 1 told the court that she did not know the appellant well as he was newly employed as a herdsboy. She went and reported the matter to the police on the same day with the assistance of her relatives.
5. PW 2, the investigating officer, testified that she was at the report office of the Police Station when PW 1 came and reported that she had been raped by the appellant. She escorted PW 1 to the hospital for examination and treatment. She recovered PW 1's torn pink panty. She also went to the scene of the incident and prepared a sketch plan. She also stated that the area chief arrested the appellant and brought him to the police station.
6. PW 3 was the clinical officer who examined PW 1 on 10th May 2014 when she was brought to the hospital. He noted that she had tenderness on the neck and although there were no visible injuries on the vagina, the semen was visible on the pubic area and the high vaginal swab revealed spermatozoa.
7. The complainant's father, PW 4, told the court that on the night of 10th May 2014, PW 1 came home and told him that she had been beaten and raped by the appellant.
8. In his unsworn statement, the appellant denied the offence. He termed the allegations against him as false. He alleged that he was framed because he lost the complainant's phone which he had been told to charge.
9. 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 DNA evidence ought to have been produced to prove the case against him. The respondent supports the conviction on the ground the prosecution proved all the ingredients of the offence of defilement.

10. The ingredients of rape which the prosecution must prove are set out in **Section 3(1)** of the **Sexual Offences Act, 2006**;

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.

11. 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 she was attacked in the shamba and subjected to penetration by force. Her testimony on this aspect was corroborated by medical evidence following an examination done on the same day that revealed spermatozoa in her vagina. Further, the prosecution produced her torn panties confirming that she did not consent to the act of penetration.

12. As to whether the appellant was the assailant, the evidence is that the incident took place in broad daylight while PW 1 was in the shamba. The complainant stated that she knew the appellant and she indeed named him when she reported the incident later that night. In his defence, the appellant did not deny that he knew the complainant. He stated that he was being framed but did not give any facts why PW 1 would implicate him in the offence. This defence, I find, was an afterthought since it was not suggested to PW 1 in cross-examination.

13. From the totality of the evidence, I find that the prosecution proved the element of the offence of rape. In my view, it was unnecessary to charge the appellant with the offence of assault as it was an integral ingredient of the offence of rape in so far as the act of penetration was done by force, threats or intimidation. For all intents and purposes, it is a lesser and cognate offence to that of rape. I therefore quash the conviction on Count II.

14. 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 in among other cases **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR**.

15. Having considered the circumstances of the case and in particular that the appellant took advantage of a person he knew had certain disabilities and the level of violence inflicted, I find the sentence of 10 years' imprisonment appropriate.

16. In conclusion, I affirm the conviction and sentence on Count 1. I allow the appeal to the extent that I quash the conviction and sentence on Count II.

DATED and DELIVERED at NAIROBI this 14th day of MAY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.