



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.24 OF 2017

GEOFFREY KIPTOO LANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence by Hon. S. K. Ngetich (SRM)

in Kericho CM Criminal Case No.68 of 2016 delivered on 20/6/2017)

JUDGEMENT

1. The Appellant was convicted with the offence of rape contrary to section 3 (1) (a) (b) (c) as read with section 3 (3) of the Sexual Offence Act No.3 of 2006 and he was sentenced to ten (10) years imprisonment.
2. The particulars of the case were that on 7/9/2016 at Chebwagan village in Bureti sub-county within Kericho County the Appellant intentionally and unlawfully caused his penis to penetrate the anus of DKK without his consent.
3. The Appellant was charged with an alternative count of Indecent Act with an adult contrary to section 11 (A) of the Sexual Offences Act No 3 of 2006 in that in the same material particulars as in count 1 above, the Appellant intentionally and unlawfully touched the anus of DKK with his penis.
4. The prosecution evidence in summary was that on the material day, the complainant a form 4 student aged 22 years met the Appellant at a wine and spirits shop at Yakwai Market and a conversation started. The complainant had gone to drink at the shop. They introduced themselves to each other and later the Appellant bought meat and invited the complainant for lunch.
5. They boarded a motorcycle and went to the Appellant's home at Sachangwan where they cooked and ate in the kitchen after which the Appellant asked that they rest.
6. The complainant fell into deep sleep and when he woke up, he felt pain in his anus. His belt had been cut and his trousers and underwear pulled down and the Appellant was lying beside him.
7. The complainant ran way to a neighbour's house where he was assisted to call his mother. His mother and brother went and took him to Yakwai Health Centre and he was referred to Kapkatet Hospital.
8. The clinical officer who examined the complainant on 8/9/2016 at Kapkatet Hospital noted a tear on the external meatus (anal opening) at 6.00 o'clock (lower aspect) and exquisite tenderness. He concluded that there was positive evidence of anal penetration.
9. The Appellant told the court in his defence that on 11/9/2016, police officers arrested him for allegedly raping the complainant. He said he had differed with the complainant over a lady and the complainant threatened him that he would see.
10. The Appellant said on the material day they had lunch together and he left the complainant resting under a shade and went to milk. When he returned the complainant had left and later he was framed with the current charges.
11. The trial court found the Appellant guilty of rape and sentenced him to ten (10) years imprisonment and he has now appealed against both conviction and sentence on the following grounds;

i) THAT the complainant's evidence was incredible and could not sustain a safe conviction.

ii) THAT there were crucial witnesses who were not called by the prosecution.

iii) THAT the penetration was not adequately proved.

iv) THAT the Appellant's defence was not taken into consideration.

v) THAT the sentence imposed upon the Appellant was harsh and excessive.

12. The Appellant submitted that the evidence adduced by the complainant was incredible that they met for the first time, went to the house of the Appellant had lunch and they slept.

13. The Appellant also submitted that there were witnesses namely BERNARD and JOSEPH BETT who were not called by the prosecution and the inference is that their evidence would have been prejudicial to the prosecution case.

14. The Appellant also submitted that his defence was not taken into account and further that the sentence imposed upon him was harsh and excessive.

15. The prosecution opposed the appeal and submitted in writing that there were four witnesses who testified and their evidence was credible, cogent and consistent and neither was it controverted by the defence.

16. On the issue of witnesses who were not called, the Respondent submitted that there is no particular number of witnesses required to prove any fact.

17. The Respondent also submitted that penetration was proved as the testimony of PW1 was corroborated by that of the medical expert.

18. The Respondent further submitted that the defence by the Appellant was taken into account and found to be a mere denial and on the issue of the sentence it was submitted that the same is lawful.

19. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses.

20. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

21. The issues for determination in this appeal are as follows;

i) Whether there was penetration.

ii) Whether the Appellant was properly identified.

iii) Whether the sentence was harsh and excessive.

22. I find that the issue of penetration was proved. The complainant said he woke up to find he had been raped by the Appellant who was lying next to him.

23. The medical evidence corroborated that of the complainant that there was a tear on the external meatus (anal opening) at 6.00 o'clock (lower aspect) and exquisite tenderness. The doctor concluded that there was positive evidence of penetration.

24. The Appellant was positively identified as the person who committed the offence. The complainant's evidence was credible. The Appellant interacted with the complainant in broad daylight and they went to the Appellant's home where the act was committed by the Appellant.

25. On the issue of failure to call crucial witnesses, the reason advanced in that the witnesses feared the Appellant. I find that there is no legal requirement that all the witnesses have to be called.

26. I find that the prosecution proved the guilt of the Appellant to the required standard. The sentence imposed is lawful and not excessive as alleged considering that the maximum sentence provided is life imprisonment.

27. I accordingly dismiss the appeal and uphold both the conviction and sentence.

Delivered, signed and dated at Kericho this 2nd day of October 2020.

A. N. ONGERI

JUDGE