



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 2 OF 2019

PATRICK KAMAU NG'ANG'A.....APPELLANT

- VRS -

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. M. Ochieng – SRM Githunguri dated and delivered on the 30th day of January 2019 in the original Githunguri Senior Principal Magistrate's Court Sexual Offence No. 30 of 2017}

JUDGEMENT

The appellant was charged with rape contrary to Section 3 (1) (a) and (b) as read with Section 3 (3) of the Sexual Offences Act. The particulars of the charge were that on 24th October 2017 at [particulars withheld] Township, Githunguri Sub-county in Kiambu County he wilfully and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of AWN without her consent.

The appellant also faced an alternative charge of committing an indecent act with an adult contrary to Section 11 (A) of the Sexual Offences Act where it was alleged that on the same day and place as in the main count, he touched the complainant's vagina with his penis without her consent.

The appellant denied the charge and the case proceeded to full trial. After evaluating the evidence adduced by both sides the trial Magistrate found the appellant guilty on the main charge, convicted him and sentenced him to ten (10) years imprisonment that being the minimum sentence prescribed by the law.

This appeal contests the entire judgement, the conviction and the sentence. The grounds cited are: -

“1. THAT, YOUR HON, I did not plead guilty at trial.

2. THAT, YOUR HON. The learned magistrate erred in law and fact by not considering that I had existing grudge with my complainant & the only other witness who was my former wife.

3. THAT, YOUR HON. I was just framed in this case by my former wife & her friend (the complainant) as revenge for a relationship that was broken & I declined to amend it up on her request on several occasions.

4. THAT, YOUR HON. I was not given witness statement, exhibits, & medical reports during the trial.

5. THAT, YOUR HON. I beg leave to file my supplementary grounds later after receiving judgement and proceedings.”

At the hearing of this appeal the appellant was represented by Miss Njeri Gathua Advocate and the State by Prosecution Counsel Stephen S. Kasyoka. The appeal proceeded by way of written submissions. It is vehemently opposed.

In her submissions, Miss Gathua made a brief summary of the evidence of each of the four witnesses called by the defence and stated that the trial court erred in failing to conclude that the prosecution's case was not proved beyond reasonable doubt. She submitted that the facts of the case leave a reasonable doubt as to whether the complainant was penetrated and if so whether the appellant was the perpetrator. She relied on the evidence of the doctor that the medical examination performed on the complainant five hours after the occurrence of the offence did not yield presence of spermatozoa or any injuries. She contended that this was inconsistent with forceful penetration and that it created a gap in the prosecution's case. Miss Gathua submitted that from her analysis of the evidence of the prosecution witnesses it was clear that the appellant was framed by his ex-wife (Pw2). She contended that the existence of bad blood between Pw2 and the appellant coupled with total

lack of medical evidence confirm that the appellant is innocent. She re-emphasized that the burden of proof lay with the prosecution and contended it had failed to present a water tight case. She urged this court to acquit the accused as the charge against him was not proved beyond reasonable doubt.

On his part, Mr. Kasyoka submitted that **Section 3 (1) of the Sexual Offences Act** must be read together with **Section 43 (1) of the Sexual Offences Act** which outlines what constitutes intentional and unlawful acts. He submitted that the prosecution proved all the elements of the offence in that there was evidence that the appellant used a knife to threaten the complainant so that she could yield to the sexual act. He stated that the appellant was also positively identified. He urged this court not to disturb the conviction and sentence stating that the sentence fitted the crime and was not harsh.

I have considered the grounds of appeal and the submissions by both sides. However, this being a first appeal it is in the nature of a retrial and I am obligated to re-consider and evaluate the evidence before the trial court so as to arrive at my own independent conclusion. I do so bearing in mind that I did not see or hear the witnesses (*see Okeno v Republic [1972] EA 32*).

Section 3 of the Sexual Offences Act states: -

“(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)”

Section 43 of the Act states: -

“(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.**

(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 a 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 transmittable disease.”**

From the above definition the key ingredients of the offence of rape are: -

- **Penetration.**

- **Lack of consent or if there was consent the presence of coercive circumstances.**
- **Identification of the perpetrator.**

These elements were stated in the following manner in the case of **Republic v Oyier [1985] KLR 353** where the Court of Appeal held: -

“1. The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

3. Where a woman yields through fear of death or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.....”

The complainant testified that on the material night she was babysitting for her friend Pw2 when at about 4am the appellant who was Pw2’s **“husband”** broke into the house. She stated that he brandished a knife and threatened to cut her neck if she screamed. She stated that he got hold of her neck and covered her mouth and forced her to remove her nightdress and pant. She stated that she complied and did as he ordered. After that he proceeded to have carnal knowledge of her. It was her evidence that he inserted his penis into her vagina while still threatening he would kill her and when he was done he left.

The complainant knew the appellant very well as she had met him in Pw2’s house on several occasions prior to this incident. She also stated that the electricity in the house was on and that she was able to see him. This was therefore evidence of recognition and I am satisfied that the circumstances favoured a positive identification free from any possibility of error. I also find it a fact from the evidence that there was penetration. The complainant is an adult and she knew and explained exactly what he did to her. She expressly told this court that he inserted his penis into her vagina. This fits the definition of penetration in **Section 2 of the Sexual Offences Act**. In my view the fact that the complainant did not sustain injuries or that spermatozoa were not seen does not negate there was penetration. The complainant was very consistent in her evidence and Pw2 confirmed that she told her the same thing when she returned home. There was also nothing in her evidence to suggest that she was influenced by Pw2 to say she had been raped. As a matter of fact, by the time Pw2 returned the complainant had already reported the matter to the police. The appellant did not suggest that the complainant herself could have had reason to fabricate evidence against him and I do not believe that the status of his relationship with Pw2 had anything to do with it. I believed the complainant. She struck me as a very truthful witness.

It is clear from the evidence of the complainant that she consented to have sexual intercourse with the appellant only because he brandished a knife at her and threatened to cut her if she did not comply. **Section 3 (1) (C) and Section 43 (1) (a) and (2) (a) of the Sexual Offences Act** provide that where consent is obtained through threats and coercive circumstances as in this case the act done is unlawful. It is immaterial that the knife used by the appellant was not produced in evidence. I find therefore that all the ingredients of rape were proved against the appellant beyond reasonable doubt.

Counsel for the appellant submitted that the trial was unfair because the appellant was not given a chance to cross examine the complainant. While the typed proceedings seem to suggest that to be so, I have perused the handwritten proceedings which are the original notes of the trial Magistrate and it is clear the appellant cross examined the complainant. That cross examination is found at page 9 of the handwritten notes. Even after cross examination the complainant remained steadfast. The fact that she reported the matter almost immediately is also evidence of her consistency and makes her evidence even more credible and reliable. As for the contradictions alluded to by the appellant, my view is that they are not so material as to water down the evidence. In the premises I find no merit in the appeal against conviction and the same is dismissed.

In regard to the sentence, I am alive to the developing jurisprudence on minimum sentences and the need for the courts to sentence convicted persons based on the nature and circumstances of the offence and other mitigating circumstances such as the antecedents of the accused. However, I find that taking everything into consideration the sentence of imprisonment for ten years was justified in the circumstances of this case. The same is upheld and the appeal is dismissed in its entirety. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE