



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

HIGH COURT CRIMINAL APPEAL NO.48 OF 2017

FRED NYASIRANGO MIRERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case 48 of 2017

at Principal Magistrate's Court at Ogembo Hon. Naomi Wairimu

dated on 6th February 2017)

JUDGMENT

1. The appellant **Fred Nyasirango Mireri** was convicted of the offence of Rape contrary to section 3(1) (a) (b) (3) of the Sexual Offence Act No. 3 of 2006. He was sentenced to 10 years imprisonment. The particulars of the offence are that, on the 28th day of April 2015 at [particulars withheld] sub location in Kenyena sub-location within Kisii County, the appellant intentionally caused his penis to penetrate the vagina of RB without her consent a person with mental disabilities.
2. The appellant now appeals against the conviction and sentence. He has filed grounds of appeal. His main ground of appeal is that the conviction was based on flawed and fabricated evidence and that the sentence meted against him was high. In his submissions he challenges evidence adduced by Pw2, Pw3, Pw4 and Pw5 arguing that the said evidence was malicious fabricated and flawed. That the witnesses testified that the alleged offence happened on the 28.4.2015 yet he was arrested on the 25.4.2015. The State asserts that the conviction and sentence are grounded on sound evidence and that the prosecution proved its case beyond reasonable doubt.
3. The duty of the first appellate Court is to consider the evidence, evaluate it and come to an independent finding having regard to the fact that it neither heard nor saw the witnesses testify(**see Okeno v Republic [1972] E.A. 32**)
4. The prosecution called six witnesses to prove its case. Pw1 (EM) the complainant's mother testified that the complainant who is her daughter is 22 years old, she is mentally ill. The appellant is her cousin. On the 28.4.2015 she left her home at 11am and on returning to her home she met with her grandchildren screaming that the appellant had done bad things to the her daughter. She saw the appellant running away. She too screamed and the appellant was arrested.
5. Pw2 (JO) testified on the 28.4.2015 whilst in the shamba with S they were called by C and informed that someone was strangling RB and on reaching the house of RB the complainant they found the appellant fastening his trouser leaving the house. S screamed and people came.
6. Pw3 SM (14 years) testified that RB is her sister. On the 28.4.2015 she was in the shamba at 11am C called her to go see what was going on. She ran to their house. She found the appellant had removed RB's clothes and he was having sex with her. She went out and started to scream. He came out and jumped the fence, he was arrested.
7. Pw4 (minor 7 years) testified that on the 28.4.2015 she was from the river and on entering their house she found the appellant doing bad manners to her mother, she called S. The appellant was arrested.
8. Pw5 (minor 7 years) testified that she was from the river with C they found RB screaming, they found the appellant doing bad things to RB. They called S.
9. Pw6 Doctor Peter Ongonga testified that on the 29.4.2015 the complainant was examined. The PRC form indicated that the complainant suffers from mental disability. She is 34 years old. On examination it was found that she had bruises on her vagina and blood stains and a

small tear on her vagina. The complainant was taken for mental assessment on the 3.3.2016 and it was concluded that she had a mental disability.

10. The appellant gave an unsworn statement. He testified that he did not commit the offence. That on the 28.4.2014 he was in his home. That there was evidence that the girl was 24 and the doctor said she was 34, the mental assessment indicated she was 17 years old. That Pw3 said the incident took place on the 28.4.2015 yet he was arrested on the 25.4.2015. That the doctor said he did not find anything.

11. In order to prove an offence of rape, under section 3 of the Sexual Offences Act, 2016 the prosecution must prove the following ;

- i. The accused intentionally and unlawfully commits an act which causes penetration into his or her genital organs.
- ii. The other person does not consent to penetration; or
- iii. The consent is obtained by force or by means of threats or intimidation of any kind.

12. From the evidence I have outlined it is clear that the appellant had sexual intercourse with the complainant. Pw3, Pw4 and Pw5 testified that they saw the appellant having sex with the complainant. Pw2 testified that “Fred *had removed my sister’s clothes and he was having sex with her... They were on the chair it was 11am.* Pw4 and Pw5 who found the appellant with the complainant testified as follows, “*I found Fred had put my mother down... Fred was doing bad manners to my mother ...*” “*He did bad things to Bosibori... She was screaming because he was doing bad things to her...*” The appellant was known to Pw1, 2, 3, 4 and 5. The evidence of these witnesses was not fictitious or fabricated, they gave evidence on what they saw. The evidence of Pw3, Pw4 and Pw5 was corroborated by the medical evidence. Pw1 too saw the appellant leave the house soon after the incident. The doctor testified that the vagina of the complainant had bruises and blood stains and a tear there was vaginal penetration. He testified that he filled the P3 form on the 29.4. 2015 and disqualified the p3 form the appellant had as it did not have the hospital stamp. I therefore find and hold that penetration took place.

13. The next issue is whether there was consent. From the onset the trial court was informed that the complainant is mentally challenged. Her mother Pw1 was used as an intermediary. Pw1 testified that RB was mentally ill from her nursery school. A mental assessment form dated 2.3.2016 indicates that RB was examined and found to be mentally unstable not fit to testify. The report indicates she had no rapport, behaviour abnormal, cognition not alert, not oriented on time and place and memory loose, insight- impaired. The Post Rape Care Form of RB filled on the 29.4.2015 indicates disabilities as Mental Retardation.

14. **Sections 42 and 43(1) of the Sexual Offences Act, 2006** provides as follows;

42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

43.(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.

4. The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act—[Emphasis mine]

(a) asleep;

(b) unconscious;

(c) in an altered stated of consciousness;

(d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;

(e) mentally impaired; or [Emphasis mine]

(f) a child.

15. The trial magistrate stated as follows in her judgment, *"It is not in doubt that she is and adult who suffers from mental disability as stated in the mental assessment that she was unable to testify and as observed by the court in the behaviour of the victim during the court proceedings where she kept leaving the court room and returning and also getting restless and looking irritable."* From the mental assessment report and observation made when the victim was first examined and the observation made by the trial court the victim who was in court did not have the ability to give her consent, as at the time of the commission of the offence she was mentally impaired. She did not have the freedom and capacity to make the choice of having sexual intercourse, she was incapable of consenting by reason of her mental impairment. The mental assessment report dated 2/3/2016 details her mental status and illness. I find that victim RB did not consent to the sexual intercourse with the appellant.

16. The appellant has raised the issue of the victim's age. Pw1 her mother testified that she was 22 years old. The P3 form indicates that she was 24 years old. The doctor Pw6 testified that she was 34 years old. The mental assessment report dated the 2/3/2016 indicated she was 17 years. I did not have the benefit of seeing the victim .The trial court in its judgment stated as follows;

"On the issue of whether the age of the complainant was proved, it is not in doubt that the complainant is an adult the only thing that seems inconclusive is her exact age. The issue of age of the complainant is relevant when determining the sentence to be meted by the court during sentencing especially where the victim of a sexual offence is a minor. The age of an adult complainant in my view considered view is of consequence since the sentence does not vary based on her age.

The trial court made a proper finding on the victim's age having seen her in court. She was an adult and therefore the charge of rape was proper.

17. The appellant's defence was on his arrest and the evidence adduced. The charge sheet indicates that the offence was committed on the 28.4.2015. The appellant was arrested on the same day as per the evidence and he was produced in court for plea on the 30.4.2015. In his defence he mentions the 24.4.2015. It could be that he was in his home on the 24.4.2015 but the incident happened on the 28/4/2015. The defence does not cast any doubt on the strong prosecution case. The prosecution have established that he committed the offence on the 28.4.2015.The prosecution case was proved beyond reasonable doubt.

18. The conviction by the trial court was proper. On sentence, Section 3 of the Sexual Offence Act provides that, 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 appellant was sentenced to ten years which is the minimum sentence under the said section. His appeal against the sentence cannot stand. I therefore affirm the conviction and sentence. The appeal is dismissed.

Dated signed and delivered at Kisii this 13th day of March 2019

R.E.OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Senior Prosecution Counsel/Respondent

Rael Court clerk