



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 8 OF 2018

MERIYE KUYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 108 of 2017 by

the Senior Resident Magistrate – Hon. J.M. Wekesa delivered

on 20th February, 2018 at Lodwar)

JUDGEMENT

1. The Appellant **MERIYE KUYA** was charged with the offence of rape contrary to **Section 3 (1) (a), (c) and (3)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on 30th day of March 2017 in Turkana District within Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of **IL** without her consent.
2. He faced an alternative charge of committing an indecent act with an adult contrary to **Section 11 (A)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on 30th day of March 2017, at [particulars withheld] in Turkana District within Turkana County intentionally touched the vagina of **IL** with his penis without her consent.
3. He pleaded not guilty to the charges, was tried, convicted and sentenced to serve ten (10) years imprisonment. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the grounds of appeal summarized as follows:-

- a) *The charge sheet was defective.*
- b) *The prosecution case was full of contradictions.*
- c) *Vital prosecution witnesses were not called.*

4. When the appeal came up for hearing before me the Appellant who was unrepresented filed handwritten submissions which he relied upon while Mr. Mongare for the prosecution opposed the appeal through his oral submissions.

SUBMISSIONS

5. On behalf of the Appellant it was submitted that the prosecution case was full of material contradictions and that vital prosecution witnesses were not called to testify and produced exhibits against him and therefore adverse inferences should be made against the prosecution as in **BUKENYA v UGANDA [1972] EA 594**. On behalf of the Respondent it was submitted that the charge sheet was not defective as the Appellant was charged under the proper section of the law. It was contended that there was no material contradiction on the prosecution case and the evidence tendered was enough to convict the Appellant his defence having been considered.

6. This being a first appeal the court is required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though giving an allowance that it did not have the advantage of seeing and hearing witnesses as was stated in the case of **OKENO v REPUBLIC [1972] EA 32** thus:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v 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 findings and conclusions; 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 v Sunday Post [1958] EA 424."

PROCEEDINGS

7. The prosecution case against the Appellant was that on the material day at 2.00 a.m. while the complainant **PW1** was sleeping with her children away from her husband **PW4**, the Appellant crept slowly into the shelter and started to have sex with her against her will. It was her evidence that she woke up and grabbed his hand but he had a knife which he used to stab her on the right thigh, as they struggled **PW4** came to her rescue and locked the Appellant in the house until the following day when he was taken to the chief's office. **PW4** her husband's testimony on the other hand was that he had been hired by the area chief to look after relief food distribution when he heard his wife scream. He rushed to the scene and using a torch found the Appellant on top of **PW1** while holding a knife on his hand. He disarmed the Appellant and later took him to the chief.

8. It was **PW4's** evidence that the Appellant was his neighbour and had known him since 1985. **PW2 SIMON KIVUTI IRUNGU** a Clinical Officer at Kakuma Mission Hospital testified on behalf of Dr. Roy Situna and produced P3 form confirming that the complainant's genitalia had internal bruises with laceration in ambulation meaning that she would not walk properly. It further confirmed that there was spermatozoa in the vagina through high vagina swab confirming forceful penetration. **PW3 PC ONDARI** testified on behalf of **PC JENNIFER KAMAU** the initial investigating officer who had gone on transfer at the time of the trial.

9. When put on his defence the Appellant tendered unsworn statement and stated that on 18/3/2107 he left Kakuma for Letea for his mother at 2.00 p.m. and went back at 3.00 p.m. and since it was during election campaign he put on his party attire when a woman abused him that his mother had died of HIV which made him angry and beat her up. The following day he was arrested by KPR's in their compound in the company of the woman and her husband.

ANALYSIS AND DETERMINATION

10. From the proceedings and submissions herein I have identified the following issues for determination:-

- 1) *Whether the Appellant was positively identified.*
- 2) *Whether there were material contradictions in the prosecution case.*
- 3) *Whether the prosecution case against the Appellant was proved to the requisite standard.*

11. On the identification of the Appellant the evidence on record is that **PW4** the husband of the complainant found the same on top of his wife having sex with her. He had a torch with him which enabled him to recognize the Appellant whom he had known since 1985. The Appellant in his defence put himself at Letea and having beaten a woman thereat. I am therefore satisfied that the Appellant was identified by recognition and whereas the chief was not called to corroborate the complainant's and **PW4's** evidence, the Appellant having in his defence confirmed being arrested and having put **PW1** and **PW4** together with him, there was no mistaken identity of the same.

12. On whether there were contradictions in the evidence of the prosecution witnesses:- I have re-evaluated the evidence tendered. I am satisfied that **PW4** corroborated **PW1's** evidence in material particulars and any contradictions as to where **PW4** was at the time of the commission of the offence as submitted by the Appellant are of minor nature which did not go to the root of the prosecution case.

13. On whether the prosecution case was proved to the required standard:- The evidence of **PW2** corroborated the complainant's evidence and confirmed that there was penetration of the complainant's vagina. **PW3** corroborated the complainant's evidence further that it was the Appellant whom he caught red handed on top of **PW1**. The Appellant's defence did not raise any doubt on the prosecution case. I am therefore satisfied that the prosecution case against the Appellant was proved beyond any reasonable doubt and therefore his conviction was safe.

14. On sentence:- Under **Section 3 (3)** of the **Sexual Offences Act No. 3 of 2006** on conviction the penalty provided for the offence of rape is an imprisonment for a term which shall not be less than ten (10) years but which may be enhanced to imprisonment for life. The Appellant was sentenced to ten (10) years imprisonment and since the said sentencing is at the discretion of the trial court, I find no fault thereon as the same was lawful.

15. In the final analysis I find no merit of the appeal herein which I hereby dismiss and affirm the trial court's finding both on conviction and sentence and it is so ordered.

16. The Appellant has right of appeal.

Dated, delivered and signed at Lodwar this 7th day of March, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ *Court assistant*