



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 50 OF 2017

PHILIP ERAMRAM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in SO Case No. 32 of 2017 (formerly Criminal Case No. 654 of 2015) by the Senior Principal Magistrate – Hon. M.K. Mwangi delivered on 16th November, 2017 at Lodwar)

JUDGEMENT

1. The Appellant **PHILIP ERAMRAM** was charged with the offence of rape contrary to **Section 3 (1)(a) and (3)** as read with **Section 43 (1) and 4(e)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on diverse dates between the month of December 2014 and July 2015 in Turkana East District within Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of **JA**. without her consent, a person who is mentally impaired.

2. He pleaded not guilty, was tried, convicted and sentenced to serve ten (10) years imprisonment and being dissatisfied with the said outcome filed this appeal and raised the following grounds:-

a) The prosecution case against him was made up due to his failure to clear dowry.

b) The case was not proved beyond reasonable doubt.

c) He sought reduction of his jail terms on the grounds what he was sickly with two children without a mother.

3. When the appeal came up for hearing the Appellant who was not represented filed handwritten submissions which he relied upon while Mr. Mongare the learned prosecutor opposed the appeal. It was submitted by the Appellant that there was a love relationship between him and the complainant who was discriminated upon by her parents on the basis of her disability and that at the age of twenty four (24) years she was entitled to raise a family of her own. He submitted that no case of rape was proved by the prosecution.

4. On behalf of the prosecution it was submitted that the prosecution case was proved beyond reasonable doubt and that there was no evidence adduced to support the Appellant's contention on dowry. It was submitted that the Appellant had sexual relationship with the complainant.

5. 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

6. The prosecution case was that **PW1** was of unsound mind who did not know her age identified the Appellant as the one who raped her between December 2014 and July 2015. She stated that as a result of the intercourse she became pregnant. She denied being the girlfriend of the Appellant. **PW2 ML** her mother confirmed that the same was of unsound mind and in May she noticed that **PW1** was pregnant and she confirmed that the Appellant was responsible. **PW3 JAE** her father confirmed her mental status and stated that she could not take care of

herself. **PW4 PC ERICK MICHIEKA** received a report from **PW2** on 10/7/2015 and was supplied with a letter from AIC Lokori confirming the mental status of the complainant. **PW5 JOSEPH KEBO** of AIC Lokori produced P3 form confirming that the complainant was thirty (30) weeks pregnant.

7. When put on his defence the Appellant testified that he was a mason. On 17th July 2015 he was attacked by a group of neighbours for no apparent reason who took him to the police station before being charged.

ANALYSIS AND DETERMINATION

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

1) Whether the prosecution case against the Appellant was proved beyond reasonable doubt.

2) Whether the Appellant was framed up.

9. The issue of the mental status of the victim (**PW1**) is not in doubt having been confirmed by the trial court. The identification of the Appellant is further not in doubt having been placed in the house of the complainant by the prosecution witnesses. The Appellant in his submissions has confirmed that there was some sexual relationship between him and **PW1**. He has raised an issue which he should have raised before the trial court – that is to say whether the complainant (**PW1**) being of unsound mind was entitled to the enjoyment of sexual activity and whether being of unsound mind she could have consented to sexual act with the Appellant.

10. However novel the submission is having not raised the same before the trial court and having not been urged to admit fresh evidence thereon, I will not make pronouncement on the same at this stage save as to say that the constitutional rights of the complainant as regards sexual activity ought to be looked at should a similar matter arise. Having said that I am satisfied that the prosecution case against the Appellant was proved beyond required degree and that his claim of failure to pay dowry was an afterthought which was not presented before the trial court either by way of cross-examination or direct evidence, I am satisfied and find that his conviction was safe.

11. On the issue of the sentence the Appellant was charged under **Section 3 (1)(a)** as read with **Section 43 (1)(c)** and **4(e)**. The only exception under the said Section is **Sub-section (5)** which states that the same shall not apply in respect of persons who are lawfully married to each other. The sentence provided for under **Section 3 (3)** upon conviction is imprisonment for a term not less than ten (10) years but which may be enhanced to imprisonment for life. I therefore find no fault with the trial court's sentence herein and dismiss the appeal on the same.

12. In the final analysis I find and hold that the appeal herein lacks merit, dismiss the same and affirm the trial court's finding on both conviction and sentence. The Appellant has right of appeal.

Dated, delivered and signed at Lodwar this 3rd day of April, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ - *Court assistant*