



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO 26 OF 2016**

**J G K.....APPEALANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment and sentencing of Hon. J.W Onchuru Principal Magistrate in Lamu Criminal Case No. 407 of 2015 delivered on 21/4/2016)*

**JUDGMENT**

1. The Appellant J G K was charged before the magistrate's court with the offence of rape contrary to Section 3(a) and (b) as read with section 3(3) of the Sexual Offences Act 2006. He faced an alternative count of committing an indecent act with a female contrary to Section 11 (2) of the Sexual Offences Act. The particulars of the offence were that on the 4<sup>th</sup> day of June, 2015 at around 9.30pm in Mombasa Town within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of MN, the complainant herein.
2. The trial proceeded before Hon. Onchuru Principal Magistrate who found the Appellant guilty of the main count and sentenced him to serve 10 years imprisonment. The conviction and sentence triggered the present appeal in which the Appellant has listed 8 grounds of appeal namely: that the complainant was not truthful on her age; that there was a conflict of the date of the alleged offence and reporting to the police, and; that the complainant was not truthful about her pregnancy and who was responsible.
3. The Appellant filed submissions dated 6<sup>th</sup> November, 2018 in support of his appeal. The gist of his submission is that the case was not proved beyond reasonable doubt. He submitted that the complainant's evidence that she was raped was obscure while that of the clinical officer did not prove that the complainant was raped. The Appellant submitted that the age of the complainant was not proved and that the trial court erred in not directing that a DNA test be conducted as the complainant delivered during the pendency of the trial. The Appellant further submitted that the evidence of the complainant was unverified and the trial court erred in relying on the evidence of one witness.
4. In further oral submissions at the hearing of the appeal, the Appellant stated that the complainant was his relative by virtue of being related to his wife. He submitted that the trial court did not consider his alibi that he was at home. He faulted the trial court for not considering the evidence of his 3 defence witnesses. Finally, the Appellant demanded that additional investigations be undertaken to ascertain who the father of the complainant's child was.
5. In oral submissions Mr. Kasyoka learned counsel for the Respondent opposed the appeal in its entirety. He submitted that the prosecution had established all the elements of the offence being that there was penetration and that there was no voluntary consent. He submitted that where consent is procured by threats, intimidation, fraud or intoxication it ceases to be voluntary. Counsel further submitted that the alibi put forward by the appellant was not true as the Appellant and the complainant were in Mombasa and spent two nights together during which time they had sexual intercourse. On the issue of pregnancy, counsel submitted that the issue came up later after the trial commenced.
6. This is a first appeal. As such this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions. This principle was clearly laid by the Court of Appeal in **Okeno v R (1972) EA 32. See also Eric Onyango Odeng' v R [2014] eKLR**. Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and I can only rely on the evidence that is on record.
7. Having considered the record, the grounds of appeal and the respective submissions of the parties, I consider the issues in this appeal to be whether the prosecution proved its case to the required legal standard; whether failure to undertake DNA testing was fatal to the prosecution case, and; whether the trial court disregarded the Appellant's alibi.
8. The evidence before the trial court which was not contested was that the complainant was a student at [Particulars withheld] Secondary School. The Appellant was her guardian and cousin. At her request he picked her from school on 28<sup>th</sup> May, 2015, took her to his mother's

house and later on took her to Mombasa for eye treatment at the Light House Clinic on 3<sup>rd</sup> June 2015. The Appellant's mother was said to be the complainant's aunt too.

9. On arrival at Mombasa the Appellant hired a double room in a lodging where, according to the complainant, they slept on separate beds. The next day they went for treatment and spent the night in the same lodging. According to the complainant, the Appellant went to buy chips and soda which he brought to the room. That after eating and drinking the soda she blacked out and woke up the next morning naked and with blood on her bed and her private parts. She felt pain on her hips. She said that she asked him what had happened but he did not give her any answer.

10. The complainant said that they left Mombasa on 7<sup>th</sup> June, 2015 and the Appellant took her back to school on 8<sup>th</sup> June, 2015. She was later found to be pregnant upon being taken for a medical test by the school principal.

11. The Appellant admitted having picked the complainant from school and taken her to Mombasa for treatment. He admitted having spent two nights in the same room in a lodging. He denied however that they had sex and also disputed the dates they slept there saying that he had returned home by the 7<sup>th</sup> and was therefore not in Mombasa on the night that the complainant says she was raped.

12. From the complainant's testimony which the trial court believed, the Appellant and the complainant had sexual intercourse on 2<sup>nd</sup> night of their stay in Mombasa. Although the complainant was a school girl, evidence in the form of her birth certificate was produced to show that she was 19 years old and therefore would in law, be a consenting adult. However there was evidence that the Appellant gave her a soda which made her lose consciousness and wake up naked with blood in her private parts and on the bed. This means that the sexual act was not voluntary.

13. According to the evidence given by the complainant and the Appellant's own admission, they slept together in the same room. From their evidence they were the only persons in the room. This fact leads to the logical conclusion that he had sex with her while she was deprived of the power of voluntary consent. It is my finding therefore, that the Appellant had the opportunity to commit the offence having taken her away from school and home to a lodging in Mombasa ostensibly to get her medical attention.

14. The Appellant argued that he was convicted on uncorroborated evidence of the complainant. In sexual offences cases, however the court can convict on the uncorroborated testimony of a complainant who is the victim. Section 124 of the Evidence Act Cap 80, provides that:-

***“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

15. In the case of **Mwangi V Republic(1984) KLR 595** the Court of Appeal at Nakuru at page 603-604 stated that :-

***“The relevant law in Kenya is succinctly set out in Chila V the Republic (1967) EA 722 at page 273:***

***“The law of East Africa on corroboration in sexual cases is as follows. The Judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.”***

16. In this case the court gave reason that he believed the testimony of the complainant that she was raped credible as she struck the court as an honest witness and the court had no reason to doubt her.

17. The record however, shows that there was corroborative evidence that the complainant had sexual intercourse. Stephen Ewoi (PW 3) a clinical officer at Mpeketoni I sub-county hospital testified that he had examined her and filled the P3 form (Exhibit 1) on 20<sup>th</sup> August, 2015. He relied on the treatment notes from the clinic which showed that she was 2 months pregnant.

18. The Appellant contends that his defence and alibi was not considered by the court. He submitted that on the 7<sup>th</sup> May, 2015 the date on which he was alleged to have raped the complainant, he was already back home in [particulars withheld]. He submitted that he called 3 witnesses to testify to that effect but that the court did not consider their evidence.

19. By definition, an alibi is a defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of crime at the relevant time (**Black's Law Dictionary 9<sup>th</sup> Edition**).

20. As I have already found, and by their own admission both the complainant and the Appellant travelled to and spent three nights in Mombasa. The variance on the dates is something that was addressed by the trial court. According to the complainant, the Appellant picked her on 28<sup>th</sup> May, 2015 and took her to her aunt's house. They left for Mombasa on 3<sup>rd</sup> June, 2015 and travelled back on 7<sup>th</sup> June 2015 and she went back to school on 8<sup>th</sup> June, 2015. According to the Appellant they left for Mombasa on 1<sup>st</sup> June, 2015 and by 4<sup>th</sup> June, 2015 he was at home in Mpeketoni having travelled back from Mombasa. He also stated that the complainant went back to school on 8<sup>th</sup> June, 2015.

21. As earlier stated the charge stated that the offence was committed on 4<sup>th</sup> June, 2015. The court in its judgment did not find the variance of date indicated in the charge sheet and the actual date of the offence material. Indeed, I would also find that the discrepancy of one day on the charge sheet and in the testimony of the complainant was not material. It is one that was curable under **Section 382 of the Criminal Procedure Code**. There was indeed no prejudice suffered by the Appellant and neither did the error on the date of the offence occasion a

failure of justice. I would therefore dismiss the Appellant's complaint in this regard.

22. I have looked at the testimony of the defence witnesses. AM (DW 2) told the court that he was the Accused's brother and did not know what happened. EK (DW3) told the court that she was the Accused's mother and did not know what had happened. She only got to know of the allegations at the police station. DW 4 G W who is the Accused's wife, told the court that she did not know what happened in Mombasa but that the Accused and complainant returned on 3<sup>rd</sup> June 2015.

23. It is apparent from the testimonies of witnesses above that they knew nothing about the offence and could not therefore offer any defence. The date of the Appellant's return stated by his wife (DW4) as 3<sup>rd</sup> June, 2015 flies in the face of the Appellant's own testimony that the complainant went back to school on 8<sup>th</sup> which both the Appellant and the complainant agree was a day after they returned from Mombasa.

24. It is my finding therefore that the allegations by the Appellant that the court did not consider his defence is untrue. There was no defence coming from his witnesses and his own defence was dismissed as a mere denial as it did nothing to cast doubt on the prosecution evidence.

25. A final issue raised by the Appellant is that the paternity of the child born out of the alleged rape was not established through D.N.A. Whereas such a paternity test would put the minds of the Appellant and complainant at ease where there was doubt, it would do nothing in law to affect the finding that the offence of rape was committed under the circumstances which I have already addressed in this judgment. Pregnancy was not one of the ingredients to be proved or disproved. A DNA test was therefore not necessary to prove the offence of rape. See **Evans Wamalwa Simiyu v Republic [2016] eKLR**.

26. As I wind up this judgment, I observe that the Appellant was the complainant's guardian. According to the evidence of the school principal Sister CM (PW2) he was the one who took her to school and indeed was known to the school administration. As such the school had no problem releasing her to him when he went to pick her. It was also the Appellant's testimony that his mother was the complainant's aunt. This aspect of the relationship however was not explained to the court conclusively for there might have been an offence of incest committed. Suffice to state that the Appellant who was placed in a position of authority over the complainant abused his trust and deserved to be punished.

27. In the premises, it is my finding that the prosecution proved its case beyond reasonable doubt. Both the conviction and sentence by the trial court were proper and lawful and are consequently confirmed. The appeal is thus dismissed.

Orders accordingly

**Judgment dated, delivered and signed at Garsen on this 22<sup>nd</sup> Day of May, 2019**

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**R. LAGAT KORIR**

**JUDGE**

**In the presence of**

The Appellant

Mr. Kasyoka for Respondent

S. Pacho Court Assistant