



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 54 OF 2019

IN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Limuru Senior Principal Magistrate's Court Criminal Case No. 1067 of 2015** by **Hon. K. M. Njalale (SRM)** on 03/04/17)*

J U D G M E N T

1. **IN**, the Appellant, was charged with the offence of **Rape** contrary to **Section 3** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **22nd day of November, 2015** in **Kiambu County**, unlawfully and intentionally caused his penis to penetrate the vagina of **FWK** without her consent.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with an Adult** contrary to **Section 11(A)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **22nd day of November, 2015** in **Kiambu County**, intentionally touched the vagina of **FWK** with his penis against her will.
3. On the second Count, he faced a charge of **Being in Possession of Bhang** contrary to **Section 3(1)** as read with **Section 3(2)(a)** of the **Narcotic and Psychotropic Substances Control Act No. 4 of 1994**. Particulars of the offence were that on the **4th day of December, 2015** in **Kiambu County** was found being in possession of bhang to wit three (3) rolls which was not in form of medicinal preparation.
4. Facts of the case were that PW1 **FWK** served her husband **PN** food at about **11.00 p.m.** and went to bed. She heard the door open and close and believed that he had gone out. All over a sudden the door was opened and the person entered the bed. Assuming that it was her husband she asked why the person was sleeping with clothes on. The individual proceeded to undress her and he removed his under pants without uttering a word. He penetrated her, the act made her realize it was not her husband. He touched the head which had hair as opposed to her husband's head which was bald. She reached out for a torch and flashed only to see the Appellant a brother to her husband. She ran out and called out her husband and told him what had happened. They went in search of the Appellant who was nowhere to be seen. The following day she sought treatment and reported the matter to the police. The Appellant showed up and was arrested on the **4th December, 2015** allegedly in possession of bhang and subsequently charged.
5. Upon being put on his defence the Appellant stated that on the **22nd November, 2015**, his brother and wife knocked his door but he did not open. His brother entered through the window and on realizing that he was drunk he (Appellant) escaped through another window. Their other brother sought to know what was wrong and the Complainant alleged that he had raped her. His brother had damaged items in his house. The following day he went to the **AP Camp** and reported. The AP gave him a number and asked him to give **Kshs. 1,000/=** so as to go and effect arrest. He went back home with the intention of talking to his brother while he was sober and he promised to repair the items that he had damaged. Despite a promise to do so, he did not. Twelve days lapsed. On **3rd December, 2015** he threatened to revenge only to be arrested the following morning. He denied having been in possession of bhang as alleged.
6. The trial Court analyzed evidence adduced, acquitted the Appellant on the second Count since no alleged bhang was produced, but convicted him for rape and sentenced him to **ten (10) years imprisonment**.
7. Aggrieved, the Appellant appeals on grounds that the case was not proved beyond reasonable doubt; and the burden of proof was shifted to the defence.
8. The Appellant canvassed the Appeal by way of written submissions. It was urged that the Complainant, an adult of 37 years who had been married for fifteen (15) years should have been cautious enough to tell the difference in the act and should have used the torch to identify the person before the act happened. And having identified the culprit she should have held him and screamed to get help from her husband who should have caught him red-handed. He faulted the victim for not reporting the incident immediately it was alleged to have happened; and

failing to call the Assistant Chief who allegedly received the report at the outset as a witness. That, the forensic evidence adduced by the medical expert did not conclusively prove the offence of rape; and no DNA examination was done. And, that by disregarding the defence put up by the Appellant, the trial Magistrate shifted the burden of proof to him.

9. The State through learned Counsel **Ms. Muthoni** opposed the Appeal. She urged that rape was proved by evidence of the Complainant who knew the Appellant her brother-in-law. That no consent was given. Failure to call the Assistant Chief was not fatal to the Prosecution's case as he was not an eye-witness to the act. The law allows a conviction based on evidence of a victim. That there is no bar in instituting criminal cases. There was no need for DNA testing as the victim confirmed the act and the defence put up was properly dismissed.

10. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

11. The offence of rape is provided for in **Section 3 (1)** of the **Sexual Offences Act** thus:

“(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”.

12. In the instant case the Prosecution was required to prove:

(i) The act of penetration into the Complainant's genital organs.

(ii) Whether the consent was obtained as a result of false pretence.

(iii) Lack of consent to the penetration.

13. PW4 **Geoffrey Waringu** a Clinical Officer from **Lari Sub-County Hospital** filled the medical examination report (P3). He relied on treatment notes issued at **Kinale Health Centre**. The Complainant presented herself to the Health Centre on the **23rd November, 2015** with a Complaint of sexual assault but since she had taken bath, other than the pain she alleged to be experiencing, nothing significant was noted.

14. In the case of **Kassim Ali vs. Republic Criminal Appeal No. 54 of 2005 (MSA)** the Court of Appeal stated that:

“... (The) Absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

15. The Complainant stated that after the act of penetration and upon realizing that the individual was not her husband she flashed a torch which aided her to see the person who fled. PW2 **PNW** the husband and brother of the Complainant and Appellant, respectively, confirmed that he had stepped out of the house to go and check on the cows and upon returning to the house 30 minutes later he found the Complainant crying and immediately told him that she has been sexually assaulted by the Appellant. He went to the Appellant's house but he was not there. His other brothers **JN** and **DK** joined him in the search but all was in vain. At the outset he reported the matter to the Assistant Chief **John Njoroge** who referred him to the police. He reported to the police four (4) days later. When the Appellant ultimately turned up, they met as a family but he declined to pardon him hence let the police take over the matter.

16. In his defence the Appellant alleged that on the material date PW2 who was drunk went to his house with PW1 while armed with a panga. Since he did not let them in, PW2 gained entry after he broke the window. As a result, he escaped through the window. And when his other brother and another person came out, PW1 alleged he (Appellant) had raped her. The following day he went to the Kinale Administration Police Camp to report the damage that had been occasioned by PW1.

17. PW5 **APC Isaac Ndungu** of Kinale AP Camp received a report in this regard from PW2 on the **23rd November, 2015**. By then the suspect had fled. It was not until **4th December, 2015** at **5.00 a.m.** that PW2 called them to arrest the Appellant whom they found inside his house. On being cross examined he denied the allegation that on the **23rd November, 2015** the Appellant went to the station.

18. At the point of cross examining PW2 it was not suggested that he damaged the Appellant's house, entered through the window an act that forced the Appellant to flee. This kind of defence was indeed an afterthought.

19. It is urged that if the incident did occur, the Complainant should have reported at the outset instead of waiting until **4th December, 2015**. PW5 was emphatic that the report was made to the AP Camp the following day. PW6 **No. 33634 Corporal Lina Cheserek** confirmed that at the point of taking over investigations the case had been reported and the suspect was taken to the police station by the Administration Police of Kinale AP Camp.

20. From the foregoing, the circumstances that transpired tilted towards the Complainant as having been sexually penetrated by the Appellant.

21. In consenting to the act of penetration the Complainant believed she was indulging in sexual intercourse with her husband, PW1. She only realized that the person who had penetrated her genital organs was a different person after she found him different in the course of the act and having confirmed after using the light from the torch to see him. In the premises the act committed by the Appellant was done under false pretense. **(See Section 3(1); 43(1)(b); and 3(1)(a) of the Sexual Offences Act).**

22. With regard to sentence, he was sentenced to the minimum prescribed sentence which in the circumstances was not excessive.

23. In the result, I find the Appeal lacking merit, accordingly, it is dismissed in its entirety.

24. It is so ordered.

Dated, Signed and Delivered at Kiambu this 12th day of September, 2019.

L. N. MUTENDE

JUDGE