



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MURANG'A**  
**CRIMINAL APPEAL NO. 69 OF 2016**

**BETWEEN**

**ZACHARIA GACHIE MWANGI..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from the original conviction and sentence in the Principal Magistrate's Court at Kangema Cr. Case No. 803 of 2015 delivered by Hon.J.O.Magori.,PM on 25<sup>th</sup> August, 2016).**

**JUDGEMENT**

1. The Appellant was charged with rape of a person suffering from mental disability and an alternative charge of indecent act with an adult contrary to Section 7 and 11(a) respectively of the Sexual Offences Act. The particulars of the main charge were that on 7<sup>th</sup> day of September 2015 in Murang'a County intentionally caused his penis to penetrate the vagina of MW a person with mental disability. In the alternative charge the Appellant was accused of intentionally touching the vagina of the complainant with his penis.

2. He was found guilty of the main count, convicted accordingly and sentenced to serve 20 years imprisonment. He was dissatisfied with both the conviction and sentence against which he has preferred the instant appeal.

3. The appeal has been preferred on the grounds that: the learned magistrate erred in law and fact in relying on the evidence of PW2 and PW4 while the prosecution did not comply with Section 125 of the Evidence Act and Section 31 of the Sexual Offences Act, that the charges were not adequately proved as the age of the complaint was not indicated in the particulars of the charge sheet, that Section 214 of the Criminal Procedure Code was violated as the accused was convicted on a sentence that is non-existent under the Sexual Offences Act, that the magistrate erred in rejecting the defence case and that Sections 212 and 169 of the Criminal Procedure Code was violated.

**Summary of evidence**

4. The prosecution called 4 witnesses. **PW1, JCG** was the deceased complainant's son. He indicated that on the date of the offence he had gone to see his mother but he could not see her around the home compound. He arrived at the homestead at 12.00 noon and searched around the compound for his mother. That he later met with the accused leaving the store trying to fasten his trouser. He traced her lying on the ground inside the store. She was naked. The accused ran away when PW1 screamed and members of the public came. They arrested and assaulted him as he attempted to escape. They wanted to lynch him.

5. PW1 accompanied the police and his mother to Kangema Sub-district Hospital where his mother was examined and treated. The Appellant was also treated. A P3 Form was filled and issued. His mother was 53 years and suffered mental problems. The witness referred to the medical card adduced as exhibit 3. He identified the Appellant in Court. Unfortunately the victim died on 26/11/15. In cross examination PW1 confirmed that he found the Appellant raping his mother and that he was not drunk at the time.

6. **PW2, Donah Maitima** was the Clinical Officer from Kangema Sub-district Hospital. She gave evidence on behalf of her colleague who had filled the P3 Form. The examination was done on 7/9/15. There was evidence of penetration as there were lacerations on the *labia minora*, *libia majora*, *introitus* and vaginal walls. There were also traces of seminal fluid on the middle aspect of the thighs. The complainant had a history of mental illness and was referred to a psychiatrist for review. The witness produced the P3 form as exhibit 1.

7. **PW3, Corporal Deycow Nunu** was the investigating officer. He summed up the evidence of the prosecution witness and preferred the charges against the Appellant. He arrived at the scene when Administration Police Officers had already arrived and rescued the suspect. The

complainant was at the scene and was rushed to Kangema District hospital where she was treated and discharged. The Appellant was referred to Murang'a County Hospital for further treatment and was admitted under police guard. A P3 Form was also filled. The witness testified that the complainant was mentally disabled as per treatment notes. That she passed away on 28/11/15 when the case was ongoing. A burial permit was produced as Exhibit 4.

**8. PW4, Dr. James Mburu** was a psychiatrist from Murang'a County Hospital. He compiled a medical report in respect of the Complainant which ascertained her mental status. The report was dated 18/11/15. Treatment cards confirmed she had a psychiatric condition since 2011 and was admitted at the County Hospital. She had also attended other hospitals for follow up. Her family disclosed that she was a mother of three and was a widow who was living under the care of her son and daughter in law. She did not have any history of being in conflict with the law.

9. Upon examination, the doctor noted that the complainant was elderly and moving on a wheel chair, disoriented, had low mood, limited spontaneous movement. Her judgment and memory was impaired. In his opinion she had longstanding chronic psychiatrist and neurologist disorder worsened with time due to poor clinical follow up. She could not follow proceedings or express herself before Court. She was not mentally fit and recommended restraining on treatment. The report was produced as exhibit 5 and the medical card as exhibit 3.

10. After the close of the prosecution case, the Court ruled that the prosecution had established a prima facie case and accordingly put the Appellant to answer to the evidence adduced by the prosecution. He gave an unsworn statement of defence and called no other witness. He stated that on the material date he was looking for a job and was walking along the road when he met three people. He was told that he had committed an offence and he was taken to the complainant's house where villagers came and attacked him. He was taken to the police station and arraigned in Court.

### **Analysis and determination**

11. The appeal was canvassed before me on 5<sup>th</sup> September, 2019. The Appellant was in person whilst the Respondent was represented by learned counsel, Mr. Mutinda. The Appellant relied on written submissions filed on even date. Mr. Mutinda made oral submissions. After considering both the evidence on record and the respective rival submissions, I have come to the conclusion that the only issue arising for determination is whether the prosecution proved their case beyond all reasonable doubt.

12. One key submission that the Appellant made was that the trial Court failed to comply with Section 31 of the Sexual Offences Act. Before allowing PW1, the son of the deceased complainant to testify on behalf of the deceased. Section 31 outlines the procedure to be followed when taking the evidence of a vulnerable witness in sexual assault proceedings. Section 2 of the Act defines who a vulnerable witness is as follows;

**“Vulnerable person means a child, a person with mental disabilities or an elderly person and “Vulnerable witness” shall be constructed accordingly.”**

13. There is no doubt as attested by the record that the victim was a vulnerable person by virtue of her mental disability. More particularly the evidence of PW4, a psychiatrist from Murang'a County Hospital confirmed the same by his report dated 18<sup>th</sup> November, 2015. In his summary of the report, he stated that the deceased suffered chronic psychiatrist and neurologist disorder. Further that she could not express herself or follow proceedings. In conclusion she was not mentally fit and he recommended restraining treatment. In report the witness said that the victim was accompanied by his sister who confirmed that she had a history of mental ill health. With this evidence, coupled with that of PW1, her son I cannot be- labour to conclude that the deceased was a vulnerable person for all intent and purposes for Sexual Offences Act.

14. The question that the Court would have to grapple with is whether in view therefore, the learned trial magistrate failed to comply with Section 31 of the Act to declare the victim a vulnerable witness and thereby call upon PW1 to testify as her intermediary. Needless to state is that the deceased person died on 22/11/2015 only about two months after the incident and before PW 1 could testify on 18/2/2016. Respectively, there was no witness available on whose behalf an intermediary would testify. It suffices to state therefore, that the trial Court was not obligated to make a finding that the deceased witness would testify through an intermediary. The duty of this Court in the circumstances is to reevaluate the evidence on record and arrive at an independent finding of whether or not to uphold the conviction and sentence.

15. Before I delve into this, it is important to underscore that Section 125 of the Evidence Act is not applicable as the deceased died before her time to testify was ripe. The provision provides for competency to adduce evidence by witnesses amongst them mentally disordered persons.

16. The other legal issue raised by the Appellant is that Section 214 of the Criminal Procedure Code was not complied with. This was in view of the fact that the charge sheet failed to state the age of the victim. According to the Appellant just as in defilement cases, proof of the age of the victim in a rape case is a mandatory requirement. In that respect he cited the case of **Kaingu alias Kasomo –vs- Republic CR Appeal No. 504 of 2010, High Court in Malindi** in which the High Court had this to say;

**“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.**

17. The Appellant asserted that the prosecution ought to have amended the charge sheet pursuant to Section 214 of the Criminal Procedure Code so as to reflect the age of the Complainant.

18. The learned State Counsel did not submit on this issue. It behooves this Court therefore to define the offence of rape as provided under Section 5 of the Sexual Offences Act. The same reads as follows ;

**“5.(1) Any person who unlawfully -**

**(a) penetrates the genital organs of another person with -**

**(i) any part of the body of another or that person; or**

**(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;**

**(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body, is guilty of an offence termed sexual assault.**

**(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”**

19. From this definition, age is not provided as a mandatory ingredient requiring proof before a conviction. The main elements are; proof of intentional and unlawful act which causes penetration, lack of consent to the penetration and that the consent was obtained by force or by means of threat or intimidation of any kind. The meaning of intentional and unlawful Acts are defined under section 43 of the Act as;

**“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 transmissible 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 -**

**(a) asleep;**

**(b) unconscious;**

**(c) in an altered state 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

(f) a child.

(5) This section shall not apply in respect of persons who are lawfully married to each other.

20. With the above in mind, my view is that proof of age would only be necessary where the Court or the prosecution is not certain of the age of the complainant. More so, where the age is on the border line and no medical evidence is adduced in that regard. This scenario did not obtain in the instant case. This is a case where PW1 who was an adult referred to the victim as his mother. When he was taken to the hospital PW4 the psychiatrist give her age at 53 years. The same was of PW2 a Clinical Officer from Kangema Sub-district Hospital. The investigating officer too referred to the victim as an adult. It was a case where no age assessment was necessary as the circumstances of the case concluded that the victim was an adult.

21. On the proof of the case, the facts are that PW1 the victim's mother visited the victim to check on her as was the usual routine but could not trace her in the house and around the compound. After a thorough search he went into the store where he clashed at the entrance with the Appellant who was hurriedly zipping up his trouser. Meanwhile, his mother was lying on the floor helpless without her under clothing. A close observation revealed that the mother had just been raped and semen was flowing on her thighs and her genitalia had been injured. He then raised alarm whereupon members of the public came and arrested the Appellant. The victim was immediately taken to the hospital where examination and treatment were done.

22. PW2 confirmed the evidence of penetration by use of false attested by lacerations on the libia minora and majora, introitus and vaginal walls. There was also traces of seminal fluid in the middle of the thighs. He also confirmed that the victim looked disturbed and had a history of mental illness.

23. I am in no difficulty concluding that this is a case where the Appellant was caught almost red handed raping the deceased. The fact that he intended the act is premised on the ground that he went into the victim's home when there was no one within the compound and secluded her into a store where he executed the heinous act. The victim being a person who was mentally challenged could not give consent and therefore the acts of the Appellant fitted properly on what constitutes "*unlawful and intentional*" acts against a mentally impaired person under Section 43 (4) (e) of the Sexual Offences Act.

24. I therefore make a safe conclusion that the prosecution proved all the elements of the offence of rape. The Appellant's defence that he was arrested on the road while looking for a job and taken to the victim's home has no truth in it.

25. It is true none of the members of the public who responded to the distress call were called as witnesses. Nevertheless, the evidence of PW1 was clearly corroborated by that of PW3, the investigating officer who testified that on the material date he received a telephone call that a suspect was being beaten by members of the public. He was directed by the OCS to proceed to the scene. On arrival he found that Admiralty Police officers had already reached the scene and rescued the Appellant who members of the public were baying for his blood. He accordingly re-arrested him and immediately rushed the victim to Kangema Sub-district Hospital. This evidence is sufficient proof that the Appellant was caught in the act. The witness further assisted him to hospital where he was admitted under police guard after sustaining injuries from the mob justice.

26. I accordingly dismiss the Appellant's defence and find that prosecution proved its case beyond all reasonable doubt. I find that the conviction was safe and I uphold the same.

27. As regards the submission that the judgment of the learned trial magistrate was not signed, is not factual. A signed hand written judgment is found in the original record. The Appellant was only supplied with a typed copy which the magistrate needed not sign.

28. The Appellant further submitted that he was charged with a section under the Sexual of Offences Act that did not disclose the offence charged. The main count was drafted under Section 7 of the Act. The same reads as follows;

**"A person who intentionally commits rape or indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than 10 years."**

29. Clearly this provision does not disclose the offence of rape of a person with mental disability. The Sexual Offences Act does not specifically provide for the offence of rape of a person with mental disability. The Appellant ought to have been charged under Section 3 of the Act. The fact that a complainant is a person with mental disability can only be used as an aggravating factor in sentencing. Although the wrong section was indicated in the charge sheet does not lessen the fact that the Appellant committed the offence of rape. The minor error is one of want of form and is curable under section 382 of the Criminal Procedure Code.

30. As regards to sentence, Section 3(3) provides that a person convicted for the offence of rape is liable to imprisonment for a term of not less than 10 years but which may be enhanced to life imprisonment. The learned magistrate enhanced the sentences to 20 years imprisonment after noting that the offence was serious and the Appellant did not seem remorseful.

31. I note that this is a case where the Appellant took advantage of a mentally sick person and of her isolation from other family members. It is noteworthy that the victim died barely two months after the incident. It is a case deserving stringent punishment in the circumstances. The Appellant did not offer any mitigation during the trial as well as in this Court. Although he was a first offender I do not think that 10 years imprisonment would serve as sufficient deterrence. Taking into account all these circumstances, I set aside the 20 years imprisonment and substitute it with 15 years imprisonment commencing from the date of arrest which is 7<sup>th</sup> September, 2015. It is so ordered.

**DATED AND DELIVERED AT MURANG'A THIS 12<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

1. Appellant in person.
2. Mr Mutinda for the Respondent.