



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

Criminal Appeal No. 56 Of 2018

(CORAM: HON. R.E. ABURILI - J)

GOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being An Appeal against sentence from a Judgment delivered at Ukwala Law Courts on 25/9/2018 vide Criminal Case No. 25 of 2018 before Hon. G. Adhiambo, SRM)

JUDGMENT ON SENTENCE

1. The appellant **GOR** was convicted of the offence of Rape contrary to section 3(1) (a) (b) of the Sexual Offences Act. He was sentenced to serve ten years imprisonment on 25/9/2018 vide Ukwala PM Criminal Case No. 25 of 2018 by Hon. G. Adhiambo, SRM.
2. 4/7/2017 when the appellant herein appeared for mention of his appeal before the Deputy Registrar Hon. T.M. Olando, he intimated to the court that he wished to withdraw his appeal against conviction and only seek for Sentence Review. The file was therefore placed before me for hearing on 24/7/2019.
3. On the latter date the appellant through an interpreter in Dholuo stated that he admits he committed the offence and that he had intimated to the Deputy Registrar on 4/7/2019 that he wished to withdraw his appeal against conviction and seek for Sentence Review. He pleaded with the court to consider sentence and stated that he was sorry.
4. The prosecution had no objection to the withdrawal of the appeal against conviction but left the question of sentence for the court to determine. The court proceeded and marked the appellant's appeal against conviction as withdrawn and directed that a social inquiry report be filed within 30 days but on 24/9/2019 the report was found to have been filed in a different file but was retrieved hence this date for sentencing.
5. In the charge before the trial court, it was alleged that on 7/7/2018 within Siaya County, he intentionally and unwillingly caused his penis to penetrate the vagina of MA (full name withheld) without her consent.
6. He pleaded not guilty and the trial went on. He was found guilty and sentenced to serve 10 years imprisonment. This was on 25/9/2018. On 30/10/2018 he filed this appeal challenging both conviction and sentence. The trial court record was received on 7/2/2019 and the appeal admitted on 20/2/2019.
7. The appellant was sentenced after mitigation and the prosecution stating that he is a first offender. He has been in prison for now one year.
8. I have considered the social inquiry (Sentence Review Report) dated 16/8/2019 filed by Rhoda Wanyonyi, Probation Officer. According to the Probation Officer, the appellant is aged 40 years old and is said to be well behaved in prison. He is married and engages in hawking of bananas. His wife is unknown. Only his brother visited him in prison last in May 2019. Socially, he is said to be an introvert and engages in alcohol and bhang abuse. His economic status is relatively poor. He dropped out of school in Class 7.
9. The victim of rape is the appellant's former school mate and a neighbour and when interviewed, she stated that she did not imprison the appellant and that it is her husband to give an opinion, not her.
10. Interviewed local administration, community and family are reported to be unhappy with the appellant's imprisonment because the victim was his friend and that the two had on the previous night been spotted drinking and dancing together in a **disco matanga**. A member

of the community allegedly angrily told the Probation Officer that the victim was so highly intoxicated that she kept grabbing men with the intention of having sex with them and that he was her victim but he pushed her away.

11. The appellant is also said to have been married severally but sired no child so the women have deserted him.

12. The community is of the view that the rape was reported because the victim's husband came to know of the relationship between the appellant and the victim who were friends and that the only way of saving the victim's marriage was for her to agree that she was raped. That the victim who is an alcohol addict rarely stays in her home. Once drunk, she allegedly grabs any man within her reach and when she was visited by the Probation team, she was traced to her favourite drinking point and on their arrival, they were led to another joint. She was followed immediately and found along the way and that she was already drunk. She refused to give her opinion saying she did not cause the arrest and conviction of the appellant.

13. In prison, the appellant is reported to be well behaved with no records of misconduct. He has enrolled in class. The Probation Officer recommends probation for social reintegration, guidance and counselling and drug and substance abuse.

14. With all the above facts as shown by the P3 form produced in evidence at the trial, the victim was penetrated in her vagina as she had spermatozoa in her genitalia on being examined. The offence took place on the path at around 5.00am when the victim was on her way from a funeral night vigil popularly known as "**disco matanga**."

15. From the evidence on record, it is clear that the victim, despite being described as a drunkard who preyed on men to have sex with her, she did not consent to having sex with the appellant at that time. She was strangled and the appellant had sex with her until she fell unconscious and found herself at Ambira sub-county hospital at 2.00 pm.

16. In cross examination, the appellant simply said, "**if God can enter your heart, please forgive me for my sins**". The victim responded, "**I cannot forgive you because even my husband is concerned. If you have any issue you should approach my husband because what you did is very shameful.**"

17. PW2 who woke up early that very morning was alerted by a milkman that the complainant had died in a maize plantation. She rushed to the scene and found when many people were surrounding the victim who appeared dead. She was lying facing up with her legs wide apart and her genitals were visible as her pant and biker had been pulled.

18. Again the appellant in cross examination of PW2 stated, "**what has happened, please forgive me. Please forgive me.**"

19. PW3 Victor Odhiambo Achayo who filled the P3 form at Ambira sub-county Hospital narrated that when the complainant was taken to Hospital, she was not able to recall what had happened to her because she was drunk, and smelled alcohol at the time of examination. She had spermatozoa and she was on medication because she was HIV positive. The appellant in cross examining PW3 stated that the victim had consented to being fucked by him by the roadside but she later changed her mind. In his defence, he denied committing the offence.

20. From the pieces of evidence that I have highlighted, it is the true that the victim was drunk and was at a funeral night vigil with the appellant and when she left at about 5.00 am, she was waylaid by the appellant who raped her, leaving her for dead. There was no evidence of consensual sex with the appellant. The appellant himself, before this appeal could be heard, admitted to committing the offence and sought for forgiveness.

21. Although the Probation Report paints the victim as a loose woman who grabbed men demanding for sex whenever she was drunk, it is unfortunate that the appellant could take advantage of the appellant's drunken state to rape her leaving her unconscious. She did not deserve such orgy-like sexual encounter.

22. The sentence meted out on the appellant is lawful. It is nonetheless, the minimum sentence prescribed by law, although it is not mandatory sentence. Sex pests must be discouraged as women and children are vulnerable members of the society and must be protected. A man who strangles a drunken woman and rapes her until she is unconscious cannot pretend to be well behaved in society and even attract the sympathy of the community and local administration who are expected to protect women and children.

23. In my humble view, the probation sentence recommended by the probation officer is not appropriate or acceptable sentence for the appellant. The victim, from the description of the state in which she was, could have died as she was found unconscious.

24. I do not buy in the claim by the social inquiry report that the appellant used to escort (protect) women who went to night vigils. In my view, the appellant is like any other dangerous sex pest and his "good heart of escorting women to night vigils" could be a way of luring them for sex. The society must be protected from this conduct. The appellant, in my view, must be kept away from the society for some time for the victim and her family to heal from the traumatic experience, despite the description given to the victim in the social inquiry that she is a promiscuous woman, who does not stay in her home. She is said to be drunkard grabs men demanding for sex whenever she is '**high**'.

25. The medical report showed that the victim was HIV positive and was on medication. The appellant therefore also endangered his life by raping the victim who is HIV positive, without using any protection as spermatozoa were found in her vagina, evidence that he ejaculated in her genitals. The price of insatiable thirst for sex can be heavy indeed and I can only hope that the appellant has learnt his lessons assuming he is free from the infection.

26. Therefore, taking into all the circumstances of this case, and applying the principles espoused in **Jared Koita Injiri v Republic [2019] eKLR Kisumu CA Cr. A 93/2014**, I would substitute the mandatory minimum sentence of 10 years imprisonment with a prison term of 8 years to be calculated from the date of conviction on 25/9/2018.

27. As the appeal against conviction was withdrawn, the prayer for sentence reduction is allowed to the extent that the mandatory minimum sentence of 10 years imprisonment is hereby substituted with a prison term of 8 years to be calculated from the date of conviction on 25/9/2018.

Dated, signed and delivered at Siaya this 7th day of October 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar