



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 8 OF 2019

JOSEPH BARASA ETYANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.78 of 2016 of the

Chief Magistrate's Court at Busia by Hon. J.N Maragia-Resident Magistrate)

JUDGMENT

1. **Joseph Barasa Etyang**, the appellant herein, was convicted was charged with an offence of rape contrary to section 3 (1) (a) (b) ((3) [sic] of the Sexual Offences Act No.3 of 2006.
2. The particulars were that on the 16th September 2016 in Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of CM a female adult aged 75 years.
3. After the trial the learned trial magistrate convicted him for the offence of raping a person with mental disability.
4. The appellant was sentenced to serve ten years' imprisonment. He has appealed against the sentence only.
5. His grounds of appeal can be summarised as follows:
 - a) The learned trial magistrate erred in law and in fact by meting out a harsh and excessive sentence.
 - b) That he has a young family that depends on him.
6. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that the sentence was the minimum prescribed for the offence.
7. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
8. The charge was erroneously drafted. There does not exist section 3 (1) (a) (b) ((3) of the Sexual Offences Act No.3 of 2006. The charge ought to have read:

I have however noted that the appellant was not prejudiced in any way for he was able to understand the charge and fully participated in the trial. The omission is therefore curable under section 382 of the Criminal Procedure Code.
9. Before a court can convict an accused person for an offence other than the one charged, this must be informed by the evidence on record. In the instant case there was no evidence which could have made the learned trial magistrate to convict the appellant for the offence of raping a person with mental disability.
10. The appellant ought to have been convicted for the offence of rape contrary to section 3 (3) of the Sexual Offences Act, Cap 62A or Act No.3 of 2006 as drafters insist on calling it. It is CAP. 62A Laws of Kenya.

11. Section 3 (3) of the Act provides:

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

The minimum sentence under this section is ten years. This is what was meted out to the appellant. He cannot complain that the sentence was harsh. He was lucky to have received the minimum sentence after raping an old woman of 75 years. He was equally lucky for the prosecution did not call for the enhancement of the sentence.

12. The upshot of the foregoing analysis of the evidence on record, I find that the appeal lacks merit and it is accordingly dismissed.

DELIVERED and SIGNED at BUSIA this 10th Day of December, 2019

KIARIE WAWERU KIARIE

JUDGE