REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 11 Of 2017

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 11of 2017 the Principal Magistrate's Court at Kapenguria)

J K ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

J K,the appellant herein, was charged in the lower court, in the first count, with the offence of ***Rape, Contrary to Section 3(1)(a)(b) of the Sexual Offences Act number 3 of 2006.***

The particulars of this offence being that on the nights of 6th and 7th March, 2017 at [Particulars Withheld] Sub-location, within West Pokot County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of M C, a woman aged 36 years, without her consent.

To the foregoing count there is an alternative count of committing an ***Indecent Act with an Adult, contrary to section 11(A) of the Sexual Offences Act number 3 of 2006.***

The particulars hereof being that on the nights of 6th and 7th March, 2017 at [Particulars Withheld] sub location, within West Pokot County, the appellant intentionally touched the buttocks and breasts of M C, without her consent.

The third count is of ***Assault causing bodily harm, contrary to section 251 of the Penal Code.***

The particulars of this offence are that on the nights of 6th and 7th March, 2017 at [Particulars Withheld] sub-location, within West Pokot County, the appellant unlawfully assaulted M C, thereby occasioning her actual bodily harm.

The prosecution case is that the complainant in this case, who gave evidence as PW-2, is married to PW-3. They live at [Particulars Withheld] sub-location. The appellant is their neighbour at the place and also a relative as he is married to PW-3's elder sister.

On the night of 6th and 7th March, 2017 the complainant was asleep in the house with her 2.5 months old child. PW-3, her husband, was asleep in a different house which was about five kilometers away. At about 2am, the wooden door to the house was broken. She used a torch to see who was the intruder. She

noted it was J her neighbour. He held her neck and strangled her. She was in only her under pant. He tore it and removed his black trouser and inner pant. He then used his penis to penetrate her vagina. The complainant using a stick hit him on the head. He sustained an injury as a result and bled. After he left she screamed but no one went to her assistance. In the morning at 4.00am she sent a son called S S to inform PW-3 about it. PW-3 got the report and proceeded home. Upon arrival he noted the house door was broken and there was presence of blood. PW-2 told him that she was raped by J. He took her to Kapenguria County Referral Hospital and thereafter reported the matter to Kapenguria Police Station. Her P-3 form was filled on 8.3.2017 by PW-1. The clinical officer noted that she had pain on the neck out of strangulation, pain on the right side of the chest caused by a hit with a blunt object and pain on the thighs due to immense pressure. In relation to rape he noted that the hymen was broken, a sign of penetration. Save for the broken hymen of which the age was not given, other injuries were about 3 days old. He assessed the degree of injury as harm.

The appellant was arrested on 9.3.2017 by the Kenya Police Reservists. He was handed to PW-5 at Kapenguria Police Station. He had a visible injury on the left side of the face. He was re-arrested and charged with the stated offences. The P-3 form and the complainant's torn pant were produced in court as exhibits.

The appellant in his unsworn statement in defence stated that on 6.3.2017 he woke up, proceeded to the market where he purchased whatever he wanted. He then went home where he ate dinner and slept. The following morning after breakfast he went to the centre at 1.00pm. On 8.3.2017 he was arrested and charged with an offence of which he does not understand. He denied the charges. The trial court weighed the evidence and found him guilty of the offences of Rape and Assault. However upon conviction on both, he was only thereafter sentenced for the offence of rape, to serve 10 years imprisonment.

Dissatisfied with both the conviction and the sentence, the appellant appealed to this court against both on the following grounds:-

1. **That he pleaded not guilty during trial.**

2. **That he was not supplied with witness statements during trial.**

3. **That he was not examined in relation to the offence he was facing.**

4. **That his defence was rejected for no cogent reasons.**

5. **That the case was poorly investigated.**

6. **That the evidence was by family members.**

7. **That the prosecution had not proved their case beyond reasonable doubt.**

During the hearing he submitted written submissions. What has caught my eye in it is reliance on the case of ***Maina versus Republic (1970) E.A 370,*** where he urged this court to find that in a Sexual Offence, it is really dangerous to convict on the evidence of the woman or the girl alone.

The state opposed the appeal and submitted that the offence of rape was proved by the prosecution beyond reasonable doubt. The victim was properly recognized and had an injury sustained during the ordeal. Penetration was established by medical evidence and the evidence of struggle indicates there was no consent. The 10 years sentence was averred to be appropriate for the offence, in law. I was urged on the grounds to dismiss the appeal.

I have re-evaluated the entire evidence in the case. For the offence of rape, the ingredients that the prosecutions are required to proof beyond reasonable doubt are:-

1. That it is the accused who committed the alleged offence. Evidence of recognition and or identification is therefore crucial, as well as any other evidence that would connect him with the offence.

2. Evidence of penetration. That is, the accused penetrated the victim's genital organ with his genital organ and;

3. That the said penetration was without victim's consent.

For the second count of Assault, the ingredients are:-

1. Identification or recognition of the accused as the perpetrator.

2. That the perpetrator caused actual bodily harm to the victim.

On the first ingredient for both offences, the evidence of PW-2 shows clearly and firmly that she knew the appellant before then as a neighbour. The evidence of PW-3 shows that they were even related to the appellant as he is married to PW-3's elder sister. The complainant used a torch to see him and recognized him as J. Her evidence is corroborated by the fact that she hit the assailant with a stick during the ordeal and injured him on the face to an extent where he bled. The evidence of PW-3 confirms the appellant had such stated injury during his arrest and PW-5 also witnessed it. The court witnessed the scar of the said injury in court, confirming he was the right culprit. Given the evidence of recognition of the appellant by the victim, and her well corroborated evidence of the injury she inflicted on him, the trial court was not obliged in law to warn itself of the danger of convicting on uncorroborated evidence of a girl or a woman alone. This case is therefore distinguishable from the case of ***Maina versus Republic (1970) EA 370***, where there was no such corroboration. I therefore find that there is reliable evidence that it is the appellant who was involved in the claimed incident.

On penetration, the victim by the time was aged 36 years old. She was a married woman who had given birth. She was not therefore a virgin or new to the issue of sex. When she said in her evidence that the appellant tore her pant, the only clothing she was in, removed his black trouser and pant before he inserted his manhood into her vagina, to anyone it is clear and enough evidence that he penetrated her. However the medical evidence, save for painful thighs has nothing to suggest there was penetration. The broken hymen given that she was not a virgin before then, is not evidence of penetration at the time of the alleged offence. Evidence of tender labias, presence of epithelial cells, spermatozoa or any other injury at the genitalia can suggest such, but in this case it is absent. However that does not mean complainant was not penetrated as she claimed given that slightest penetration would suffice and for an adult, used to sex, the possibility of non-physical injury in a non-consensual sex, is possible. The available evidence shows beyond reasonable doubt that she was penetrated.

The injuries sustained by the complainant during the ordeal, her torn pant and the injury she inflicted on her assailant in self-defence, shows beyond doubt that she had not consented to the penetration or sex. The evidence of the broken door also indicates the assailant was unwelcome visitor on the material night. It is therefore well established by way of evidence that the appellant herein committed the offence of rape against the complainant.

Assault was also committed in the process of commission of the offence of rape. Given that assault is a much lesser offence to that of rape, and was committed to facilitate rape, it is incidental to the offence of rape, and the appellant needed not be convicted of it. It would have been better if it was preferred as an alternative count rather than a count on its own. Probably for the reason, the trial court did not sentence for it but reason ought to have been given. The same applies to the preferred alternative count. The court was obliged to indicate that having found the appellant guilty of the main count, it would make no consideration on the alternative count.

The bottom line is that the appellant herein was rightly convicted and sentenced for the offence of rape, in accordance to the law. The appeal is unmerited and is hereby dismissed.

Judgment read and signed in the open court in presence of the appellant and Ms. Kiptoo, the state prosecutor, this 6th day of March, 2018.

S. M. GITHINJI

JUDGE

6.3.2018