



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 44 OF 2014

ROBERT KINYUA NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being and Appeal from original conviction and sentence of Hon. S.K. Mutai

Ag. Principal Magistrate Embu in Criminal Case No.261 of 2013)

JUDGMENT

The appellant was charged with the offence of rape to a person with mental disability within the view of a family member Contrary to Section 7 of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on the 8th day of April 2013 a[particulars withheld]village, Gaturi location within Embu County, intentionally and unlawfully caused his genital organ penis to penetrate the genital organ vagina of V. I. alias P. without her consent within the view of a brother RKM a child aged 11 years.

The trial Court convicted the appellant and sentenced him to serve ten (10) years imprisonment. The appellant's grounds of appeal are: -

- 1. The appellant pleaded not guilty before the trial Court.**
- 2. The Hon. Magistrate erred in Law and fact when he failed to analyse and re-evaluate the entire prosecution evidence resulting in miscarriage of evidence.**
- 3. The Hon. Magistrate erred in Law and facts when he acted upon evidence of recognition which was not affirmative and cogent.**
- 4. The Hon. Magistrate erred in Law and fact when he failed to observe that essential witnesses were not availed Contrary to Section 150 of the Criminal Procedure Code. Thus the prosecution case was not proved beyond reasonable doubt.**
- 5. The Hon. Magistrate erred in Law and facts when he convicted the appellant without observing that the entire prosecution case was impeachable under Section 163 (1) of the Evidence Act thus not to be relied upon.**
- 6. The Hon. Magistrate erred in Law and facts when he failed to observe there was violation of Section 212 and 302 of the CPC and fundamental rights are violated for being kept under Police custody for more than 24 hours.**
- 7. The learned trial Magistrate rejected the defence on weak grounds.**

It is submitted by the appellant that the trial court failed to analyze and evaluate the evidence on record. No independent witness was involved in the case to support the evidence of PW 1 and PW3. PW1 was told by PW3 that the appellant was beating the victim. He found the appellant on top of the victim. PW1 did not contact the neighbours but instead called the assistant chief. PW3 rushed for a distance of 300 metres and passed all the neighbours upto the scene. It would have been very difficult to find the appellant at the scene. According to PW1, the appellant is their neighbour. However, PW1's brother, PW3 could not recognize the appellant. PW3 did not give the appellant's name to PW1. PW3 testified that he does not know the appellant. PW3 went to the scene upto about 10 metres yet he did not know the appellant and it was during day light.

The appellant submit that evidence of PW1 and PW3 does not corroborate each other. No independent witness saw PW1 arresting the appellant at the scene. Not even the village elder witnessed the arrest. PW5 who is PW1's wife was 300 metres away. If the victim screamed, why didn't the neighbours respond. PW2 did not find the victim at the scene. The alleged exhibits found at the scene did not belong to the appellant. PW2 found many people at the scene yet PW1 alleged that there were no other people. The medical doctor testified that she found nothing on the appellant to connect him with the offence. The appellant testified in his defence that he was arrested on the road and tied with ropes. The prosecution did not prove its case beyond reasonable doubt.

The state opposed the appeal. Miss Nandwa contend that the prosecution proved its case beyond reasonable doubt. The ingredients of rape of a person with mental disability was proved. PW1's evidence is corroborated by the evidence of PW3. PW4, a doctor, found that the complainant had a swelling on her forehead. She had fresh bruises, blood stains and spermatozoa in her vagina. The appellant is a neighbour and was found by PW1 on top of the complainant. PW1 arrested the appellant. The incident occurred at about 6.45pm and there was enough light. The appellant's defence was considered. He did not state where he was but dwelt on how he was arrested.

Before the trial court the complainant tried to testify but was found to be mentally unfit. **PW1, AN** is a brother to the victim. He testified that the victim has mental problem.. The appellant is their neighbour in the village. On 8.4.2013 he arrived home at 6.45pm. His step brother, 10 years old (PW3) told him that someone was beating the complainant at an avocado tree. He rushed to the scene about 200-300 metres away and found the appellant on top of the victim. The appellant took off and he pursued him. He arrested the appellant and called the assistant chief. It was now about 7.00pm. The assistant chief called the Police at Manyatta Police station. The complainant was on the ground. The complainant has her own house. PW1's wife took ropes to the scene. He found the appellant on the act raping the victim. Police went to the scene and the appellant was re-arrested. The complainant was taken to hospital.

PW2 JOSEPH NYAGA NJIRU is the area assistant chief. On 8.4.2013 he was called by PW1 who told him that he had met the appellant raping the victim who is mentally infirm. He went to the scene and found the appellant had been tied with ropes. The victim was inside the house. He took about 30 minutes to reach the scene. He contacted the Police at Manyatta Police station who sent officers to the scene. The incident was under an avocado tree. He recovered the appellant's shoes at the scene.

PW3 RK is PW1's step brother. He was 10 years old and did not testify under oath. It is his evidence that he was a class five pupil. On 8.4.2013 at about 6.45pm he was in the kitchen. He heard the victim making noise. He went out to check and found someone hitting the victim using fist. He stood at about 10 metres away and found the attacker on top of the victim facing her. He informed PW1 who had just arrived home. He did not recognize the attacker.

PW4 DR. ELIZA EKERA was based at the Embu Provincial General Hospital. She examined the victim who was aged 50 years on 8.4.2013 and filled a P3 form. The victim had mental problem and was unable to communicate. She had a swelling on the forehead and a soft tissue injury on the head. Her genitalia had laceration and there were fresh bruises, and blood stains on the side of the vagina. Vaginal swab revealed spermatozoa. She signed the P3 form on 9.4.2013. It is her evidence that there was penetration.

PW5 EKN is PW1's wife. On 8.4.2013 at about 7.00pm she heard screams from the victim. She rushed there and found her husband (PW1) holding the appellant. He asked her to take ropes so that he could tie the appellant. PW1 told her that the appellant had raped the complainant. The victim was 50 years old and is mentally challenged.

PW6 COPL JERIDA NYATICH was stationed at Manyatta Police station. They received a call from the assistant chief (PW2) and rushed to the scene. She recovered open shoes and a hat belonging to the appellant. She referred the victim to the hospital. The appellant was barefoot. They re-arrested the appellant who was later charged with the offence.

In his unsworn evidence, the appellant testified that he is a timber vendor. He denied committing the offence. On the material day he met PW1 with another person at the road and they arrested him. PW5 took ropes and he was tied. They called Police officers and he was arrested and subsequently charged.

The issue for determination is whether the appellant raped the complainant who was mentally disabled. A medical report dated 15th July, 2013 from Embu Provincial Hospital did confirm that the victim had mental illness and could not follow the proceedings or stand as a witness. Dr. Thuo J.N. prepared the report.

The evidence of PW3 is that he saw someone beating the victim using his fists. He went closer to the scene but could not identify the attacker. The evidence of PW1 is that the appellant is their neighbour in the village. PW1 did not testify that the appellant is their immediate neighbour. PW3 is a ten (10) years old boy who could not be expected to know all the adult neighbours. The contentions by the appellant that PW3 did not recognize or know him does not help his case. There were no immediate neighbours. It is also the evidence of PW1 that their neighbours are a bit far. That explains why PW1 rushed to the scene. There is no neighbour within the distance of about 200-300 metres covered by PW1 to the avocado tree. The neighbours went to the scene after the incident and their evidence could not have been of much help.

According to PW3, the attacker hit the victim with his fist. PW4 examined the victim and saw that her forehead was swollen and she had lacerations on the head. The evidence of PW3 is therefore corroborated by that of PW4. This was not a case of a mentally insane person willingly participating in sexual intercourse during her lucid moments. The victim was subdued through beatings before she was raped.

The appellant's defence is that he was arrested on the road and tied with ropes. It is PW1 who arrested him. According to PW1, when the appellant saw him approaching the scene, he took off. PW1 ran after the appellant and managed to arrest him. The appellant was therefore not arrested at the spot of the incident. He ran away and was apprehended. He admits that it is PW1 who arrested him. I do agree with the findings of the trial Court that the appellant's defence does not raise any doubt on the prosecution case.

According to PW4, she did not examine the appellant. PW4 could not testify that the appellant did not commit the offence. Her role was to

examine the victim and find out if indeed she was raped. The contentions by the appellant that PW4's evidence does not connect him to the offence is incorrect. According to PW4, the victim was penetrated. There were sperms in her vagina as well as fresh lacerations. PW4 examined the victim about two hours after the rape incident. According to PW1, he found the appellant raping the victim. His evidence is corroborated by that of PW4. There was proof that the victim was raped.

Given the evidence on record, I do agree with the findings of the trial court that it is the appellant who raped the victim. He was found by both PW1 and PW3 raping the victim. He started by assaulting the victim and thereafter raped her while very well knowing that she was mentally unstable. The prosecution proved its case beyond reasonable doubt. Under Section 7 of the Sexual Offences Act, the minimum sentence is ten (10) years imprisonment. That is what the trial Court imposed.

In the end, I do find that the appeal lacks merit and is hereby dismissed.

Dated and Signed at Marsabit this day of July, 2018

S. CHITEMBWE

JUDGE

Dated, Signed and delivered at Embu this 2nd Day of July, 2018

F. MUCHEMI

JUDGE