**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 284 OF 2014**

**SAMUEL OKENO MAUTI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of Honourable W. Kagendo*

*Principal Magistrate, delivered on 30th December, 2010 in Nakuru*

*Chief Magistrate's Court Criminal Case No. 6245 of 2009)*

**JUDGMENT**

1. The Appellant, Samwel Okeno Mauti was convicted of the offence of rape contrary to section 3(1) of the Sexual Offences Act. He was sentenced to twenty years imprisonment.

2. The charge sheet expressed the offence as "rape of a person with mental disability contrary to section 3(1) of the Sexual Offences Act." The particulars were that "on diverse dates between 2nd and 3rd of November, 2009, at [Particulars Withheld] Estate in Nakuru District within Rift Valley Province, intentionally and unlawfully committed an act which caused penetration of his genital organs namely penis into the genital organs namely vagina of NVA aged 18 years, a person with mental disabilities.

3. The Appellant also faced an alternative charge of committing an indecent act with an adult contrary to section 11 of the Sexual Offences Act. The venue and particulars of the victim and dates were the same except that the alternative charge alleged that the Appellant had intentionally touched the private parts, namely vagina of VGA, a person with mental disabilities.

4. The Appellant was dissatisfied with the conviction and sentence and has appealed to this Court. He raised four grounds of appeal as follows:

> *1. That the learned trial magistrate erred in law and fact by failing to appreciate that the complainant was never satisfied to be mentally disabled prior to the reception of his sworn evidence.*
>
> *2. That the learned trial magistrate erred in law and fact by failing to find that the appellant's identification was never positively done.*
>
> *3. That the learned trial magistrate erred in law and fact by failing to consider the appellant's defence yet it raised considerable doubt against the prosecution's case.*
>
> *4. That the learned trial magistrate erred in law and fact by failing to comply with the rules of Judgment writing as dictated by law.*

5. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see ***Okeno v Republic*** **[1972] EA 32**).

6. The prosecution called five witnesses to prove its case. The Complainant testified as PW2. The Court observed that she was a "vulnerable person as she is mentally handicapped." However, upon conducting voir dire, the Court concluded that "even though she had problems pronouncing some words, she was mentally alert and could tell her whereabouts and even understood the meaning of oath."

7. The Complainant testified that she travelled from her home in Kakamega on 30/10/2010 to Nakuru to attend a crusade rally and prayers led by the famous (Prophet)(Dr.) Owuor. She travelled with her aunt and uncle and were in Nakuru on 31/10/2010. However, during the rally, she lost contacts with her aunt and uncle and she was left alone. She got lost trying to locate them. The Complainant testified that she walked for a long time before finally asking for help. When she asked for help, she testified, it was from the Appellant. The Appellant promised to help her. Instead, the Complainant told the Court, the Appellant took her to his house and "did manners to her." Before "doing the bad manners", the Complainant testified that the Appellant removed her clothes and took a "plastic paper" which he "put on that thing of his for passing urine.

8. The Complainant testified that she bled during the intercourse and that her petticoat, dress and *lesso* got blood stains in the process. She identified all three in Court. The Complainant's testimony was that the Appellant raped her the whole night on Saturday, the whole day on Sunday and the whole of Sunday night. On Monday morning, he asked her to leave. The Complainant left in her blood-stained clothes. She wandered into the compound of Margaret Wanjuhi Gichuki.

9. Margaret testified as PW1. She lives in [Particulars Withheld] Estate, Nakuru. In Court, she recalled 03/11/2009 at 7:30am. The Complainant went into her compound. Her clothes had visible blood stains. The Complainant told her that she had just escaped from a compound where she had been raped overnight. The Complainant described the man who had raped her as short and dark. She also said that the assailant was dressed in a hooded jacket.

10. Margaret told the Court that she asked the Complainant to go show her the house where she had been raped. The Complainant led her to a house in her neighbourhood – about 100 metres away from hers. She knew that the house was owned by a lawyer by the name Kariuki. Margaret had Kariuki's number. They went back to Margaret's house and she placed a call to Kariuki. Kariuki was in his house and he agreed to go to Margaret's house. Upon narration of what the Complainant had said, Kariuki asked the Complainant to describe his compound. He did this to test the veracity of her story. The Complainant gave an accurate account of his compound. At that point, Kariuki became convinced that the Complainant was telling the truth. He led the Complainant and Margaret to his compound and the Complaint pointed to the mabati house where she said she had been sexually assaulted. When Kariuki called out for the Appellant to come out, Margaret told the Court that a short, dark man came out. The man was also dressed in a hooded jacket. He fitted perfectly the description the Complainant had given. Margaret also described the clothes the Complainant had on, and correctly identified them in Court.

11. The Kariuki who Margaret talked about as a neighbour also testified as PW4. His full name is Josphat Munyua Kariuki. He lives and works in Nairobi as a lawyer. He confirmed the account given by the Complainant and Margaret about how he received a call from the latter on 03/11/2010 with the news that the Complainant had been sexually assaulted in his compound. He narrated how he led the Complainant and Margaret to his compound and called out to the Appellant from his house. He told the Court that while the Appellant at first denied the claims, alleging instead that he had slept with a prostitute, he did admit to the act upon interrogation by Kariuki. Kariuki, then, took the Appellant to the Police Station – and the girl to the hospital thereafter.

12. At the Nakuru PGH Hospital, the doctor who examined the Complainant was Dr. Samuel Onchere. He described examining the Complainant who was in a blood-stained dress. He found her to be "mentally handicapped". Upon examination of her genitalia, he found a freshly raptured hymen which was still bleeding. On the anus, he saw swellings and bruises. The doctor concluded that there was obvious evidence of recent rape. He signed a P3 Form which he produced an exhibit in the case. He also produced the Out Patient Cards for the Complainant.

13. The Prosecution case was rounded off by the testimony of PC Safari Cheya, the Investigating Officer who corroborated the Complainant's and Kariuki's narrative about the first time they went to the Central Police Station with the Appellant to report what had happened. PC Cheya completed the investigations and made a recommendation that the Appellant be charged with rape. She also took custody of the clothes the Complainant had on when the incident happened.

14. Put on his defence, the Appellant flatly denied the allegations. He insisted that he did not rape the Complainant and that he was being framed. He offered no motive the Complainant would have for framing him. He insisted that if he had raped the Complainant as claimed, then she could have screamed and Kariuki would have heard since his house is right next to the Appellant's house.

15. The Learned Trial Magistrate was persuaded that the charged offence had been proved beyond reasonable doubt. She concluded thus:

> *The Court is satisfied that the physical condition of PW2 shows she had some penetrative activity that violently raptured her hymen and also bruised her anus. The Court, having seen her and also from the P3 Form, is satisfied that she did not have the capacity to fully comprehend the nature of the acts that were done and even though she stated that it was bad manners, she did not have the capacity to object. Even in Court, she referred to the Accused Person as Jirani, neighbour, showing she took him to be a good Samaritan who took her in when she got separated from her aunt and uncle. This good Samaritan however, turned into a wolf and attacked the protégé – taking advantage of her disability to object handling and viciously (sic). The Court is satisfied that beyond reasonable doubt that the identification by PW2 was proper. She described his physical features to PW1; described his clothings and also described PW5's compound. Clearly, this was not a case of mistaken identity and the Court therefore does not hesitate to convict the Accused Person of the main charge of rape.*

16. It is important to begin analysis by pointing out that despite its framing, the Appellant is charged with rape contrary to section 3 of the Sexual Offences Act. Under that section, the Prosecution is obliged to prove the following ingredients in order to obtain a guilty verdict when rape is charged:

> a. The accused intentionally and unlawfully commits an act which causes penetration into his or her genital organs;
>
> b. The other person does not consent to penetration or the consent is obtained by force or by means of threats or intimidation of any kind; and

c. The Accused is properly identified as the person who caused penetration.

17. In the present case, evidence abounds that there was penetration. First, the oral evidence of the Complainant is quite straightforward on this question. The Learned Trial Magistrate concluded that the Complainant was a truthful witness; and the mode of her testimony bears this out. Second, the medical evidence presented in the form of the oral testimony of Dr. Onchere, the P3 Form and the Treatment Notes corroborate Complainant's claim that she had been raped. Third, the surrounding, contextual circumstances provides further evidence of penetration. In particular, the evidence of Margaret (PW1) about how the Complainant approached her as well as the blood stained clothes the Complainant was dressed in accentuate the evidence of penetration.

18. The third element, that of the identity of the person who caused the penetration as the Appellant, is, to my mind also eminently established beyond reasonable doubt. Several factors inevitably lead to this conclusion. First, the Complainant testified that she spent at least a whole night and a whole day with the Appellant virtually ruling out the possibility of error in recognition. This is because of the length of time as well as the favourable conditions for identification. Second, the Complainant gave a very accurate description of the Appellant to PW1 – including his clothing (a hooded jacket). Third, the Complainant gave Kariuki an accurate description of his compound further cementing the credibility that she had, indeed, been to that compound. I would therefore easily find that the Appellant was the person who caused penetration to the genital organs of the Complainant (See ***Regina v Turnbull [1976] 3WLR 445***)

19. The crux of the case turns on the second element. The question is whether the Prosecution proved beyond reasonable doubt that the penetration was without the consent of the Complainant or that the consent was obtained by force or by means of threats or intimidation of any kind.

20. In the present case, the Prosecution's case was that the Complainant could not consent because she did not have the capacity to fully comprehend the nature of the acts that were done to her. Her consent was, therefore, vitiated.

21. Both the Prosecution and the Learned Trial Magistrate were relying on sections 42 and 43 of the Sexual Offences Act in their analysis and conclusions. The two sections provide as follows:

> *42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.*
>
> *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 transmittable 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 stated 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.*

22. The case made out and accepted by the Court was that the Complainant was *is incapable in law of appreciating the nature of an act which caused the offence because she is mentally impaired at the time of the commission of the act which caused penetration. (See* Section 43(4)(e) of the Sexual Offences Act.

23. In the present case, evidence of mental impairment of the Complainant came from Dr. Onchere who said that the Complainant was, according to him "mentally handicapped). He noted as much in the P3 Form. The Court also made observations about the Complainant in reaching its conclusion that the Complainant was mentally impaired.

24. On my part, I am not persuaded that there was sufficient evidence to reach that conclusion. The fact of mental impairment in order to displace consent must be established beyond reasonable doubt. In my view, the sparse evidence of mental impairment produced by the Prosecution does not rise to that level. See ***Wilson Morara Siringi v Republic [2014] eKLR.***

25. Fortunately for the Prosecution, however, this does not end the analysis. The real question is whether the Prosecution demonstrated beyond reasonable doubt that the Complainant did not give consent to the penetration. In my view, the Prosecution accomplished this goal. It did this by demonstrating that the penetration in this case was achieved through coercion: the Complainant never said yes to sexual intercourse. Indeed, the surrounding circumstances – including her visible developmental challenges – clearly communicated non-consent to sexual intercourse. According to our law (sections 3; 42 and 43 of the Sexual Offences Act), having sexual intercourse with a person who has not consented amounts to rape. It is therefore incumbent upon a party to establish that the other party to a sexual act has consented to penetration. Here, the Appellant was aware that the Complainant had not consented to sexual intercourse; yet, he proceeded to penetrate her severally. To be clear, there is no requirement that the victim of rape screams or make any active attempts to resist the rape or run away. It is enough that the victim did not consent to the penetration. The circumstances of each case will determine in a fact-intensive way whether consent had been obtained or not.

26. Given this analysis, it is my finding that the Prosecution proved any reasonable doubt that the Appellant committed rape against the Complainant. The Trial Court was correct in dismissing the Appellant's defence as implausible given the weight of the Prosecution case and the credibility the Court assigned to the Prosecution witnesses.

27. Turning to the sentence imposed, I note that the Appellant was sentenced to twenty years in prison. Part of the reason for the enhanced sentence was that the Appellant was the Court had found the Appellant to be mentally impaired. As shown above, this fact was not established beyond reasonable doubt. However, there was enough evidence to demonstrate that the Complainant had developmental challenges. In the circumstances, I would treat this as an aggravating circumstance – but not strong enough to enhance the sentence imposed from the statutory minimum of ten years imprisonment to twenty years imprisonment. Consequently, I would reduce the sentence to fifteen years imprisonment.

28. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

**a. For the reasons stated above, the appeal against conviction is dismissed and the conviction is hereby affirmed.**

**b**. **The sentence imposed by the Trial Court of imprisonment for twenty years is hereby set aside. In its place, the Appellant is sentenced to imprisonment for fifteen years from 30/11/2010**.

29. Orders accordingly

**Delivered at Nakuru this 20th Day of September, 2018.**

**.....**

**JOEL NGUGI**

**JUDGE**