



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 34 OF 2017**

**ALEX MOSOTI KIBATI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against the conviction and sentence by Hon. P. O. Ooko (PM) in Mavoko Sexual Offences Case No. 29 of 2014 delivered on 27<sup>th</sup> November, 2015)**

**JUDGEMENT**

1. Alex Mosoti appeals against the conviction and sentence in Mavoko Sexual Offences Case No. 29 of 2014. He filed this appeal on grounds that:

- a) That the learned trial magistrate erred in both law and facts by shifting the burden of proof from the prosecution to the appellant.***
- b) That the learned trial magistrate erred in law and facts by convicting the appellant on evidence which was below the requisite standard of proof.***
- c) That the learned magistrate erred in law and facts by relying on the uncorroborated evidence.***
- d) That the trial magistrate erred in observing that the appellant had connections to the offence in question whereas there was no evidence that was tabled to create a link between the appellant and the victim.***
- e) That the trial court did not adequately consider the plausible submissions of the appellant and the defence evidence.***

2. The appellant was charged with the offence of rape contrary to section 3 (1) (a) as read with section 3 (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the appellant on 1<sup>st</sup> September, 2014 in Athi River District within Machakos County, intentionally and unlawfully caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of M A K without her consent. The alternative charge was that of committing an indecent act with an adult contrary to section 11 A of the Sexual Offences Act No. 3 of 2006 and faced a second count of Stealing contrary to section 268 (1) as read with section 275 of the Penal Code.

3. It was the prosecution case that M A K (PW1) rented a house in which the appellant was the caretaker. She paid an unreceipted sum of KShs. 1,000/- being rent. The appellant promised to introduce her to the landlord and on the material day informed her that the landlord had agreed to meet her at a bar which she declined to enter into. The appellant later told her that the landlord had agreed to meet her at the house. At around 10.00 am, the appellant invited her into his house in pretext that the landlord was ready to meet her. The appellant locked the door as soon as she got into the house, drew a panga and demanded to have intercourse with her. She raised alarm and struggled with the appellant who overpowered her, removed her clothes dragged her onto the mattress and raped her and she became unconscious. She regained consciousness at around 4.00 am when the appellant let her go. She went to her house where she took a bath, changed her clothes and went to Mlolongo Police Station where she made a report. That the appellant later ambushed her while armed with a panga and demanded to know why she reported the matter. That the appellant instructed a boy to take her phone make Nokia. Police Constable Jane Muthoni (PW2) booked the report and issued her with a p3 form as well as post rape care form. She visited the scene and received the appellant from members of the public who had arrested him. That PW1's phone (P. Exhibit 3) was recovered from the appellant. She consequently charged the appellant. Ruth Lengate (PW3) a clinical officer at Nairobi Women Hospital, Kitengela produced the p3 form (P. Exhibit 1) and post rape care form (P. Exhibit 2) on behalf of a Clinical Officer by the name Christine Netesha who examined PW1. She stated that on examination, PW1 was found to have lacerations on the labia majora with a whitish discharge on the vaginal openings. That her hymen was torn with rugged edges. On cross examination, it was stated that no spermatozoa was revealed from PW1's genitalia and that she gave a history of being married.

4. The appellant was put to his defence and testified that he on 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> September, 2014 and proceeded to work and returned to his residence by 5.00 pm. That on 5<sup>th</sup> September, 2014 after work proceeded to town and was surprised to be arrested by five (5) police officers on allegation that he had stolen a cell phone. That the complainant gave the said cell phone to the police who arrested him with the same. He was taken to Mlolongo Police station where he was locked up and later arraigned in court.

5. This is a first appeal. This court is thereby under duty to re-evaluate the evidence afresh with a view of arriving at its own independent conclusion. I have further consequently considered the submissions tendered by the rival parties. Rape is defined under Section 3 of Sexual Offences Act. For it to be established the following elements must be demonstrated:

**(a) The intentional and unlawful penetration of the genital organ of a person by another.**

**(b) The absence of consent.**

**(c) Where consent is obtained by force or by means of threat or by intimidation of any kind.**

6. I have given due consideration to the evidence on record. PW1's evidence was in my view consistent. She consistently narrated how the appellant lured her into the house and threatened her using a panga and raped her. The appellant was by that time known to PW1. The ordeal occurred during the day when she was able to recognize him. PW1's testimony was corroborated by PW3 who stated that PW1 sustained lacerations on the labia majora with a whitish discharge on the vaginal openings. The appellant's testimony was on the other hand mere denial that did not have any probative value and further did not cast doubt to the prosecution case. In any event the Complainant had just rented the premises where the Appellant was a caretaker and she was thus a new tenant and that there was no previous dispute between her and the Appellant. There was no reason at all for her to frame him up for the offence of rape. In the end, I find that the prosecution proved its case beyond reasonable doubt. On the second count, I note that no sufficient evidence was tendered to prove the said charge. In the end, I find no merit in this appeal and I consequently uphold the trial court's conviction and affirm the sentence meted therein.

Orders accordingly.

Dated and delivered at Machakos this 17<sup>th</sup> day of **October**, 2018.

**D. K. KEMEI**

**JUDGE**