



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

**CRIMINAL APPEAL NO. 75 OF 2018**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**ELIUD KINYUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. E.M. Ayuka, RM dated 22<sup>nd</sup> May 2018 at the Senior Resident Magistrate's Court at Nkubu in Criminal Case (SOA) No. 458 of 2016)***

**JUDGMENT**

1. The appellant, **ELIUD KINYUA**, was charged and convicted of the offence of rape contrary to **section 3(1)** as read with **section 3(3)** of the **Sexual Offences Act** ("the Act"). The particulars of the charges were that on 20<sup>th</sup> April 2016 at Mitunguu in Imenti South within Meru County he intentionally and unlawfully caused his penis to penetrate the vagina of LW a person with mental disability.
2. The appellant was sentenced to 10 years' imprisonment and now appeals against conviction and sentence. Before I deal with the issues raised in this appeal, it is important to recall the principle that governs the exercise of this court's jurisdiction. As the first appellate court, I am required to re-analyse the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972]EA 32**). In order to proceed with this task, I will set out the facts as they emerged before the trial court.
3. The complainant, PW 1, testified that the appellant was a neighbor and that they were staying in the same plot. She recalled that on the night of 19<sup>th</sup> April 2016 at 11.00 pm she was at home and since she was mentally unstable, her mother would lock her in the house from outside. On the material day, her mother, PW 2, did not lock the house so when the appellant came in she thought it was PW 2. The appellant took her to his house, locked her inside, removed her clothes and started to have sexual intercourse with her causing her to scream. This caused PW 2 to come and when she saw what happened, she also screamed.
4. PW 2 recalled that on the material night, one of her visitors who was staying with her woke her up and told her that she had heard PW 2 screaming. She went to her house but she was not there. She then went to tell the appellant that PW 1 was missing but instead found the radio playing loud music. She peeped through the curtain and saw PW 1 on the bed naked and lying facing up. She screamed thereby attracting neighbours. In the meantime, the appellant who refused to open the door until the group threatened to break it. He gave himself up and was arrested.
5. PW 3, the clinical officer at Kanyakine District Hospital, produced the P.3 form and testified that PW 1 was taken to the hospital and treated at about 12.30pm on the material day. She noted that there were no lacerations on the vagina and the hymen was absent. The investigating officer gave an account of the investigations.
6. In his sworn defence, the appellant testified that he came home on the material night and found the gate locked, he jumped over it and entered his house whereupon the lady called the police who arrested him.
7. Given the totality of the evidence, the trial magistrate convicted the appellant. Counsel for the appellant contended that the evidence was contradictory, the medical evidence was weak, and did not point to the appellant as the perpetrator of the rape.
8. Having considered the evidence, I find that the appellant knew PW 1 and PW 2 as they lived in a single plot in separate houses. Counsel for the appellant pointed to the fact that PW 1 was mentally sick and that evidence of the P3 form showed that she was a prostitute as weakening the prosecution case. Both PW 1 and PW 2 admitted that PW 1 was indeed mentally sick. However, PW 2 testified that PW 1 was under medication and was normal at times. During the proceedings there was no indication that PW 1 was unable to testify or answer any questions put to her.

9. Under **section 3(1)** of the **Act**, the offence of rape is established if:

- i. The accused intentionally and unlawfully commits an act which causes penetration of the victim's genital organs,
- ii. The other person does not consent or,
- iii. The consent is obtained by force or by means of threats or intimidation of any kind.

10. Counsel for the appellant suggested that since the narration in the P3 form stated that PW 1 had a mental disability and was involved in prostitution, there was doubt that the appellant committed an act of rape. The prosecution must prove lack of consent or that consent was obtained involuntarily beyond reasonable doubt to succeed in the prosecution and it does not matter whether the victim had a mental disability or is a prostitute.

11. The evidence in this case is that the appellant removed PW 1 from her house at night and proceeded to sexually assault her causing her to scream and raise attention of others including PW 2 who found him in the act. He was arrested at the scene and subsequently charged.

12. The appellant submitted that the evidence did not establish penetration. The answer to this is that medical evidence is merely corroborative of the testimony of PW 1. The Court of Appeal in **Kassim Ali v Republic Mombasa Cr. App. No. 84 of 2005 (UR)** held that:

*[The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.*

13. The fact that there were no lacerations or bruises or other indications of injury to the vagina or that the hymen was broken as a result of the fact that PW 1 had had a child could not absolve the appellant in view of the testimony of PW 1.

14. The appellant's defence in light of the testimony of PW 1 and PW 2 cannot stand. Both witnesses remained firm under cross-examination and nothing suggested to them that he was being framed. In fact, PW 1 in response to the appellant's question was very clear that the appellant had threatened to rape her several times. I find that the prosecution proved its case. I affirm the conviction.

15. Before I conclude the judgment, I wish to comment on the manner in which the charge against the appellant was formulated. The appellant was charged with, "*causing his penis to penetrate the vagina of LW person with mental disability.*" This was clearly wrong as the offence of rape under **section 3** of the **Act** is defined by reference to consent of the other person not by the mental capacity. Mental capacity may only be a factor in considering whether there is in fact consent but it is improper to proceed from the basis that a person who is mentally challenged cannot ipso facto give consent. I do not consider the error fatal and indeed it is one that is curable under the provisions of **section 382** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

16. As the sentence of 10 years' imprisonment provided by **section 3(3)** of the **Act** is the minimum provided by law, I affirm it.

17. The appeal is dismissed.

**DATED and DELIVERED at MERU this 16<sup>th</sup> day of October 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Anampiu, Advocate for the Appellant.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.