



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 64 OF 2015

ROBINSON CHERUIYOT CHEPKWONY.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being the appeal from the conviction and sentence in Criminal Case No. 67 of 2012 Sotik SRM's Court- Hon Kassam SRM)

JUDGMENT

The appellant was convicted and sentenced to thirty years imprisonment for the offence of rape of a person with mental disability C/s 7 of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 26th day of October 2012 at [particulars withheld] in Sotik sub county – Bomet County he intentionally caused his penis to penetrate the vagina of WC a person with mental disabilities.

The term mental disabilities is defined in S.2 of the Sexual Offences Act thus:- means a person affected by any mental disability irrespective of its cause, whether temporary or permanent and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question was-

- (a) Unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act.
- (b) Able to appreciate the nature and reasonably foreseeable. Consequences of such an act but unable to act accordance with that appreciation.
- (c) Unable to resist the commission of any such act: or
- (d) Unable to communicate his or her unwillingness to participate in any such act”.

In the instant case the matter proceeded to hearing without the prosecution establishing the mental status of the complainant.

Indeed the case proceeded to hearing on the same date the appellant was arraigned in court to take his plea.

The court was informed that the medical report ascertaining the condition of the complainant was not ready. The court allowed the taking of evidence of PW1, PW2 and PW3 on the day of plea. The Accused had not been furnished with the witness statements at the time.

The mental report was produced by a clinical officer later on 14/3/2013.

At no time was the complainant declared a vulnerable witness.

Section 31 of the Sexual Offences Act provides:- A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness other than the Accused, who is to give evidence in those proceedings a vulnerable witness if such witness is:-

- (a) The alleged victim in the proceedings pending before the court.
- (b) A child, or
- (c) A person with disabilities

It was incumbent upon the prosecution to prove that there was no consent.

S.44(1) of the Sexual Offences Act provides:- "If in proceedings for an offence under this Act, it is proved.

a) That any of the circumstances specified in subsection existed and

b) That the Accused person knew that these circumstances existed. The complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented and the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it".

In the instance case there was no sufficient evidence adduced by the prosecution on the issue of mental disability of the complainant.

She was not declared as a vulnerable witness and no intermediary was appointed as is required under the Act.

The report by the clinical officer was not sufficient and his evidence in court was simply that upon examination he found the complainant a mentally disturbed lady. There was no suggestion to the effect that she was not capable of consent.

This case was not proved beyond reasonable doubt. The conviction was not safe. I am satisfied that the appeal has merit.

The appeal is allowed. The conviction is quashed and sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open court this 4th day of May 2017 in the presence of learned counsel for the prosecution Miss Gitahi for learned counsel for the defence, court assistant Rotich.

M. MUYA

JUDGE

4/5/17