



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
CRIMINAL APPEAL NO. 51 OF 2016

DENIS MWITI JACKOMINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the original conviction and sentence in **Thika Chief***

Magistrate's Court Criminal Case No. 2840 of 2011 by Hon. M. W. Mutuku Ag S P M on 12/9/13)

J U D G M E N T

1. **Denis Mwiti Jackomino**, the Appellant, was charged with rape contrary to section **3(1)(a)(b)(3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **5th** day of **May, 2011** at **[particulars withheld]** in **Muranga County** within the **Republic of Kenya**, intentionally and unlawfully caused his penis to penetrate the vagina of **M W N** without her consent.
2. In the alternative, he was charged with the offence of **Committing an Indecent Act** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **5th** day of **May, 2011** at **[particulars withheld]** in **Muranga County** within the **Republic of Kenya**, intentionally touched the vagina of **M W N** a girl aged **20 years** with his fingers.
3. He was tried, convicted and sentenced to ten **(10) years imprisonment** on the main charge.
4. Aggrieved by the conviction and sentence he now Appeals on grounds that:
 - The case was poorly conducted by the Prosecution.
 - The trial Magistrate did not consider that a family feud existed between him and the Complainant.
 - Vital witnesses were not summoned.
 - The defence put up was not considered.
 - His rights were denied.
5. The Appellant canvassed the Appeal by way of written submissions.
6. The Respondent (state) through learned state counsel MsMathew opposed the Appeal. She submitted that the Complainant identified the Appellant as the person who attacked her while on the farm although she did not report immediately. She revealed that she had been raped when she got complications following the pregnancy. Evidence that she had features of retardation came up but she was in command of the present and past events. The issue of DNA having not been done was irrelevant as it

was not an ingredient of the offence or prejudicial to the Appellant.

7. In a rejoinder the Appellant stated that he was not the person responsible for the pregnancy.

8. This being a first Appeal I am duty bound to reconsider the decision of the Lower Court exhaustively and come up with my own conclusion bearing in mind that I had no advantage of hearing and seeing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

9. **PW2 P W** and **PW3 O N E** testified that **PW1, M W N** is mentally retarded. **PW4 Anthony Mwangi**, the clinical officer who examined the Complainant on the **15.6.2011** formed the opinion that she had a slow mental growth. I have seen on record a handwritten document by one **Dr. Mwashwao** addressed to the OCS Kabati in respect of the Complainant. The document is in respect of her mental status dated **20th July, 2011**. It was noted that the Complainant's past and remote memory was present but diminished. The abstract thinking was inappropriate for her age. He concluded that the patient showed mental retardation affecting some higher function. That she could be fully cognizant of the said offence or assailants to be a utility to the judicial system. Her condition was however stable. The document was indicated as an exhibit but the record was silent on how it got into the file.

10. A retarded individual is a competent witness. **Section 125(2)** of the **Evidence Act** provides thus;

“(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”

11. The Appellant having been charged and convicted of the offence of rape the prosecution was duty bound to prove that the Appellant;

- (i) Intentionally and unlawfully committed an act which caused penetration with his genital organ.
- (ii) The Complainant did not consent to the act of penetration; or that;
- (iii) The consent was obtained by force or by means of threat or intimidation of any kind.

12. Per the evidence adduced PW1 stated that she was picking kales (sukumawiki) when Dennis went, pulled her to the side, tripped her and she fell. He forced himself onto her and put his penis into her vagina. On finishing he dressed up and left her there. When she went home she did not tell anyone what happened. Later on PW2 and PW3 discovered she was pregnant. According to PW3 she mentioned ‘Deno’ as the person responsible but due to her mental retardation she was not able to recall the date when it happened.

13. Having conceived, the logical explanation would be that her egg was fertilized by a man's sperm, most probably as a result of penetrative sex. This was proof of penetration by a male organ into the Complainant's genitalia.

14. Evidence adduced by the Complainant suggested that there was no consent obtained from her. Without a medical record it is not easy to tell if the Complainant appreciated the nature of the alleged act. According to her, force was used against her which made the act intentional and unlawful **(see section 43 of the Sexual Offences Act).**

15. In his defence the Appellant denied having committed the act that caused penetration into the Complainant's genitalia that resulted into pregnancy.

16. The learned magistrate in coming up with her decision relied on the medical report dated **20th July, 2017** where the Doctor stated that the present and immediate memory were present but she failed to note that none of the witnesses who testified produced the document in evidence.

This was an important document that was authored after the accused was arraigned in court. Justice would have demanded that it be produced in evidence by the author in order to explain in what circumstances it was authored and how the examination, if any, was done.

17. This having not been done, there is no proof of whether indeed the recent past was present.

18. The learned magistrate appreciated the fact that the Complainant suffered a miscarriage therefore no DNA was done to establish if indeed the Appellant was the person responsible for the pregnancy.

19. The Complainant was examined on the **15th July, 2017** by PW4 who opined that she was one (1) month pregnant. This therefore brings in the question when the act took place? She was not able to remember when it exactly happened. It is a case that would have required corroboration of the fact of the Appellant having perpetrated the offence.

20. In the premises it was unsafe to convict on evidence adduced. Therefore, I allow the Appeal, quash the conviction and set aside the sentence meted out. The Appellant shall be released forthwith unless otherwise lawfully held. 21. It is so ordered.

Dated and Signed at Kitui this 19th day of April, 2017.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Kiambu this 12th day of June , 2017.

PROF. J. NGUGI

JUDGE