



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL APPEAL NO.33 OF 2015

BARAKO GUYO ELEM.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.242 of 2011 of the Principal Magistrate's Court at Marsabit by S.O Mogute – Senior Principal Magistrate)

JUDGMENT

The appellant, **BARAKO GUYO ELEM**, was Charged with an Offence of rape contrary to section 3(1) (3) (sic) of the Sexual Offences Act No.3 of 2006. He was alternatively charged with an offence of indecent act contrary to section 11 (6) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 14th July 2011 at North Horr township in North Horr District of Eastern Province, the appellant knowingly and intentionally caused his penis to penetrate into the vagina of **A B B** without her consent. Alternatively if he did not rape her, he touched her genitalia indecently.

The appellant pleaded guilty and was convicted in the substantive charge and sentenced to serve 10 years imprisonment. He now appeals against both conviction and sentence. He appealed in person.

From the listed six grounds of appeal, am able to distill three grounds as follows:

- 1.That the appellant was not able to follow the proceedings in court due to difficulties in communications.
- 2.That he was told by the police to plead guilty with a promise of release.
- 3.That at the time of trial he was aged 17 years.

The state opposed the appeal and was represented by Mr. Mwangangi, the learned counsel. He contended that the appeal offends the provisions of section 348 of the Criminal Procedure Code which provides as follows:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been

convicted on that plea by a subordinate court, except as to the extent or legality of the sentence”

Before I embark on the analysis of the grounds the appellant raised, I wish to point out that substantive charge was incorrectly drawn for it referred to a non existence section. It ought to have read:

"...Contrary to section 3(1) as read with section 3 (3)..."

Since the appellant understood clearly the charge, no miscarriage of justice occurred.

The appellant pleaded guilty to the offence of rape. I will therefore endeavor to find out if the law was complied with.

On 19.7.2011 before the plea was taken, the appellant told the court that he understood Borana language. The record indicates that the interpretation was done by Abdulrahman into Borana language. The contention by the appellant that he had difficulties in communications is therefore baseless.

The appellant was arrested on 17.7.2011 which was on a Sunday and was taken to court on 19.7.2011, a Tuesday. Given the terrain of the place and the distance to court, nobody can conclude that he was held long by the police to coerce him to plead guilty. He never raised any complaint with the trial court over this allegation. This ground lacks merit.

Though the appellant contends that at the time of the trial he was 17 years, during his mitigation he did not raise the issue of his age. Had he done so, the court may have ordered for age assessment. At the time of hearing this appeal, the appellant appeared to me to be in his late twenties. This therefore means that at the time of the trial he was in his early twenties. In any case he did not make any attempt to establish his claim. The ground on age must therefore fail.

Section 3 of the Sexual Offences Act provides as follows:

3. Rape

(1) A person commits the offence termed rape if—

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

The appellant was sentenced to the minimum sentence provided by the law. There is therefore no illegality in the sentence which can make me interfere with the sentence meted out by the trial magistrate. Consequently, the appeal is dismissed and the appellant shall serve the sentence meted out by the learned trial magistrate.

DATED at Marsabit 2nd day of March 2016

KIARIE WAWERU KIARIE

JUDGE