



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 150 OF 2014

JULIUS MATE KIVOTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.104 of 2013 of the Principal Magistrate's Court at Tigania by Hon. D.Wangeci – Ag. Senior Resident Magistrate)

JUDGMENT

The appellant, **JULIUS MATE KIVOTO** , was Charged with an Offence of rape contrary to section 3(1) (a) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 4th August 2013 at [Particulars Withheld] Market in Tigania East District of Meru County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of **T N** without her consent.

The appellant was tried and convicted. He was sentenced to serve 10 years imprisonment. He now appeals against both conviction and sentence.

The appellant raised two grounds of appeal as follows:

- 1.That the learned trial magistrate erred in relying on the demeanour of the complainant to conclude that she had no capacity to give consent.
- 2.That the learned trial magistrate failed to appreciate that the sexual intercourse was consensual.

The facts of the prosecution case were briefly as follows:

After the complainant and the appellant had taken a meal in a hotel at [Particulars Withheld] market and which the appellant paid for, he asked her to pay back by sexual favour but she refused. He then dragged her into his house where he raped her.

The appellant contended that the complainant was his lover and he alluded to consensual sexual intercourse.

The state partially (whatever this meant) opposed the appeal and was represented by Mr. Musyoka, the

learned counsel.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

In her judgment the learned trial magistrate made the following opinion:

"... am not an expert in medicine but from my observation, I opined that the complainant was suffering from some form of mental illness

It is for this reason that I find that the complainant was not in any way possessed with the understanding and knowledge and was incapable of giving consent or exercising any judgment on the matter."

With all due respect to the learned magistrate this was a wrong approach. An opinion from mere observation can be misleading. It is only an expert who can make such a finding. When the complainant testified and she was doubtful of her mental capacity, the right procedure would have been to refer her for an assessment.

The learned trial magistrate erred in claiming in her judgment that the appellant said the complainant was his wife. My perusal of the record show that the appellant said that the two were in a courtship relationship.

The narration by the complainant of the events raises more doubts than support the prosecution case. The incident started in a public place. One wonders why she never raised an alarm or why she did not sustain any physical injuries if indeed she was dragged to the house of the appellant.

When a witness says something which is self contradictory or is contradicted by other witnesses, it becomes difficult where to draw the line of divide between the truth and untruths. In the instant case the complainant did exactly that. She testified that when the police went for her in the appellant's house, they found her stark naked and that it was the police who dressed her. All the other witnesses including the police officers who went to the appellant's house testified that they found her sitting on a bed and was dressed. It is only her shoes that she put on before they left with her. About such a witness the Court of Appeal case of **NDUNGU KIMANYI -V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JJA held:

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

From the foregoing analysis of evidence, it is clear that the evidence point more to a consensual sexual intercourse than rape. The onus was on the prosecution to prove that the complainant lacked capacity to give consent and that any reasonable man could have noticed the same. This onus was not discharged. Consequently, the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru 10th day of May 2016

KIARIE WAWERU KIARIE

JUDGE