

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 14 OF 2014

Charles Ndirangu Kibue.....Appellant

Versus

Republic.....Respondent

(Appeal against Judgement, sentence and conviction in Criminal case number 597 of 2013, R vs Charles Ndirangu Kibue at Mukurweini, delivered by W. Kagendo, SPM, on 27.1.2014).

JUDGEMENT

This being a first appeal this court has a duty to make a complete and comprehensive appreciation of all vital features of the case, and to scrutinize the evidence on record with care and caution and also to see that justice is appropriately administered. It is also a duty of this court to weigh the materials and to consider the evidence objectively and dispassionately^[1] and arrive at its own conclusions.

The appellant was convicted of the offence of rape contrary to Section **3 (1) (a) (b) (3)** of the Sexual Offences Act^[2] and sentenced to **20 years imprisonment**. The particulars of the offence were that on the 28th day of December 2013 at [particulars withheld] Village in [particulars withheld] sub-county within Nyeri County, intentionally and unlawfully caused his penis to penetrate the vagina of **R W M** without her consent. The appellant also faced an alternative count of committing an indecent act with an adult contrary to Section **11 (a)** of the Sexual Offences Act.^[3]

The prosecution called a total of five witnesses whose evidence is summarized below. **PW1**, who was the complainant narrated how the complainant confronted her as she came from a river, pulled her into bushes, removed her pants and raped her. **PW2**, a brother to the complainant informed the court that **PW1** was mentally challenged, a problem she had since childhood while **PW3** testified that he was in charge of community policing in the area, that he escorted the complainant to the police station. He also assisted the police in arresting the appellant. **PW4**, a Medical officer confirmed that the complainant had a degree of mental retardation, and classified the injury as rape. **PW5** was the investigating officer and he preferred the charges against the appellant after concluding his investigations.

After evaluating the evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence. The accused elected to give unsworn evidence and raised the defence of consent. He insisted that it was not the first time he had sex with the complainant and that he had a relationship with her.

The learned magistrate analysed the evidence of all the witnesses and concluded that the appellant was guilty as charged and convicted him and sentenced him to **20 years imprisonment**. There was no finding on the alternative count.

Aggrieved by the above verdict, the appellant appealed to this court raising **6** grounds in his supplementary petition of appeal. I note that the appellant did not dispute having sex with the complainant but insisted that there was consent. In my view, the grounds of appeal can be conveniently reduced into two, namely **(a)** whether the defence of consent was proved, **(b)** whether the sentence is excessive in the circumstances.

The appellant handed in written submissions and argued his grounds and concluded by asking for a

verdict that will lead to his acquittal. The learned prosecution Counsel Miss Chebet urged the court to uphold the conviction and sentence. She argued that there was overwhelming evidence to support both the conviction and sentence.

I have carefully considered the submissions made by the appellant and the prosecution counsel. I have also reviewed the evidence on record and the relevant law. Section 3 (1) of the sexual offences Act provides that 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;*
- (d) the consent is obtained by force or by means of threats or intimidation of any kind.*

3 (2) *In this section the term ‘intentionally and unlawfully’ has the meaning assigned to it in section 43 of this act.*

In this regard **Sections 42 and 43(1)** of the **Sexual Offences Act, 2006** are relevant and they provide as follows:-

42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

Section **43(1)** of the Sexual Offences Act^[4] outlines what constitutes intentional and unlawful acts. That is to say:-

- a. in any coercive circumstance.*
- b. under false pretence or by fraudulent means; or*
- c. in respect of a person who is incapable of appreciating the nature of an act which causes the offence.*

Section **43(4)(e)** further provides that:-

The circumstances in which a person is incapable in law in appreciating the nature of an act referred to in Subsection 1 include circumstances where such a person is, at the time of commission of such an act –

- (e) mentally impaired.*

As such if Section **43** is read in isolation its implication is that a person who is mentally challenged cannot consent to appreciate the nature of an act that causes an offence under the act. But again, Section **44** sets out instances where court can make evidential presumptions about consent to reach a finding that the complainant did not consent to a sexual act. The said section provides as follows:-

- (1) If in proceedings for an offence under this Act, it is proved-*
 - a. That any of the circumstances specified in subsection (2) existed; and*
 - b. That the accused person knew that those 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 that 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.

(2) The circumstances are that:-

(a) any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the offence or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the accused was not, unlawfully detained at the time of the commission of the act;

(d) the complainant was asleep or otherwise unconscious at the time of the commission of the act;

(e) because of the complainant's disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the commission of the act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the act is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began."

The complainant gave a detailed account of what transpired on the material day. Her evidence was that the appellant pulled her to the nearby bush, that the appellant removed her under wear and that she screamed. This evidence was not disputed, but instead the appellant insisted that there was consent. The complainant stated that she informed a neighbour that she had been raped and this raises doubts on the alleged consent. If at all there was consent as alleged, then it would not have been necessary for her to inform her neighbour or even report to the police.

In the case of *Republic vs Oyier*,^[5] the court of appeal held that:-

"the lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not."

As for the mental element required in rape, the prosecution is required to prove that the complainant physically resisted or, if she did not, her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. Where a woman yields through fear of death or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will, nor is it any excuse that she consented after the fact.^[6] In the present case, there is evidence that the complainant screamed, that the complainant was somehow mentally retarded and that she reported to a neighbour that she had been raped.

One of the central elements of the offence of rape is the question of whether the complainant consented to the penetration by an accused. Additionally, it should also be noted that the complainant must also have the capability to consent as well. Chief Justice King^[7] said:-

“The law on the topic of consent is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. A previous refusal may be reversed thereby rendering the act consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.”

Consent to sex matters because it can transform coitus from being among the most heinous of criminal offenses into sex that is of no concern at all to the criminal law. Unfortunately, the normative task of making the law of rape more just is commonly impaired by conceptual confusion about what “consent” means. Consent is both a single concept in law and a multitude of opposing and cross-cutting conceptions of which courts and commentators tend to be only dimly aware. Thus, consent can be a mental state on a woman’s part, an expression by her, or both; it can consist of facts about a woman’s mental state or expressive conduct that do not necessarily constitute a defense to rape, or only such facts as do constitute a defense to rape; and it can consist of facts about a woman’s mental state or expressive conduct, or a legal fiction of such facts. In so far as we are unaware of the ways in which this conceptual framework structures the way we think about consent, we risk confusing ourselves and others in undertaking to make the law of rape more just. Some examples are **(1)** confusion as to whether the defense of consent ought to be deemed to consist of a mental state on a woman’s part or an expression; **(2)** confusion about the relationship between consent to sexual intercourse and resistance to it; and **(3)** confusion about the relationship between force and non-consent.[\[8\]](#)

Consent possesses what Heidi Hurd calls the normative “magic” to transform sexual intercourse from being conduct that is heinousness in to being conduct that is criminally innocuous.[\[9\]](#) Consent matters because to locate consent with respect to sexual intercourse is to locate the normative boundary between criminal rape and non-criminal sex.

The word rape is derived from the Latin term *rapio*, which mean ‘to seize’.[\[10\]](#) Thus rape literally means a forcible seizure. It signifies in common terminology, “as the ravishment of a woman without her consent, by force, fear, or fraud” or “the carnal knowledge of a woman by force against her will.” In other words, rape is violation with violence of the private person of a woman.

A man is guilty of rape if he commits sexual intercourse with a woman either against her will or without her consent as enumerated under the Section 43 cited above. The sex must be against the will of the complainant. The word ‘will’ implies the faculty of reasoning power of mind that determines whether to do an act or not. The expression ‘against her will’ would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition.[\[11\]](#) The essence of rape is the absence of consent. Consent means an intelligent, positive concurrence of the ‘will’ of the woman. The policy behind the exemption from liability in the case of consent is based on the principle that a man or a woman is the best judge of his or her own interest, and if he or she decides to suffer a harm voluntarily, he or she cannot complain of it when it comes about.

Consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific sexual act. Thus, to absolve a person of criminal liability, consent must be given freely and it must not be obtained by fraud or by mistake or under a misconception of fact. This clause operates where a woman is unresponsive whether because of the influence of drink or drugs or any other cause, or is so imbecile that she is incapable of giving any rational consent. Consent of the woman has to be obtained prior to the act.

The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the woman. A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent may be either expressed or implied depending upon the nature and circumstances of the case. However, there is a difference between consent and submission. An act of helpless resignation in the face of inevitable compulsions is not consent in law.

I have carefully considered the evidence tendered by the prosecution and particularly the complainant and the defense raised by the appellant and I find nothing to show that the sexual encounter was consensual. It is also not disputed that the complainant had a degree of mental retardation. I find that the learned Magistrate arrived at the correct findings and that the conviction was proper and was supported by the law and the evidence. I accordingly uphold the conviction.

On the sentence, Section 3 (3) of the Sexual Offences Act^[12] provides that 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 learned magistrate sentenced the appellant to twenty years.

Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously.^[13] In *Shadrack Kipchoge Kogo vs Republic*,^[14] the court of appeal stated:-

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

The general principles the Court adopts in an appeal relating to sentence as stated by Nicholas J in the South African case of *R v Rabie*^[15] are the following:

“ 1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal (a) should be guided the principle that punishment is “preeminently a matter for the discretion of the trial Court”; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised,

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”

The Supreme Court of India in *State of M.P. vs BabluNatt*^[16] stated that ‘the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.’ In *Alister Anthony Pareira vs State of Maharashtra*,^[17] the court held that:-

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances”

I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, and the scar the incidence left in the life of the victim. I have also considered the purpose of sentencing and the principles of sentencing under the common law.^[18] I note that the minimum sentence provided under the law is **ten years** but can be enhanced to life imprisonment where there are aggravating circumstances. The complainant was mentally challenged.

As for the sentence, I have considered that the complainant was somehow mentally retarded which to me is an aggravating factor and considering the nature of this case, I find that there is no reasonable basis for me to interfere with the sentence.

Accordingly, I dismiss this appeal on both conviction and sentence.

Signed, Delivered and Dated at Nyeri this 7th day of June 2016

John M. Mativo

Judge

[1] K. Anbazhagan v. State of Karnataka and Others, Criminal Appeal No. 637 of 2015

[2] No. 3 of 2006

[3] Ibid

[4] Supra

[5] [1985] KLR 353

[6] See James Nganga Njau vs Republic, High Court Criminal Appeal number 298 of 2009, Nairobi

[7] *Question of Law Reserved on Acquittal (No 1 of 1993)*

[8] Peter Westen,* Some Common Confusions About Consent in Rape Cases, Ohio State Journal of Criminal Law, Vol. 2, Page 334. * Professor of Law, Michigan Law School.

[9] Heidi M. Hurd, *The Moral Magic of Consent*, in 2 LEGAL THEORY 121 (1996).

[10] **Soumya Singh Chauhan, UIILS, Chandigarh**, Section 375: Analysis of Provisions Relating to Rape, <http://www.lawctopus.com/academike/section-375-analysis-of-provisions-relating-to-rape/>

[11] *State of Uttar Pradesh v. Chottey Lal* {2011} 2 SCC 550.

[12] Supra

[13] See Makhandia J (as he then was) in Simon Ndungu Murage vs Republic, Criminal appeal no. 275 of 2007, Nyeri.

[14] Criminal Appeal No. 253 of 2003 (Eldoret), Omolo, O'kubasu & Onyango JJA)

[15] 1975(4) SA 855 (A) at 857DF

[16] {2009} 2S.C.C 272 Para 13

[17] {2012} 2 S.C.C 648 Para 69

[18] Regina vs MA {2004} 145A