



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 69 OF 2014

B M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR. 2658/10 at Embu Chief Magistrate's Court by Hon. P.C. Biwott - PM on 27th November, 2016)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 10 years in respect of the offence of rape contrary to section 3 (1) (a) as read with section 3 (3) of the Sexual Offences Act No. 3 of 2006, which was imposed upon him by the court of the Senior Principal Magistrate at Embu on 27th November, 2014.
2. Ms Matere for the respondent has conceded the conviction and sentence recorded against the appellant.
3. The appellant was convicted on the eye witness evidence of the complainant (PW 1, name withheld) who was a sister in law to the appellant. The evidence of the complainant was that the appellant was sent by the father of the complainant to take to her a calculator which had been bought by the father of the complainant. Upon arrival, the appellant gave her the calculator. In the meantime the complainant went to prepare tea for the appellant. The children who were with the complainant went outside the house to listen to the music which was being played by the motor cycle of the appellant. It is her further evidence that the appellant locked the door of the house and proceeded to rape her.
4. Furthermore, the complainant testified that the appellant was unable for the first two times to have sexual intercourse with her. However, he did manage when he tried the third time. It is her further evidence that she felt a lot of pain as a result of which she bled. The rape according to the complainant took place on the floor of the house.
5. She reported the rape to her sister who in turn informed their father, J N S. He told his daughter *name withheld* and her mother to report to Itabua police station as a result of which the appellant was arrested and charged with this offence. The complainant's father denied knowing that the appellant was a friend to his daughter (the complainant).
6. The complainant was taken for medical examination and was found to have no injuries. The doctor who had examined the complainant namely Dr Kinyanjui had resigned from the Government service and his report was put in evidence as Pex 4 (a) by Dr Coremo Ginda (PW 3). According to the doctor's report, there were no injuries on the lower limbs of the complainant. There were also no injuries on the genitalia. The doctor also found that there was no presence of any discharge from the private parts of the

complainant. Upon cross-examination, the doctor found that there was penetration of the female organ of the complainant. The doctor testified that after carrying out a pregnancy test and an HIV test, he found both to be in the negative. The doctor found that the hymen of the complainant was perforated.

7. The doctor further testified that the breaking of the hymen did not mean that the complainant had sexual intercourse because it can be broken by several causes. He made it clear that the hymen may also be perforated because of rape or defilement. Finally, the doctor concluded by testifying that the doctor who had originally examined the complainant did not form an opinion as to the cause of the perforation.

8. Upon being placed on his defence, the appellant gave sworn testimony. He testified that the complainant was his sister in law and that she was her friend. He further testified that his wife is the elder sister of the complainant. He also testified that the complainant consented to the sexual intercourse. He denied raping the complainant. The appellant called his wife, B W (DW 3). She testified that in 2010 she had rumours that her sister the complainant had a relationship with the appellant when she was admitted in hospital. Upon her being discharged, she confronted the husband and the sister to confirm whether they had such a relationship. Her evidence was that they admitted to have had a relationship for the period she was in hospital. She further testified that the complainant never quarrelled with the appellant.

9. The appellant has raised 7 grounds of appeal. In ground 1, he stated the unchallengeable fact that he did not plead guilty. In ground 2, he faulted the trial court both in law and fact for failing to consider that the clothes of the complainant were not produced in court to confirm that they were blood stained. In ground 3, the appellant faulted the trial court in law and fact for believing their evidence which was "impeachable" under section 163 (1) (c) of the Evidence Act (Cap 80) Laws of Kenya. In ground 5, the appellant faulted the trial court in law and fact by failing to consider that important witnesses were not called to testify in court and to be subjected to cross-examination. In ground 6, the appellant has faulted the trial court in law and fact by relying on the uncorroborated and inconsistent evidence of the complainant. And finally in ground 7, the appellant has faulted the trial court for rejecting his defence without good reasons, which is in violation of section 169 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

10. Miss Matere for the respondent has conceded this appeal on the ground that the judgement of the trial court did not comply with the provisions of section 169 of the Criminal Procedure Code. It did not give reasons for rejecting the defence case. The 2nd ground for conceding the appeal is that the trial court relied on the single evidence of the complainant to convict the appellant without warning itself. The 3rd ground for conceding the appeal is that the complainant was not a truthful witness in view of the evidence of her sister (PW 3) who testified that the appellant and the complainant had never quarrelled.

11. Mr Edie Njiru supported Ms Matere in conceding the appeal. He submitted that the examining doctor did not find any injuries on the body of the complainant. According to him, this showed that the complainant was not raped.

12. This is a first appeal. As a first appeal according to *Peters v. Sunday Post Ltd (1958) EA 424*, I am required to reassess the entire evidence tendered at trial and come to my own independent conclusions. I have done so. I find that the complainant (PW 1) was not a credible witness. This is clear from the medical evidence of Dr Choremo Ginda who found no injuries on the body of the complainant and in particular the doctor did not find any injuries in the private parts of the complainant. I further find that the absence of injuries in the private parts and in the body of the complainant generally shows that the sexual intercourse between the complainant and the appellant was by consent. The defence evidence of the appellant ought to have been believed, which was to the effect that the sexual intercourse was by consent. This was further supported by the evidence of the complainant's sister, B W (DW 3) who testified that the complainant and the appellant had never quarrelled. In the circumstances, I find that the judgement of the trial court was in violation of section 169 of the Criminal Procedure Code.

13. I find that Ms Matere properly conceded the appeal. It is equally important to point out that the court was not bound by the concession of the appeal by prosecution counsel, but reached that conclusion after a careful analysis of the entire evidence.

14. The upshot of the foregoing is that the appeal of the appellant is unsafe and is not supported by the evidence tendered at trial. It is hereby allowed. The conviction and sentence are hereby set aside.

15. The appellant is hereby ordered to be released unless otherwise held on other lawful warrants.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **1st** day
DECEMBER 2016

In the presence of Ms. Njuguna holding brief for Mr. E. Njiru and Ms. Mbae holding brief for Ms. Matere for the respondent

Court clerk Njue.

J.M. BWONWONGA

JUDGE

01.12.16