



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 40 OF 2014

EPHANTUS KINYUA NJUE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Sentence and Conviction by the Senior Principal Magistrate Embu in Criminal Case No. 28 of 2014 on 9th July, 2014)

J U D G M E N T

The appellant was convicted of the offence of rape contrary to Section 3(1)(a) as read with 3(3) of the Sexual Offences Act No. 3 of 2006 and sentenced to ten (10) years imprisonment. He was acquitted of the alternative charge of committing an indecent act with an adult contrary to Section 11 of the same Act. Being dissatisfied with the judgment of the Embu Senior Principal Magistrate, the appellant lodged this appeal.

The appellant in his petition of appeal contends that his rights for fair trial were violated in that he was not given a chance to cross-examine the complainant; that the court based its conviction on the evidence of members of one family; that he was a stranger in the area and was framed by the relatives of the complainant and eventually attacked by a mob; that he was not examined by the doctor in order to prove he committed the offence. In his submissions, the appellant raised a new ground to the effect that the charge was defective.

The facts of the case were that on the 6/1/2014, the mother of the complainant left home under the care of her brother PW1 for she was deaf and dumb. PW1 was at home when he was informed by a neighbour that the complainant had been seen entering a nearby coffee plantation with a man.

PW1 called PW2 and both proceeded to the coffee farm to look for the complainant. PW1 found the complainant in the plantation with the appellant having sexual intercourse. He raised alarm and the appellant was arrested as he ran down the valley towards a nearby river. A mob gathered at the scene beating him up. He was later rescued by PW4 the area assistant chief and taken to Manyatta Police station where he was held before being charged with the offence.

It was the evidence of PW1 and PW5 the brother and the mother of the complainant that she was deaf and dumb. She could neither hear nor talk. The doctors who examined the complainant PW3, PW7 and PW8 confirmed that she was not only deaf and dumb but also mentally retarded.

PW3 Dr. J. Thuo the medical officer Embu provincial hospital testified that the complainant was taken to him by police officers from Manyatta police station for mental assessment because it was believed she was mentally retarded. The doctor found that the complainant was incapacitated for she could neither

hear nor speak. She could not express herself and was below normal intelligence. PW3 concluded the complainant was mentally retarded and produced his report in evidence.

PW7 Dr. Godfrey Njiru and PW8 Dr. Christine Marete assessed the age of the complainant as over 24 years. On examination which included laboratory examination, a tear was found on the lateral wall of her genitalia and the hymen was perforated. The doctors formed the opinion that penetration had taken place.

PW6 was harvesting a banana in her farm on 6/1/2014 at around 9.00 a.m. testified that she saw the complainant walking on the road. He then saw the appellant whom he knew well also walking ahead of the complainant. The two persons then disappeared into the bush and she could not see them again. PW6 knew the complainant well. PW6 went to the complainant's home and reported to her brother PW1 what he had seen. This information prompted PW1 to go looking for his sister at the coffee plantation near where PW6 had seen her with a man.

The accused gave an unsworn statement of defence. He said that on the 6/1/2014, he went to a coffee farm near the road to cut grass for his cow. He saw the complainant passing by and her two brothers following her. One of the the brothers screamed attracting the attention of members of public who cornered him and attacked him. He was later rescued by the assistant chief and arrested. He was taken to Manyatta police station where he was charged with the offence. He maintained his innocence against the charges.

During cross-examination of PW1, the appellant only put two questions to the witness only in regard to whether he had seen him before the incident and what time it was when the witness saw him. For PW2, the appellant put only one question as to where he saw him running away. As for PW6, the appellant put to her just about three questions. Although the appellant alleged he was framed by the witnesses, he did not raise the issue during cross-examination.

PW5 the mother of the complainant did not witness the incident. In his defence he was silent on the issue of framing up. It can only be concluded from this analysis that the issue of framing the charges was an afterthought which was raised on appeal. I find no merit in respect of this ground.

The appellant alleged in his submissions stated that the charge was defective for two reasons; firstly that it was framed partly in the words "without her consent". Secondly the appellant contended that PW6 testified that he saw complainant walking towards the scene voluntarily followed by the appellant. The appellant therefore argues that if it is the complainant who took herself to the farm, it was a misdirection by the magistrate to find that she did not consent to the act of rape.

The charge alleged that the appellant "*intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of CWK without her consent*". The charge includes all the ingredients of the offence of rape contrary to Section 3(1) of the Sexual Offences Act. The words "intentionally" and "unlawfully" and "without her consent" were essential to describe the charge the appellant was facing. The charge was drawn in strict compliance with Section 134 of the Criminal Procedure Code and it is therefore not defective.

The complainant was deaf and dumb and also mentally retarded as confirmed by the three doctors (PW3, PW7 and PW8) who examined her. PW3 produced the mental assessment report which confirms that she was more than an imbecile and incapable of giving consent to the act of rape even though she was over 18 years of age. This clearly explains that the lack of consent was proved medically by the doctors and the witnesses who knew her (PW1, PW2, PW5 and PW6). The magistrate was correct to find that there was no consent to sexual intercourse on the part of the complainant.

It was contended that the appellant's constitutional rights of fair trial were violated because he did not cross-examine the complainant. The trial magistrate explained in his judgment what transpired. He said:-

"At the preliminary stage of this case, the court brought a sign language interpreter for the

complainant but found that she did not appreciate sign language. PW3 confirmed to the court that the complainant was not only deaf by also mentally retarded. For her dumbness therefore this court could only observe the complainant and noted that she looked well above 18 years of age”.

The proceedings of 13/3/2014 confirm that a sign interpreter by the name Joseph Muriithi Nyaga was availed by the court. He told the court:-

“I have interacted with complainant. ... in the presence of he mother and family outside court No. 2. I found that she does not understand Kenyan sign language”.

The court did all that was necessary in the circumstances of the case. The complainant could not hear or speak and neither could she understand sign language. The doctors found her physically and mentally incapacitated. As such, she was incapable of testifying in court. PW1 her brother who witnessed the incident and PW6 who saw the complainant and the appellant disappear into the bush testified and were cross-examined by the appellant. The issue of his constitutional rights to a fair trial does not arise. He was convicted on evidence which was fully tested as provided by the law. There was no evidence from the complainant for the appellant to cross-examine her on.

The appellant contended that he was a stranger in the area which fact was not raised in his defence. Furthermore, an offence may be committed by a stranger on a certain location or by one who is a resident of the area. The most important thing is for the prosecution to tender evidence to sustain a conviction. PW6 said he knew the appellant well because he was her brother in law although she did not say where he lived.

It was not necessary for the accused to be medically examined. The nature of the charge was such that the only medical evidence required was in respect of the complainant. The medical evidence tendered before the court was sufficient to corroborate the evidence of the key witnesses.

On perusal of the judgment, I find that the defence of the appellant was fully considered by the court and rejected as not being plausible which finding was correct. The defence puts the accused at the scene of crime, with the victim and subsequently brings the two key witnesses there and the attack by the mob followed by the rescue by PW4. The appellant did not explain satisfactorily what he was doing there at the time. He said he was cutting grass for his cow. The magistrate correctly found that no already cut grass or cutting tool was found at the scene. Even assuming that the cutting tool was recovered, that does not mean that the appellant could not commit the crime while on a mission to cut grass. There was direct and circumstantial evidence from PW1, PW2, PW6 and other witnesses against the appellant which coupled with the medical evidence, this was sufficient to convict the appellant with the offence he was facing.

I find that the trial magistrate reached the right conclusion that the prosecution proved the case against the appellant beyond any reasonable doubt. The sentence imposed was lawful under Section 3 of the Act. I find that this appeal has no merit and it is dismissed accordingly. The conviction and sentence are hereby upheld.

I hereby so order.

DELIVERED, SIGNED AND DATED AT EMBU THIS 4TH DAY OF FEBRUARY, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Marete for the State

The Appellant

F. MUCHEMI

JUDGE