



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, SHAH, J.J.A & BOSIRE AG. J.A.)
CRIMINAL APPEAL NO. 84 OF 1996

BETWEEN

GILBERT NDUNGU KIMANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court
of Kenya at Nairobi (O'kubasu J.) dated 7th August,
1996
in
H.C.CR.A. NO. 334 OF 1996)

JUDGMENT OF THE COURT

The appellant was convicted after a trial before a Subordinate Court of the offence of rape contrary to S.140 of the Penal Code and was thereafter sentenced to an imprisonment term of 4 years. His first appeal to the superior court was dismissed. The appellant now appeals to this Court on a question of fact. There were concurrent findings of both courts below that the complainant C did not consent to the sexual act with the appellant. The appellant admitted he had sexual intercourse with the complainant.

There is clear evidence on record that the complainant, a cripple was forced by the appellant to have the sexual act. Being a cripple she would not possibly resist the appellant. There is evidence on record that she screamed, and her mother who was in a separate building heard her cries and came to her help. By the time she arrived the appellant had escaped. His jacket and belt were found on the complainant's bed. Furthermore medical evidence shows that the complainant bled as a result of the sexual act. The circumstances clearly exclude the possibility that the complainant consented to the act.

Clearly the appeal against conviction has no merit. The new ground by the appellant is raising that the complainant bled because she was aborting is an after thought having not been raised before the both courts below. We have no basis for disturbing the conviction.

As for the sentence the penal section carries mandatory hard labour which was not ordered by the trial court. In the circumstances considering that we consider the sentence of imprisonment to be appropriate we affirm it but impose hard labour in addition.

In the above circumstances we dismiss the appellant's appeal in its entirety. Order accordingly.

Dated and delivered at Nairobi this 15th day of January, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR