



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 7 OF 2019**

**BETWEEN**

**BENSON KALOMOT.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from original conviction and sentence by Hon. V. O. Adet, SRM dated 23.3.2019 in Kapenguria PMC Criminal Case (S.O.) No. 48 of 2018)***

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. This appeal arises out of the judgment of Hon. V. O. Adet, SRM dated 23.3.2019 in Kapenguria PMC Criminal Case (S.O.) No. 48 of 2018 in which the appellant was found guilty, convicted and sentenced to serve 10 years imprisonment for the offence of ***rape contrary to Section 3 (1) (a) (b) of the Sexual Offences Act No. 3 of 2006***. The particulars of the offence are that on the 28<sup>th</sup> day of October 2018 at around 1.00am in West Pokot County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of GT without her consent.

2. In the alternative the appellant was charged with committing an ***indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act, No. 3 of 2006***. It was alleged that on the 28<sup>th</sup> day of October 2018, at around 1.00am within West Pokot County, he intentionally touched the vagina of GT with his penis against her will.

3. Following the plea of not guilty, the prosecution called five witnesses, namely Kennedy Kipchumba (Kennedy) who testified as PW1, GT (the complainant) as PW2 and Emmanuel Lemu (Emmanuel) as PW3. Elias Pkemoi (Elias) testified as PW4. The last witness was number 11218 PC Tanui William (PC Tanui).

4. At the close of the prosecution case, the appellant was found to have a case to answer and placed on his defence. He gave sworn evidence but he did not call any witnesses.

**The Appeal**

5. Being dissatisfied with both conviction and sentence, the appellant preferred this appeal on nine substantive grounds of appeal, the gist of which is that:-

- a) *There was no evidence by the prosecution showing that the complainant suffered from mental challenges.*
- b) *There was no corroboration by the prosecution witnesses of the P3 form and therefore the case against the appellant was not proved to the required standard.*
- c) *Penetration was not proved as required by law.*
- d) *The age of the complainant was not proved beyond reasonable doubt.*
- e) *The complainant's defiler was not properly and positively identified.*

6. The appellant prays that his appeal be allowed.

7. This is a first appeal. In that regard, this court is under a duty to carefully reconsider and re-evaluate all the evidence on record with a view to reaching its own conclusions in the matter, save to remember that it has no chance of seeing and hearing the witnesses who testified during the trial and to make an allowance for it. See *Pandya versus Rex [1957]EA 336*.

#### **The Prosecution Case**

8. The complainant testified that on 28.10.2018, at around 1.00am, she was asleep at a newly built church in Ptokou. She said she had taken a little liquor. While she slept, someone (who was later identified as the appellant) crept into the church and held her by the neck and also injured her on the arm. The person removed her pant and shirt before raping her, without the use of a condom. She tried hard to resist as she also screamed. Some people from the complainant's home rushed to the scene where they found the appellant on top of the complainant and apprehended him. The appellant was taken to the police while the complainant was taken to hospital

9. When the complainant got to Sigor Sub-County Hospital, she was attended to by Kennedy, a Clinical Officer at the said hospital. On examination of the complainant, Kennedy confirmed that the complainant was a mentally challenged person though she was oriented to places, time and person. Kennedy examined her under Med.Ref 14687 and found that there were bruises on the left elbow region. The lower limbs also had bruises on the knees and some mud stains. There were no other bruises although the complainant's hymen was broken. A urinalysis test revealed no spermatozoa since the complainant visited the hospital 24 hours after the commission of the alleged offence. Pus cells were however visible, which was an indication of an infection. The test for HIV was negative, so was VDRL. Kennedy produced the P3 form as Pexhibit 1.

10. Emmanuel testified that, as he walked along the road from Kator at around 1.00am on 28.10.2018 and as he approached a Catholic Church he heard the voice of a woman screaming. The woman was the complainant as Emmanuel eventually established. Emmanuel summoned Elias for reinforcement as he entered the church where the appellant was found lying on top of the complainant. Emmanuel testified that the appellant's trouser had been lowered to the knees while the complainant's skirt was pulled to the chest. According to Emmanuel, the complainant's pant was off. Emmanuel also testified that both the appellant and the complainant were well known to him and that he saw them clearly with the help of the moonlight.

11. In cross examination, Emmanuel testified that he was coming from a drinking spree, though he claimed he was not drunk.

12. Elias testified that while he was asleep in his house at around 1.00am on 28.10.2018, he heard a knock on the door of his house. It was Emmanuel seeking his help following screams of a woman coming from the nearby church. Together with Emmanuel, Elias rushed to the church where they found the appellant in the act and arrested him. That the appellant was on top of the complainant with his trousers lowered to the knees while the complainant's clothes were halfway up towards the chest.

13. In cross-examination, Elias stated that he had known the appellant for a long time and that he did not have any disagreement with him [appellant]. Elias further testified that when Emmanuel went to call him, he did not tell him. That he [Emmanuel] had

identified the person who was struggling with the complainant.

14. PC Tanui testified that he received a report of the incident from the complainant at around 10.00am on 28.10.2018. PC Tanui confirmed that the complainant was a mentally challenged person. PC Tanui issued a P3 form to the complainant after recording statements from witnesses. PC Tanui later visited the scene at the Ptokou Catholic Church. He also testified that the appellant was taken to the police station by members of the public.

### **The Defence Case**

15. In his sworn evidence, the appellant denied committing the offence. He alleged that he was arrested after the complainant alleged he had pushed her and she wanted money to go to hospital. He was thereafter arrested by a KPR officer and taken to Sigor Police Post where he was placed in cells before being taken to court. The appellant alleged that the case against him arose out of a land dispute in which he had acted as judge.

### **Submissions**

16. At the close of the hearing, both appellant and the prosecution made their final submissions. These submissions were considered by the learned trial magistrate before he passed his judgment. I have also read through the submissions for purposes of this judgment. I have also carefully considered the appellant's submissions made in support of the appeal.

17. The appeal was opposed on grounds that the evidence adduced by the prosecution proved the case against the appellant beyond any reasonable doubt. M/S Kiptoo, prosecution counsel urged the court to dismiss the appeal.

### **Issues for Determination**

18. The issues for determination are those set out under *section 3(1)(a) and (b) of the Sexual Offences Act, number 3 of 2006*. The prosecution in this case was under a duty to prove that the appellant intentionally and unlawfully committed an act which caused penetration and that he did so without the consent of the complainant. *Under section 2 of the Sexual Offences Act, number 3 of 2006*, penetration can either be partial or complete; and once it is established that there was no consent from the complainant, rape will have been established.

### **Analysis and Determination**

19. From the evidence on record, I am satisfied that the appellant who was well known to the complainant found her in the incomplete building, undressed her and raped her.. Both Emmanuel and Elias testified that when they heard the complainant's screams, they ran to her rescue and found the appellant in the act. The complainant, Emmanuel and Elias all testified that there was bright moonlight on that night of the incident and that they each saw the appellant clearly. Each one of them had known the appellant who was a neighbour for many years. Both Emmanuel and Elias also described the clothing which the appellant was wearing on the material night when they found him in the act. This confirmed their averments that they saw the appellant on that night and that the appellant was raping the complainant. The appellant did not dispute this piece of evidence.

20. According to Kennedy, the complainant was raped though no spermatozoa could be found. He explained that spermatozoa could not have been seen since the complainant went to the hospital some 24 hours after the incident.

21. With regard to consent the complainant testified that when the appellant grabbed her and started raping her, she resisted and screamed until Emmanuel and Elias came to her rescue. Clearly the complainant did not give any consent for the sexual assault on her by the appellant.

### **Conclusion**

22. In summary, I am satisfied that the case against the appellant was proved beyond reasonable doubt and there is therefore no merit in his appeal. Conviction was therefore safe.

23. As regards sentence, I do not find any reason to interfere with the same. The learned trial magistrate considered the appellant's mitigation before passing the sentence. In any event, it is my considered view that people like the appellant, who take advantage of the vulnerable in society should be shown no mercy.

24. The appellant's appeal on both conviction and sentence is hereby dismissed. Right of appeal within 14 days from the date of this judgment.

25. Orders accordingly.

**Judgment delivered, dated and signed in open court at Kapenguria on this 1<sup>st</sup> day of October, 2019**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of:-**

Appellant present in person

M/S Kiptoo for Respondent

Mr. Juma – Court Assistant



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