Case Number:	Criminal Appeal 17 of 2014
Date Delivered:	22 Sep 2014
Case Class:	Criminal
Court:	High Court at Migori
Case Action:	Judgment
Judge:	David Shikomera Majanja
Citation:	Wilson Morara Siringi v Republic [2014] eKLR
Advocates:	Ms Owenga, Senior Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.
Case Summary:	-
Court Division:	Criminal
History Magistrates:	D. K. Kemei
County:	Migori
Docket Number:	-
History Docket Number:	Criminal Case No. 681 of 2012
Case Outcome:	Appeal allowed
History County:	Migori
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 17 OF 2014

((FORMERLY KISII HCCRA NO. 61 OF 2013)

BETWEEN

WILSON MORARA SIRINGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 681 of 2012 at Senior Principal Magistrate's Court at Migori, Hon. D. K. Kemei, SPM dated on 12th July 2013)

JUDGMENT

1. The appellant, **WILSON MORARA SIRINGI**, was convicted of the offence of rape contrary to **section 3(1)(b)** and **(3)** of the ***Sexual Offences Act, 2006***. He was sentenced to serve 15 years imprisonment. The particulars of the offences were that on 5th December in 2012 at[Particulars Withheld]in Migori County, he intentionally caused his penis to penetrate the vagina of SMO without her consent.

2. He now appeals against the conviction and sentence. He has filed written submissions in which he challenges his conviction on two main grounds; that he did not rape the accused and that his alibi defence was plausible and well corroborated. The State asserts that the conviction and sentence are grounded on the evidence and that the prosecution proved its case beyond reasonable doubt.

3. The duty of the first appellate Court is to consider the evidence, evaluate it and come to an independent finding having regard to the fact that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

4. The prosecution called four witnesses to prove its case. PW 1, a brother-in-law of the complainant, PW 2, testified that PW 2, was *"mentally retarded"* and was taken to a traditional healer for treatment.

The traditional healer was a brother to the accused. On 5th December 2012, he was called and informed that PW 2 had been raped. He went to the home of the appellant and found her there seated on the bed without her skirt. He took her to Migori Hospital but as the doctor's were on strike, he took her to St. Joseph's Mission Hospital. Later on he reported the matter to the police.

5. PW 2, the complainant testified that she was 34 years old and that she lived PW 1 who had married her sister. She stated that she knew the accused as he lived where she was being treated. She stated that the appellant asked her if she could be his wife and that he would pay her medical bill. He also told her he would give her money if they slept together. She also stated that PW 1 asked her why she had gone to the accused home and that he would beat her. She admitted the PW 1 found her seated on the bed and took her to hospital. She stated that she had never slept with a man.

6. PW3, a clinical officer at Migori District Hospital, produced the Medical report on behalf of the Doctor who examined PW 2. He found her to be mentally unstable. He conducted a vaginal examination which revealed a foul smell plus vaginal discharge. The hymen was broken and the external genitalia was tender. He concluded that she had had sexual intercourse.

7. PW4, the investigating officer, stated that PW1 reported that PW2 had been raped on 5th December 2012 at about 7 pm. He gave him a P3 form and arranged to arrest the appellant.

8. In order to prove the offence of rape, under **section (3)** of the ***Sexual Offences Act, 2006*** the prosecution must prove the following:

1. The accused intentionally and unlawfully commits an act which causes penetration into his or her genital organs.

2. The other person does not consent to penetration; or

3. The consent is obtained by force or by means of threats or intimidation of any kind.

9. From the evidence, I have outlined above, it is clear that the appellant had sexual intercourse with PW 2. The testimony of PW 2 was clear that she knew the appellant. PW 1 confirmed that he found PW 2 in the appellant's house. The evidence of PW 2 was corroborated by the medical evidence which proved that sexual intercourse took place. I therefore find and hold that penetration was proved.

10. The charge against the appellant was that there was penetration without the consent of PW 2. The main issue in this appeal is whether lack consent as an element of rape was proved by the prosecution. 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.

43.(1) An act is intentional and unlawful if it is committed—

(a) in any coercive circumstance;

(b) under false pretences 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.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

(3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person—

(a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;

(b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or

(c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmittable disease.

4. The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act—

(a) asleep;

(b) unconscious;

(c) in an altered stated of consciousness;

(d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;

(e)mentally impaired; or

(f) a child.

5. This section shall not apply in respect of persons who are lawfully married to each other. [Emphasis mine]

11. After analyzing the evidence, the learned magistrate, in convicting the appellant, concluded as follows, *"At section 43 of the Act an act is intentional and unlawful if it is committed inter alia in the circumstances whereby the person is incapable in law of appreciating the nature of the act …….. if at the time of commission the person was mentally impaired. Even if the complaint was an adult she was legally incapable of consenting due to mental illness. I therefore disagree with the accused when he states that she was capable of making a sound decision. I find the apparent consent was vitiated by the complainant's mental illness."*

12. The prosecution evidence for lack of consent was that the complainant was mentally impaired. The issue is not whether the complainant was mentally impaired generally but whether, *"at the time of commission of such act was the complainant mentally impaired."* In the words of **section 42, 43(1)** and **(4)** of the ***Act*** which I have emphasized in paragraph 10 above, the inquiry is focused on whether the complainant exercised freedom and capacity to make the choice of having sexual intercourse and whether at the time the act took place the complainant was incapable of consenting by reason of mental impairment. While the testimony of PW 1 and PW 3 alludes to the fact that PW 2 was mentally unstable, that alone does not assist the prosecution case. The medical evidence on this issue is sparse as the medical examination report merely states that the complainant was not "*mentally stable*". PW 3, who testified on behalf of the doctor who examined the complainant, did not state the nature and extent of mental illness afflicting the complainant so that the court can conclude that the complainant was unable to exercise her own free will.

13. Before PW 2 testified, the learned magistrate conducted a *voir dire* and concluded that the complainant was intelligent. She was able to give coherent testimony and answer questions put to her on cross-examination. This fact, together with the lack of medical evidence to negative the fact the complainant was at any time unable to appreciate the nature of the act or consent to it, tends to show that the complainant, despite having mental illness, was in some instances able to make independent decisions. Hence it is possible that the complainant, as an adult, could make a decision as to whether or not to have sexual intercourse. It was the duty of the prosecution to prove beyond reasonable doubt that the complainant did not consent by reason of impairment at the time of commission of the felonious act.

14. The prosecution case is also undermined by the complainant's testimony where she stated as follows; "*Hezbon asked why I had gone to the accused home. He said he would beat me. Hezbon took me."* This testimony points to the fact that the complainant went to the accused's house voluntarily and that it is PW 1 who threatened to beat her because of her decision. The conclusion I draw is that the case was agitated by PW 1 rather than PW 2. I therefore find that the prosecution failed to prove the lack of consent beyond reasonable doubt.

15. In conclusion I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. This approach is inconsistent with the provisions of **Article 12** of the ***Convention on the Rights of Persons with Disabilities*** which requires State parties to recognise persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others. Kenya ratified this Convention in 2008 and by dint of **Article 2(6)** of the Constitution it forms part of the law of Kenya.

16. It is therefore improper and inconsistent with the Convention and an affront to the right of dignity of a person protected by **Article 28** to label any person as mentally retarded and proceed on the basis that the person is incapable of making a free choice to engage in sexual intercourse. What the ***Sexual Offences Act, 2006*** requires is that the prosecution must prove beyond reasonable doubt that at the time the act of penetration is committed, the complainant was incapable of consenting by reason of mental impairment. In this case the prosecution failed to discharge that burden.

17. I allow the appeal and quash the conviction. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 22nd day of September 2014

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.