



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 40 OF 2019**

**SAMUEL KIIRU HASSAN .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. GICHEHA(CM) DATED 16<sup>TH</sup> MAY 2019 IN NAKURU CMCCR NO. 2167 OF 2018).***

**JUDGEMENT.**

1. The appellant and his co accused were charged with various offences. The first count was **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on the **9<sup>th</sup> day of July 2018** at Capitol hill hotel area within Nakuru county jointly robbed one JCT her one mobile phone make ITEL, cash Kshs,5000, and assorted clothes all valued at Kshs. 15,500 and at or immediately before or immediately after the said robbery used actual violence on the said JCT.
2. The second count was **Rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006**. The particulars of the offence were that on the **9<sup>th</sup> day of July 2018** at Capitol hill hotel area within Nakuru county, you Samuel Kiiru Hassan with another before court with common intention committed the offence of rape by inserting your male genital organ namely penis to penetrate the female genital organ namely vagina of JCT without her consent.
3. The alternative count was **indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No 3 of 2006**. The particulars of the charge were that on the **9<sup>th</sup> day of July 2018** at Capitol hill hotel area within Nakuru county intentionally and unlawfully committed an indecent act with an adult by touching the private parts namely vagina, breast and buttocks of JCT with your hands.
4. After a full trial the appellant was convicted on all counts and sentence to suffer death. He has filed this appeal raising several home grown grounds. Before looking at the same it shall be worthwhile to summarise the evidence as presented during trial.
5. **PW1** the complainant testified that she works as a house help and that on **9<sup>th</sup> July 2018** she met the appellant whom she inquired where she could get some job. She gave him her phone number and after sometime he called her. They went with him to Maili kumi where the appellant and another lady went to drink alcohol in a certain bar.
6. The three thereafter left and on the way they alighted at some forest as the motorbike could not move on the grass. The appellants co accused told her to remove her clothes. They started assaulting her and forcefully removed her clothes and she only remained with her panty.
7. The appellant then ordered her to remove her panty but was thereafter removed by the appellants co accused. The said appellants co accused held her legs and the appellant proceeded to rape her. She tried to scream but the co accused held her mouth. After they were through they left her there as they went with the motorcycle. She screamed and a person at the nearby hotel heard and came to her rescue. She was given a *shuka* to cover herself and taken to the police station.
8. She was thereafter referred to the Nairobi women hospital for treatment. She was also given a P3 form which she filled and she identified in court.
9. She went on to state that later while in town she saw the appellants co accused wearing her clothes and she screamed for help. Members of the public came and arrested her as well as the police. She said that she recognised her clothes as well as her face. She was later taken by the police to her house where the complainants maasai *shuka* was found.
10. She later went back to the police station where she found the appellant had been arrested.
11. When cross examined by the appellant she said that she did not know his name but it was him whom he had taken her to section 58.

12. **PW2 KAREHU KURU** testified that the accused was a son to his brother in law and that he had given his motor cycle registration number KMBS 946K for his youngest son whom he had earlier given the same had died. He said that he later learned that he had been arrested for raping a girl. He said that the last time he saw the motorbike was in May and later he identified it at the police station. He produced the same as an exhibit.

13. **PW3 CORP. MARGARET BUSIENEI** from Nakuru police station carried out the investigation after the complainant made a report on 10<sup>th</sup> July 2018. She was referred to the hospital for medical attention where the P3 and PRC forms were filled. She recorded her statement and later the appellants co accused was arrested by the members of the public while she wore the complainant's clothes. The said co accused led the police to the appellant's house where the exhibits were recovered. She produced the same in court.

14. When cross examined by the appellant she said that she did not photograph the appellant with the motorbike. She said that before his arrest the complainant had made a proper report about her assailants.

15. **PW4 EDWIN WAMBANI** a clinical officer testified on behalf of Dr. Kariuki who examined the complainant. The doctor found that there was an old torn hymen and there was pus cells and he concluded that there was trauma to the vagina. He produced both the P3 and PRC forms.

16. When placed on his defence the appellant gave unsworn evidence denying the charges and stated that he received a call on 26<sup>th</sup> while in his place of work and asked to go to Impala hotel where he met two people who took him to Free area. At that time some men came and took him to the police station and later in the evening they went to some estate where his co accused was. Later he was accused of the offence which he continued to deny.

17. The court directed that the appeal be disposed by way of written submissions which the parties have complied. The appellant submitted generally basing his submissions on the grounds of appeal which in my view were general in nature.

18. He submitted that it was wrong for the trial court not to have conducted a trial within a trial to determine how the appellants co accused led them to where the appellant was. He said that the respondent violated Article 50 of the constitution by tramping on his rights.

19. He further stated that there was discrepancy on the registration number of the motor cycle as described by the court in its judgement as well as pw2. He also submitted that identification was not conclusive and that an identification parade ought to have been conducted.

20. The learned state counsel on the other hand opposed the appeal arguing that there was sufficient evidence that the appellant was fully recognised by the complainant as they interacted all through the day and at Section 58. That there was sufficient light that aided in the recognition.

21. She submitted that the medical report produced was conclusive that the complainant had indeed been raped. There was no requirement that sexual offences be corroborated as was held in the case of **Muthengi v. Rep. (2015) eKLR**.

22. She urged the court to disallow the appeal as both robbery with violence as well as rape charges had been proved beyond any shadow of doubt.

#### **ANALYSIS AND DETERMINATION.**

23. The duty of the court at this level was spelt out in the case of **OKENO V. REP. 1973 EA 32** namely.

24. *"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.*

25. The court has carefully perused both the evidence on record, the exhibits produced and the submissions by the parties. What is essential is whether the ingredients of the two offences namely robbery and rape were established. The court shall deal with them seriatim.

26. **Section 296 (2) of the Penal Code** clearly points out the same. It states as follows;

*"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".*

27. The assailant must thus be armed with any dangerous weapon, in a company of more than one person and inflict personal injury to the victim.

28. In the case at hand it is evident that those who attacked the complainant were two who in this case were the appellant and his co accused. I have no doubt in my mind that the appellant participated in the offence as he was clearly identified by the complainant. Contrary to his submission he spent the whole day with her right from the time he was approached by her asking whether he knew anybody who had a

job.

29. It was the appellant who took her using his motorbike to where his co accused was and later went on a drinking spree. There was no evidence to suggest at all that he tried to conceal himself. They were together during the day and later in the night when he took her with the co accused and on the way they raped her.

30. The act of raping her was forcefully. The appellant through the assistance of the co accused pinned her down, removed her panty and proceeded to rape her as the co accused held her legs. The doctor found that there was trauma on the complainant's vagina as well as pus cells.

31. Other than this they also forcefully took the complainants clothes and other belongings which were later recovered both in the custody of the appellant as well as the co accused and the complainant managed to identify all her recovered items.

32. The motor cycle used by the appellant belonged to PW2. He was able to prove the same in court. Although there could have been typing error or description error on its registration number by the court, PW2 the real owner did not err. He produced the relevant documents as well as explained how the appellant came into possession of the said motor bike. He did not rebut PW2 evidence.

33. In the premises, the offence of robbery was established against the appellant and the reasons by the appellant are unfounded. His submissions that his rights were violated are as well not true. He was accorded all the latitude during the prosecution of his case and nowhere was he disadvantaged.

34. On the second charge of rape, **Section 3 of the Sexual Offences Act** defines the same thus;

*(1) "A person commits the offence termed rape if—*

*(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;*

*(b) the other person does not consent to the penetration; or*

*10.*

*(c) the consent is obtained by force or by means of threats or intimidation of any kind*

35. The evidence by the complainant was graphic and consistent. Both the appellant and the co accused participated in the commission of the offence. The co accused held her legs apart while the appellant raped her. The co accused provided a condom to the appellant before raping her.

36. The complainant described how the appellant ordered her to remove her clothes and with the aid of the co accused raped and abandoned her. The medical evidence produced pointed to this fact. The P3 concluded that there was blunt trauma to the vagina and there was pus and an old torn hymen. There was as found above evidence that the appellant was properly identified and or recognised by the complainant.

37. The ingredients of the second charge of rape was in my view proved and accords well with the provisions of **Section 10 of the Sexual Offences Act** provides as hereunder;

*"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."*

38. The unsworn evidence by the appellant was of no probative value as it never gave chance for cross examination in any way. At any rate it never attempted to explain his presence at the scene and what role he may or may not have played. He did not explain his conduct with the appellant on the material day but instead dwelt on the day of his arrest.

39. In the premises, this court does not find any merit in the appeal. The trial court's judgement was sound both in law and fact. The appellant and his co accused meticulously planned the incident. They did not intend to seek employment for the complainant. The act of raping and robbing her were barbaric. They took advantage of a woman who was desperate for employment.

40. **The appeal is dismissed.**

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 4TH DAY OF OCTOBER 2021.**

**H K CHEMITEI.**

**JUDGE**