

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT BUSIA
SEXUAL OFFENCE CASE NO. 89 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

PC JAMES KINYUA.....ACCUSED

J U D G M E N T

The accused is charged with rape contrary to section 3(1)(a)(b)(3) of the Sexual Offences Act No. 3 of 2006; the particulars thereof being that on the night of 23rd August 2018 at Kotur Police Patrol base in Amukura Division within Busia County he intentionally and unlawfully caused his genital organ to penetrate the genital organ of S.A., a girl aged 19 years old without her consent.

In the alternative the accused is charged with committing an indecent act with an adult contrary to section 11A of the Sexual offences Act No. 3 of 2006; the particulars thereof being that on the night of 23rd August 2018 at Kotur Police Patrol base in Amukura Division within Busia County he intentionally touched the genital organ of S.A. a girl aged 19 years old with his fingers.

The accused denied both charges. A summary of the facts is that on the material night the victim was booked in the police cells at Kotur Police Patrol base for the night, the next morning when her father went to pick her she reported that the previous night while in custody the suspect, being the police officer on duty at the material time had raped her, hence the charges.

PW1, the complainant stated that on 21st August 2018 following a domestic squabble between herself and her mother she left home in a fit of rage and went to her cousin's home a Kamolo area. It is PW1's evidence that the next day her father and another person went to pick her from her cousin's home when they

took her to Kotur Patrol Police Base. Once at the police PATROL Base PW1 says her father had told the police officers that she had been missing from home and she had just been found when the accused suggested that she should be taken to hospital to be subjected to medical examination to ascertain what she had been upto during her absence from home.

It is PW1's evidence that following medical examination it was ascertained that she was okey and a P3 form to the said effect filled but to her surprise the accused insisted that she should spend the night in the police cells to 'be taught a lesson for having run away from home', a proposal PW1's father agreed to albeit reluctantly. The accused asked the complainant's father to go home and return the next day.

PW1 says she remained in the cells, all this while crying bitterly. According to PW1 the accused left only to return later that night and pick his gun before leaving again.

PW1 says she slept on a mattress in the cells when the accused came and told her that he wished to sleep with her, the victim says she woke up and sat on the chair so the accused could sleep on the mattress thinking the mattress is the accused's usual sleeping place whenever he is on night duty but the accused grabbed her and pushed her on the mattress. PW1 says she tried to scream but the accused restrained her by putting his hand over her mouth and when she fell on the mattress she says the accused removed her pants which he threw away and raped her.

The victim adduced in evidence as PEXH-2 the torn red paint, telling the court that the entire incident took about 30 minutes, and that the accused had tied her

mouth using a sweater as he raped her, he untiled her once he was done, locked the door behind him as he left.

PW1 says that a while later the accused returned with a bucket of water and asked her to wash her private parts but she declined, the accused clicked and left with the water. It is PW1's evidence that the accused had threatened to shoot her if she screamed, he also picked a panga and told her that if she did not cooperate he would kill her.

PW1 says that at around 5.00am the accused had returned carrying a jug containing some water and two pink tablets in his hand which he gave her and asked her to take as he pleaded with her not to tell her father, telling her that should she report him he would not only be imprisoned but also lose his job, the accused, PW1 says, even promised to compensate her if she did not report him. It is at this time that PW1 says the accused returned her pants to her.

The complainant says when she declined to take the pills the accused wanted to hit her, so she pretended to swallow them but hid them beneath the mattress and took some water to make the suspect believe that she had taken the pills, which she adduced in evidence as PEXH-3A&B respectively.

The complainant says that the accused also gave her a piece of paper containing a mobile phone number telling her that if she ever needed anything she should feel free to call him on the said phone number being 0723-433410.

The complainant identified the said piece of paper.

It is PW1's evidence that when another police officer came and found her crying that morning he sought to know what the matter was but the accused told his colleague that the victim had asked for drinking water, the accused once more

cautioned the victim against telling anyone what had transpired the previous night.

The victim says she then heard the accused converse with her father on phone and a while later her father arrived before she was released from the cells so she could go home with her father. PW1 says once she was with her father, in the presence of the police officers she told her father what had happened to her. According to PW1 the other police officer was shocked to hear what she had to say, as the accused pleaded with PW1's father to forgive him.

PW1's father took her to the Chief's office where they reported the incident, the OCS ADUNGOSI advised PW1's father to take the victim to hospital once more where she was examined and issued with a second P3 form.

The victim says she was once more examined at Kocholia sub county hospital, she was also sent to Kisumu for DNA sampling.

The victim says identification parades were conducted, that during the first one the suspect was not present, but she was able to identify him during the second one.

In cross examination the victim stated that it was her first time to go to Kotur police post, and that there were three police officers at the station. The complainant's case is that the accused entered the room while armed with a gun but when she tried to scream he picked a panga and threatened to cut her, that he also used a sweater to cover her mouth. The victim is categorical that the accused did not give her any money, and that he was on duty during the day but during the night he came to the cells where she was being held. The child insisted that

she never had a love affair with the suspect, that when she ran away from home she went to her relative's home and not the accused's house.

PW2, JOHN IMOJIR KARANI, the complainant's father stated in evidence that on 20th August 2018 when he got home from work in the evening he noted that PW1 and her mother had had an argument stemming from PW1's dress code which had left them both really upset. It is PW2's evidence that the next morning before he left for work he sat the two ladies down and urged them to maintain peace as he left for work but on returning that evening he did not find PW1 at home, she was missing. As a responsible father PW2 says he reported the incident at Kotur police post. It is PW2's evidence that on 23rd August they went to a relative's home where they found PW1 and they took her with them but on the way home they decided to pass by Kotur police post so they could inform the officers that the reported missing person had been found.

PW2 says they found the suspect and another light skinned officer at the police post, when the suspect suggested that PW1 should be taken to hospital for examination prior to going home, the family obliged and were accompanied by the other officer to Amukura hospital where PW1 was medically examined and a P3 form filled which the witness identified as PMFI-1.

When they took the results back to the police post, PW2 says the accused insisted to book PW1 in the cells for the night claiming she had to be taught a lesson to deter her from ever running away from home again. PW2 says he obliged but the next morning when he went to pick PW1 he found her crying and soon as she was released from the cells, in the presence of the suspect the victim told her father that the previous night the suspect had raped her, the child then narrated in detail what had transpired that night.

PW2 says he then confronted the suspect but he only pleaded for pardon. The victim's father reported the incident to the chief who advised them to take PW1 to hospital which they did, a P3 form was filled which PW2 identified as PMFI-5. According to PW2 the second medical examination confirmed that the victim had been raped. PW1 and PW2 proceeded to Adungosi police station and recorded their respective statements. They once more recorded statements with an officer from IPOA.

PW2 too identified the suspect at an identification parade conducted at Adungosi police station and was categorical that he did not witness the incident.

PW3, Ms BARBARA MERCY AMAI the clinical officer who examined the victim on 23rd August 2018 at Amukura Sub County hospital confirmed that there were no positive findings as at then and that she formed the opinion that there had been no sexual intimacy. The witness adduced in evidence as PEXH-6 the victim's treatment notes and PEXH-1 the P3 form dated 23rd August 2018.

PW4, SAMMY WABUYABO the clinical officer who examined PW1 on her subsequent visit at Amukura Sub county hospital observed that an examination of the victim's private parts revealed that the hymen was absent, there was some brownish discharge/ fluid noted in the vagina and the cervix appeared hyperemic and the same was tender on touch, which findings the witness opined were indicative of rape or forceful penetration. There were spermatozoa also seen.

The witness adduced in evidence as PEXH-5 the victim's P3 form containing his findings and as PEXH-7 the treatment notes, he further adduced in evidence as PEXH-8 the victim's PRC form.

In re-examination the witness confirmed that a HVS was done on the patient and a sample of the swab taken by the police officers for DNA Sampling.

PW5, CIP LUKE WAICHABE WAMOCHA the OCS Adungosi police station stated that on 23rd August 2018 he went to Kotur Police post under his command to serve the suspect with Marching orders as the latter was on transfer to Maritime police unit. It is PW5's evidence that he found the suspect and PC Kimongo on duty at Kotur police post, with PC Mutai as the one who was holding forte for Sgt Reuben Kirui the in charge.

PW5 says he checked in the cells and as at 4.00pm there were no suspects therein. The witness clarified that the marching order was dated 24th August 2018, (the date the officer was to leave) but he served the same upon the suspect on 23rd August 2018, a copy of which document the witness adduced in evidence as PEXH-9. According to PW5 the suspect was to check out of duty on 24th August 2018 and hand over to PC JOHN KIPKORIR and PC IBRAHIM NJIRU.

The witness says that on 24th August at around noon he received a call from SGT REUBEN KIRUI informing him that he had been informed by PC MUTAI that there was a problem at Kotur police post. On further inquiry from PC MUTAI PW5 says he established that a female suspect who had bene booked in the cells on the night of 23rd August 2018 had, upon her release the next morning, claimed that while in custody the previous night, been raped by the suspect.

It is PW5's evidence that eh proceeded to Kotur police post and perused the OB Register which confirmed that indeed the complainant had been booked in the cells on the night of 23rd August, meanwhile PW5 says he did not find the suspect at the station as he had left without handing over. PW5 then contacted the victim's

father who narrated to him what PW1 had told him. PW5 advised them to go to the police station so they would have their respective statements recorded.

According to PW5 the suspect left without booking out that he had left duty at Kotur police post, and the witness immediately informed Headquarters of the said turn of events but on 30th August 2018 the suspect presented himself at Adungosi police station and was arrested by DCI officers. The next day two identification parades were conducted with the suspect taking part in one and PC Kimongo the officer on duty alongside the suspect in the other. Both the complainant and her father identified the suspect as the person they said had raped the victim.

In cross examination PW5 confirmed that there is no Gazetted cell at Kotur police post, only a holding place.

PW6, PC HILLARY MUTAI stated that he was on duty from 7.00pm on 22nd August 2018 to 7.00am on 23rd August 2018 when he handed over to the suspect and PC KIMONGO. PW6 says that later at around 10.00am he received a call from the suspect and when he went to the post he found him in the company of the complainant and her father. PW6 says he offered to take the suspect to hospital where she was examined and a P3 form filled. PW6 says when they got back to the police post it was noted that the victim's father had not carried the victim's birth certificate, so it was resolved that the victim should be booked in the Protection and Care unit overnight as her father goes to get the birth certificate.

PW6 says the next morning the victim's father picked his daughter from the police post but afterwards he alleged that the victim had been sexually abused while in police custody. The witness confirmed that on 23rd August the victim was subjected to medical examination which confirmed that she had not been

raped, but maintained that there was a suspect named OJUMA suspected to have sexually abused the victim.

In cross examination PW6 clarified that he had never seen the victim at the suspect's house, and that on the material night he never heard screams coming from the cells which are about 5 metres away from his residence. PW6 further clarified that PW6 was not booked in the cells, rather she was placed in the Child Protection Unit reserved for children in need of Protection and Care.

PW7, Mr RICHARD KIMUTAI LANGAT the Government Analyst a duly gazetted officer from Government chemist stated that on 28th August 2018 he received an exhibit memo form from DCI officers from Teso forwarding a HVS from the victim, a red underpant from the victim and buccal swab from the suspect. The suspect too was present and her buccal swab was taken for analysis.

It is PW7's evidence that he extracted DNA from each of the items presented and subjected them to a DNA Analyzer with each of them generating DNA Profiles. It is PW7's expert opinion that from the DNA Profiles generated, the HVS and the red pant generated DNA profiles which were mixed marched with that of the victim and that of the suspect. The witness documented his findings in the Report dated 29th March 2019 which he adduced in evidence as PEXH-14A. he also adduced in evidence as PEXH-14B the exhibit memo form.

In cross examination the witness clarified that the DNA results would be the same regardless of whether the act was consensual or otherwise and that the specimen was collected within 72 hours of the subject act.

The witness further clarified that the red pant was soiled but not torn.

PW5 was recalled to produce several exhibits, among them the marching orders served upon the suspect as PEXH-9, The casualty return the officer says he had sent to the OCPD informing him of the suspect's transfer and redeployment to Maritime Unit as PEXH-9B and a casualty return to Maritime Unit informing them that the suspect had been released as PEXH-9C.

PW8, Inspector Lillian Onsongo of Adungosi police station stated that on 24th August 2018 she received the complainant and her father who reported that the previous night while in police custody at Kotur police post the complainant had been raped.

PW8 stated that when she interviewed the victim she told her that it was dark in the cells but the accused used his mobile phone torch to light the room and thus she was able to clearly see him.

The victim also showed the officer a torn red pant which she stated got torn as the suspect forcefully removed the same during the struggle. The victim also gave the officer two pills which she said the suspect had given her after the incident, directing her to take them but she hid them and lied she had swallowed them and a piece of paper with a phone number written on it which the victim told the witness the suspect had given her after the incident, telling her that it was his phone number and that if she ever needed any help she should not hesitate to contact him.

The witness adduced in evidence the piece of paper containing a phone number as PEXH-4, the two pills as PEXH-3A&B and the torn red pants as PEXH-2.

PW9 Corporal Mark Arao an officer from CID also testified. It is his evidence that he took over the investigation of this case from PW8. It is PW9 who prepared the

exhibit memo form and sent it to Government chemist together with the specimen for analysis.

The witness once more identified exhibits 2, 3A&B and 4 respectively, which he said he received from PW8.

Pw9 was one of the arresting officers. The witness also drafted a second exhibit memo form vide which he sent the piece of paper containing a phone number together with a specimen signature to a Handwriting expert for examination, both of which the witness adduced in evidence.

In cross examination the witness confirmed that he got the exhibits from the OCS Adungosi police station, and that when they visited the scene it was disturbed hence they could not get much therefrom.

RASHID NGOLO WEKESA from IPOA also testified. PW11, PC KIMONGO ERICK stated that on the 23rd August 2018 he was on duty with the suspect but since he was not feeling well he left at 10.00pm to seek medication and from hospital he went to his house to rest, having left the suspect on duty alone. PW11 says the next morning he heard from his other colleague that the previous night the suspect had raped a female victim while in police custody by which time PW11 says the suspect was missing.

It emerged in cross examination that PW11 did not book out of duty when he left work to go to hospital but that he informed the in charge PC HILLARY MUTAI. PW11 also says he was not present when the victim was booked in the cells.

PW12, CORPORAL MARTIN MUTAI the forensic document examiner who analyzed the specimen signature being the suspect's known handwriting *viz a viz* the handwriting on the piece of paper which the complainant claimed had been handed to her by the suspect and formed the opinion that the questioned document and the specimen handwriting were both authored by the same person.

The witness documented his findings in a report dated 14th September 2018 which he adduced in evidence as PEXH-17.

In defence the accused elected to give sworn defence with no witness. The accused admitted that he got intimate with the complainant on the material night but maintained that it was consensual. It is the accused's case that the complainant and he had been in a relationship for about six months then, during which period the complainant would routinely pay him a visit. The accused says on 21st August 2018 the complainant paid him a visit at his workplace and on 23rd August the OCS informed him that he was on transfer to MARITIME POLICE UNIT, which news he broke to the complainant, further informing her that he wished to terminate their relationship, which news the accused says the complainant did not take kindly and an argument ensued between the two of them which culminated in the complainant running away.

The accused says later that day the OCS served him with the marching orders and the next day he proceeded on transfer before he was subsequently informed that the complainant and her father had reported that he had raped the latter. He was subsequently arrested and charged when he returned to Kotur police post to report to the OCS.

In cross examination the suspect maintained that the complainant was his girlfriend and they would engage in acts of sexual intimacy but that he decided to end the relationship so as to focus on his other girlfriend whom he intended to marry.

The accused maintained that the complainant was annoyed because he told her that he wished to terminate the affair, and that they had severally gotten intimate, on which occasions he would give her contraceptives to prevent her from conceiving.

At the close of the defence submissions the prosecution through IPOA filed their submissions urging the court to convict the suspect.

The court is called upon to analyze the prosecution evidence *viz a viz* the accused's defence in determining whether or not the charges are proved beyond doubt.

The questions for determination are:-

- Whether there is proof of penetration?
- Whether there is proof of consent?

The complainant stated in evidence that she was nineteen years old and thus an adult. The suspect is charged with the offence of rape.

In the course of the accused's defence he admitted that he got intimate with the complainant save that he insists it was consensual. This being a case of rape consent is a valid defence thereto.

Section 3 of the Sexual Offences Act No.3 of 2006 states thus;-

A person commits the offence termed rape if-

- a) *If 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*
- c) *The consent is obtained by force or by means of threats or intimidation of any kind*

This being a case of rape the court has to satisfy itself as to the fact that there was penetration which was either intentional and unlawful or that the victim did not consent to the same, or that the consent was obtained by force or by means of threats or intimidation if a conviction is to ensue.

In the course of his defence the accused admitted to having engaged in an act of sexual intimacy with the victim, in addition there is on record government Analyst's report, to wit PEXH-14A to confirm that the DNA profiles generated by the high vaginal swab (HVS) and the stains on the red underpants was a mixed DNA profiles of the suspect and the survivor.

Guided by evidence of the complainant, the expert opinion of the health worker who examined PW1 and filled the P3 form on 24th August, adduced in evidence as PEXH-5, the suspect's admission and the expert report being PEXH-14A the court finds that there is sufficient evidence on record to show that the accused got intimate with the victim on the material night.

The identity of the person who got intimate with the victim having been ascertained coupled with the fact that the victim is aged 19 hence capable of giving consent, the next issue for determination is whether the act of intimacy was consensual or otherwise.

PW1 says the accused while armed with a gun and a panga had threatened her into submission before he got intimate with him, against her will.

In defence the accused says the victim was his girlfriend and that she would severally visit him, during which occasions they would get intimate, including the material time.

According to the complainant, she was booked in the cells at the material time when the suspect whom she did not know prior to the material date coerced her into getting intimate with him, the complainant says the suspect threatened her of violence when she tried to resist and covered her mouth using a sweater to prevent her from screaming for help. After the act the suspect is said to have brought the victim a bucket of water with instructions that she should clean up but the victim declined, the suspect then brought her two pills and a glass of water to take but the victim says she only took the water and hid the pills without the suspect's knowledge. The accused subsequently gave the victim a piece of paper containing his mobile phone number and told her if she ever needed help she should not hesitate to call him. The said piece of paper was adduced in evidence and the handwriting expert confirmed that the same bore the suspect's handwriting.

The accused's defence is that the victim went to see him on 21st August and on 23rd when he told her that he wished to end their affair she got annoyed, hence she falsely accused him of rape.

From the accused's defence it came out that he and the victim had gotten intimate on several other occasions prior to the material night, including on 21st when she paid him a visit, which assertion is inconsistent with the medical evidence on record, to wit PEXH-1 which shows as at 23rd August when the victim was

medically examined she was found not to have engaged in an act of sexual intimacy. This casts doubt on the suspect's defence greatly.

Further there is ample evidence on record to show that the complainant was in the police cells on the night of 23rd August 2018, the next morning she reported that she had been sexually abused by the police officer on duty that night and the medical examination confirmed her assertions.

The accused's assertion that he was in a love affair with the victim and she spent with him from the 21st August 2018 does not hold, there is ample evidence on record in the form of PEXH-1 which shows that as at 23rd August 2018 when examined the victim had not engaged in an act of sexual intimacy. There is also evidence on record, in particular from PW1, PW2, PW5 and PW6 confirm that the victim was booked in the cells on the night of 23rd August, the next morning she complained that she had been raped while in police custody.

The accused's defence is inconsistent with the prosecution version of what transpired. It is given that a suspect in the cells can consent to an act of sexual intimacy, but the circumstances of this case point to the exact opposite, namely, the victim was booked in the cells and she says the suspect approached her while armed with a gun which he placed down and picked a panga and threatened to harm her if she did not sleep with him, those are hardly acts of a person who believes that his advances are welcome. The accused coerced the victim into giving in to his demands and he cannot say he believed that the victim consented, he took advantage of the complainant's vulnerable situation to sexually abuse her. To that end the accused's act of penetration was intentional and unlawful, as the same was done without the other person's consent.

The accused's defence that the victim was his girlfriend does not hold since the victim was categorical that she did not consent to the act, and that she did not know the suspect, she only met him on 23rd August when she was taken to the police post by her father. The fact that the accused even wrote his phone number on a piece of paper and gave it to the victim points at two people who had just met. If the two were previously known to each other and the victim use dot visit the suspect she would already have had his phone contacts.

The complainant's father also says that when he went to pick the complainant on the morning of 24th August 2018 he found her weeping and soon as she was released from the cells she told her father that the previous night the suspect had raped her, this she said in the presence of the suspect who could only ask for pardon from the complainant's father. The accused's act of asking for pardon is an admission in itself which, corroborated by the rest of the evidence on record, goes to support the charges.

The suspect acted in breach of the trust bestowed upon him by his employer and the public in general by taking advantage of a subject in custody, whom he was tasked to guard by raping her in the most ruthless manner.

The court, guided by the evidence on record finds that there is sufficient evidence to support the charge of rape against the suspect, the defence of consent does not hold as the same lacks credence, the accused being in a position of advantage over the victim simply abused the trust the complainant's father had in him when he left his daughter at the police post. Had the accused believed that the complainant consented to his advances he would not have issued the threats he issued, nor would he have asked for pardon from the victim's father soon as he found out what had transpired.

The court, guided by the evidence on record proceeds to convict the suspect of rape contrary to section 3(1)(a)(b)(3) of the Sexual Offences Act No. 3 as charged. This is a conviction under section 215 of the CPC.

Judgment dated and delivered in open court at Busia on theday of..... 2021.


P. Y. KULECHO

SENIOR RESIDENT MAGISTRATE

Judgment delivered in the presence of:-

C/A..... Mudo to

ACCUSED..... Present

PROSECUTION..... Mr Namasake

25/2/2021

OFFICE OF THE DIRECTOR OF
PUBLIC PROSECUTIONS
P. O. Box 476
BUSIA (K)

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