



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 32 OF 2019

FRANCIS KINUTHIA KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence by Hon M.O Okuche (SRM), dated 3rd November 2017 in criminal case No. 1640 of 2014 at the Chief Magistrate's Court at Kajiado)

JUDGMENT

1. The appellant was charged with rape contrary to section 3(1)(a) as read with sections 3(1) (b) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 20th day of October, 2014 at [particulars withheld] Village Illasit Location in Kajiado South District in Kajiado County, he intentionally and unlawfully caused his private organ to penetrate the private organ of MNN by use of force.

2. The appellant denied the charge and after a trial in which the prosecution called 7 witnesses and the appellant's sworn defence, he was convicted and sentenced to 10 years imprisonment. He was aggrieved with both conviction and sentence and lodged this appeal on the following grounds:

- 1. That the trial magistrate erred in law by failing to observe that the age of the victim was not established in accordance with the law and DNA test was not conducted accordingly and the age of appellant at the time of commission of the offence. (sic)***
- 2. That the trial magistrate erred in law by failing to observe section 107 of the evidence Act whereby the prosecution case was not proved beyond threshold in criminal law.***
- 3. That the learned trial magistrate erred in both law and fact by convicting him yet investigation was not properly done.***
- 4. That the learned trial magistrate erred in both law and fact by failing to consider that the prosecution's evidence was highly inconsistent and contradictory.***
- 5. That the trial magistrate erred in law and fact by failing to observe compliance with section 124 of the Evidence Act on where the victim is not truthful.***
- 6. That the trial magistrate erred in law by failing to observe compliance with section 39 of the Sexual Offences Act.***
- 7. That the trial magistrate erred in law by failing to observe compliance with section 169 (2) of the Criminal Procedure Code on where my defense was not given adequate consideration on telling the truth of what has transpired.***

3. The appellant filed amended grounds of appeal together with his written submissions, stating;

- 1. That the learned trial Magistrate erred in law and fact by convicting him on evidence which was below the required standard of proof.***
- 2. That the trial Magistrate failed to thoroughly scrutinize the prosecution's evidence to notice that there was inconsistency and gaps that needed to be filed to reach a clear determination of the case.***
- 3. That the learned trial Magistrate failed to adequately consider his plausible defence.***

4. This appeal was disposed of through written submissions. The appellant argued grounds 1 and 2, that the complainant testified that she

was in the kitchen washing utensils when he went wrestled her to the ground and raped her and that it was her first time to see him. According to the appellant, this was strange because he was a neighbour who ought to have been known to her.

5. The appellant submitted that PW4, the doctor, told the court that the complainant was two weeks pregnant (or three months) from the date of examination and that it is not a must that pregnancy only occurs when there is penetration. This, the appellant argued, meant that the complainant had been exposed to sexual intercourse before the alleged date of rape, 20th October, 2014.

6. The appellant further argued that the complainant was examined less than 24 hours after the alleged rape but PW4 stated that there were no spermatozoa in her private parts. The appellant faulted the prosecution and investigating officer for not subjecting him to DNA test given that he was arrested on the same day the offence was allegedly committed. This, he argued, would have ascertained whether or not he was the perpetrator of the crime.

7. The appellant again argued that PW2 confirmed that he owed him (appellant) money and it was not a coincidence that PW2 was the first person to arrive at the scene and started fighting him (appellant). He submitted that there was bad blood between him and PW2, the complainant's uncle and they had had fights before this date. He also took issue with the fact that all witnesses except PW4 and the investigating officer, were family members. The appellant argued, therefore, that there was collusion to fix him. He faulted the prosecution for not calling a single witness from members of the public said to have been present.

8. Regarding grounds 3 and 4, the appellant submitted that the burden of proof was on the prosecution in terms of section 111 of the Evidence Act. He faulted the trial court for stating that the fact of penetration had not been rebutted. He argued that it was not his duty to disprove penetration but that the prosecution's evidence must be water tight. He also relied on sections 109 and 110 of the Evidence Act on the burden of proof.

9. The appellant submitted that he did not dispute the fact that the complainant could have had sexual encounter given that she was pregnant. The issue was whether he had raped her. He denied committing the offence and pointed out that there was no direct evidence connecting him with commission of the offence. He blamed the trial court for not considering his plausible defence, more so given that there existed a grudge between him and PW2.

10. Miss Ireri, learned prosecution counsel, relied on their written submissions dated 22nd October 2019 and filed on 22nd October 2020. She submitted that the complainant testified that the appellant raped her and this was confirmed by medical evidence that there was penetration. On consent, she submitted that there was use of force by the appellant to penetrate the complainant which could not be considered consensual.

11. On identity of the attacker, she submitted that PW2, PW3, PW5 and PW6 positively identified and recognized the appellant who was a neighbor as the perpetrator. She submitted that the appellant was found in the house shortly after the complainant screamed and PW2 met the him in the kitchen and engaged him in a fight.

12. Regarding pregnancy, she submitted that even though the complainant may have been pregnant prior to the alleged sexual attack complained of, that alone did not rule out rape on the day she was raped. She prayed that the appeal be dismissed.

13. I have considered this appeal and submissions by parties. I have also perused the trial court's record and the impugned judgment. This being a first appeal, this court has a duty as the first appellate court, to reevaluate, reanalyze and reconsider the evidence on record and come to its own conclusion on that evidence. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. (See *Okeno v Republic* [1972] EA 32).

14. In *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal held that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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.”

15. The complainant testified that on 20th October, 2014 she was in the Kitchen washing utensils. The appellant went and got hold of her, fell her to the ground, undressed and raped her. She screamed and PW2, her uncle went to her rescue. He found the appellant in the kitchen and she was naked. She was taken to hospital for treatment. She became pregnant after the appellant raped her. She had not seen the appellant before.

16. PW2 James Kamaru Kamau testified that on that day, 20th April, 2014 at around 10 pm he was working on his farm near the complainant's home. He heard the complainant scream calling him. He rushed to the house and met the appellant running out of the kitchen with the complainant following him crying. He asked the appellant what the problem was but the appellant started throwing fists at him. Members of the public responded and assisted in arresting the appellant. Women checked on the complainant's private parts. The appellant and complainant were taken to Illasit police station from where she was later taken to Loitokitok Hospital. Examination revealed that she was pregnant. In cross-examination, the witness denied that he had a grudge with the appellant. He however admitted that he had lent the appellant Kshs. 5,000/-

17. PW3 Mary Wambui John testified that on the material day she was in the farm when she heard screams from nearby homes. Her neighbour told her that her daughter had been raped by the appellant. When she went to check, she found the appellant was being beaten by

members of the public. He was taken to the police station and the complainant was taken to hospital where she was examined and PRC as well as P3 forms filled.

18. PW4 Dr. Issa Mohammed, attached to Loitokitok Sub County Hospital, testified that on 21st October, 2014 a 17-year old girl who appeared mentally retarded was taken to the facility with a history of rape. On examination, the hymen had been freshly broken. Her labia had fresh lacerations. She was given ARV'S. She was already pregnant. PRC form was filled on 14th October, 2014 by Sofia Telica, a medical officer who had since been transferred from the hospital. She noted lacerations on the labia and it showed that the hymen had been broken. Appellant's results were negative and venereal disease tests were also negative. No spermatozoa were noted. He produced the P3 and PRC forms as exhibits. Pregnancy was about 2 weeks prior to the examination or 3 months from the date of examination. He stated that it is not a must that pregnancy will occur through penetration only. The complainant had been exposed to a man's sperm before the date of rape.

19. PW 5 James Mburu Kamau testified that on that day 20th October, 2014 at around 10 a.m. he was in the farm when he heard screams. He went to check and found the appellant fighting with another man. When the appellant realized that many people were coming, he attempted to run away. He tripped the appellant and he fell down. People were saying that he had raped the complainant.

20. PW 6 Grace Wairimu testified that on that day, at 10 a.m., she was at home with the complainant. While in the sitting room, she saw the appellant peep into the sitting room door and asked for water which she gave him. He told her that he wanted to send her to the shop and gave her Kshs. 50/- to buy him a cigarette and 3 cakes. On the way she met her younger brothers and gave them money to buy the items the appellant had sent her. She went back and heard the complainant crying in the kitchen. She went and asked her what the problem was. The complainant told her that it was the appellant. She called the appellant's name and he opened the kitchen door. She called PW2 who was in the farm. PW2 came with other people and apprehended the appellant. PW2 asked the ladies who were with him to check the complainant's private parts since she was saying that the appellant had removed her underwear.

21. PW7 No. 64043 CPL Mutinda previously attached to Illasit police station, testified that on 20th October, 2014, he was assigned to investigate the case. He interrogated the appellant who told him that he had been framed up. The complainant informed him that she was in the kitchen washing utensils when the appellant went to the kitchen wrestled her to the ground and raped her. He recorded statements from witnesses. He referred the complainant to hospital where she was examined and a P3 form filled. The appellant was arrested and charged.

22. When put on his defence, the appellant gave a sworn testimony and denied committing the offence. He told the court that he had a grudge with PW2, the complainant's uncle. He also fought with the complainant and that was why she was alleging that he raped her.

23. After considering that evidence, the trial court was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted him as charged. The court stated:

“The complainant's averment that she had a sexual intercourse on the material day was confirmed by PW4. The question therefore is what the accused person was doing in solitude with the complainant in this kitchen. On the other hand, why did they lock themselves inside. Was it not for ulterior motive? They had no business locking themselves inside. Though evidence has not been led as to who locked this door, it must be definitely the accused, this is given by the circumstances of the case. He had tripped the complainant. The complainant was also washing utensils. This court believes that he had no time to go and lock the door.”

24. The trial court went on to consider the fact that the appellant found PW6 in the house and sent her to the shop to give him an opportunity to fulfil his mission. It concluded that indeed the appellant committed the offence.

25. The issue that arises for determination in this appeal is whether the prosecution proved its case against the appellant beyond reasonable doubt. The appellant argued that the prosecution did not prove that he defiled the complainant and that there were inconsistencies in the prosecution case. He also blamed the trial court for not taking his defence seriously.

26. This being a case of rape, the prosecution was required to prove through cogent evidence that there was penetration. That is, complete or partial insertion of his male organ into the complainant's female organ. The complainant testified that the appellant went to the kitchen, wrestled her to the ground and raped her. She raised an alarm and PW2 went for her rescue. He found the appellant in running away and arrested him with the help of members of the public.

27. PW2 also stated how he heard screams and rushed to the house where he met the appellant coming from the kitchen and engaged him in a fist fight. PW3 also testified that she heard screams from nearby homes and her neighbour told her that her daughter had been raped by the appellant. She went to check and found members of the public beating the appellant. He was taken to the police station while the complainant was taken to hospital where she was examined and PRC as well as P3 forms filled.

28. PW 5 similarly told the court that he heard screams and when he went to check he found the appellant fighting with another man. When the appellant realized that many people were coming, he attempted to run away but he was apprehended. PW6, sister to the complainant told the court that the appellant found her in the sitting room and sent her to buy for him a cigarette and cakes. On the way she met her younger brothers and sent them instead. When she went back she heard the complainant crying in the kitchen. She went and asked her what the problem was. The complainant told her that it was the appellant. She called the appellant's name and he opened the kitchen door. She then called PW2 who came with other people and apprehended the appellant.

29. Except the complainant, the rest of the witnesses PW2, PW3, PW5, PW6 and PW7 did not witness the appellant committing the offence. What they told the court is what the complainant told them. They all however found the appellant in the house. This was therefore, a case of evidence of a single witness on what really happened to her. That is, it was only the evidence of the complainant that the appellant raped her.

30. Sexual offences ordinarily require corroboration. However, the proviso to section 124 allows a court to convict an accused person on the sole evidence of the victim of sexual assault, if the court believes that the victim is telling the truth. The section provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth” (emphasis)

31. The question to be answered here is whether the prosecution proved that the complainant was raped. The complainant stated that she was raped on 20th October 2014 and became pregnant. The medical evidence by PW4 confirmed that the hymen had been freshly broken, the labia had fresh lacerations. She was already pregnant. Although PW4 is recorded to have stated that PRC form was filled on 14th October, 2014, it was actually filled on 20th October 2014 the same day the complainant was assaulted. Lacerations were noted on the labia and it showed that the hymen had been broken. Although the complainant was pregnant before the assault the subject of this appeal, that did not mean she could not be raped as it happened in this case. I am satisfied as the trial court was, that the complainant was raped.

32. Regarding who the perpetrator was, I have reevaluated the evidence on record and considered it myself. The appellant did not deny that he was in the house with the complainant on the material day. He also did not deny that he met the complainant on that day. He did not even explain what he was doing in that house on that day. He stated that he had a grudge with the complainant’s uncle (PW2) but told the trial court: ***“we fought with the complaint. I beat her she fell down. After she got up, she now claimed that it is me who raped her.”***

33. This is clear admission that he was with the complainant on the material day. He did not say why he fought with the complainant he had a grudge with PW2 and not the complainant. In my view, the fact that the appellant fought the complainant supports the complainant’s evidence that he wrestled her to the ground to achieve his mission to rape her.

34. Following from what I have stated above, the appeal on conviction has no merit and is dismissed.

35. Turning to sentence, the appellant was sentenced to ten years imprisonment 3rd November 2017. The section under which he was charged, prescribed a minimum sentence of ten years. He was arrested on 20th October 2014 and was released on bond on 6th November 2014. The sentence of ten years is reduced to 7 years to run from the date he was convicted by the trial court that is 3rd November 2017.

Dated, signed and delivered at Kajjado this 26th day of February, 2021.

E.C. MWITA

JUDGE