



**REPUBLIC OF KENYA**

**CRIMINAL DIVISION OF HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL REVIEW NO. E008 OF 2020**

**RICHARD NGUGI NJOROGЕ .....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(An appeal against the decision of Hon. Maroro, PM on 13<sup>th</sup> February 2020, in criminal case number S.O. 60 of 2015, at the Chief Magistrate's Court Kibera Law Courts)***

**JUDGMENT**

1. Richard Ngugi Njoroge (herein “the Appellant”) with the offence of; rape contrary to section 3(1) as read with section (3) of the Sexual Offences Act, No. 3 of 2006, vide Chief Magistrate’s Sexual Offences Case No. 60 of 2015. He was convicted and sentenced to serve a jail term of ten (10) years. He has now filed a petition of appeal which is the subject of this judgment.

2. He seeks for orders that; the appeal be allowed, the conviction be quashed and the sentence set aside. The appeal is based on the grounds as here below reproduced: -

- a) *That the learned trial magistrate erred in fact by failing to find that there was no sufficient evidence to sustain a conviction;*
- b) *The learned trial magistrate erred in fact and law by failing to find that there was no evidence to establish the ingredients of the charge.*
- c) *That the learned trial magistrate erred in fact and law by failing to find that the evidence adduced was at variance with the particulars of the charge sheet;*
- d) *The learned trial magistrate erred in fact and law by failing to find that the charge was incurably defective;*
- e) *The learned trial magistrate erred in fact and law by failing to find that the trial offended and contravened the appellant’s constitutional rights to a fair trial;*
- f) *The learned trial magistrate erred in fact and law in upholding the prosecution witnesses’ testimonies which prima facie was incredible whilst proceeding on extraneous considerations which were not before the court to disregard the defence evidence which was verifiable;*
- g) *The learned trial magistrate erred in fact and law by failing to find that the exhibits tendered by the prosecution failed to be of any evidentiary value to the prosecution’s case;*
- h) *The learned trial magistrate erred in fact and law in convicting the appellant while the prosecution did not satisfy their burden of providing their case beyond reasonable doubt; and*
- i) *The learned trial magistrate erred in law and in fact by imposing a harsh excessive and untenable sentence upon the appellant.*

3. The background facts of the case are that; on the 8<sup>th</sup> August 2015, PW1 “TMK”, (herein the complainant) went to a birthday party at “Jimmy’s” place. She met, one Mailu, whom she described as an old boyfriend she had “dated” for (10) years. That, she arrived at the birthday venue at 3pm and stayed there until the following day when she left in the company of; Mailu and his brother; Wangeci for Rockess Pub in Lavington.

4. That, while at the pub, an argument ensued between Mailu and one Martin. Apparently, Martin had picked an argument with a stranger

and when Mailu intervened, then an argument ensued between the two. As a result of the aforesaid, the complainant and her companion decided to leave the pub, and took a taxi to Tips Bar still in Lavington area. However, Martin and the appellant who had been with them right from the birthday party followed them to Tips Bar. Mailu's brother Wangeci left for home.

5. The complainant testified she also decided to leave for home at Embakasi and in the company of Mailu called for a taxi. That, as the two waited for the taxi, the Martin and the appellant followed them, telling the complainant that, she was beautiful and should not go home." That, the appellant told her, he would have sex with her and at that point; Martin held her hand and refused to allow her go home. That she felt uncomfortable, but Mailu assured her that, she was safe and should just ignore the two.

6. However, a taxi eventually came by and although she did not want to get into the taxi, the taxi had taken too long to be available, so she boarded it in the company of; Mailu, and so did Martin and the appellant. After about five (5) minutes, Martin and the appellant told the taxi driver to stop, so that, they could assist her charge her phone. That, she needed to charge the phone to enable her access her Mpesa services to make payment for the taxi services.

7. That, as they headed for the house, which she later learnt belonged to Martin, Martin and the appellant started beating Mailu; stepping on his head and injured him; leading to bleeding and swollen eyes. He was then left outside the house, and the house was locked. The complainant was locked inside the house.

8. She told the court that, she hid her phone in her dress as the appellant was demanding for it. The appellant then started touching her breasts, grabbed her pant and tore it. He then punched her on her left cheek, as Martin removed her bra. The appellant then removed his clothes and raped her, first using condom and then removed it and raped her again without it. That, Martin was just waiting fondling his penis and smiling. After the appellant finished and stood up to dress, she tried to get out of bed but Martin pushed her back to the bed and she got injured on the leg. He then raped her from 2.am to 5.00am.

9. The Complainant stated that by the time the whole incident was over, she had developed "a bad headache and could not see." That she dozed off and when she woke up, she was naked and alone in the house. As she tried to leave, she realized the door to the house had been locked from outside with a big padlock. However, she managed to get a lady who passed by the house and send her to inform a friend by the name Isaack, to go to her rescue.

10. As she was waiting for help, Martin returned to the house in the company of Mailu. That, he was upset, alleging that, she had defamed him by telling two ladies that, he was insisting that, she was his girlfriend. As a result, a crowd gathered, forcing her and Mailu to leave for Rockers Pub. Shortly thereafter, the police came in the company of her friends Isaack and Mugeke. Martin was arrested while she was referred to Nairobi Women's Hospital for examination and treatment. Later she was referred to the Government surgeon for examination. One day after the incident, she returned to the house in the company of the investigating officer and recovered her torn pant; and the condom wrapper.

11. The prosecution case was further supported by the of Dr E. Kinuthia, a Clinical Officer; who produced the PRC form filed and signed by one; Dennis Ndolo, previously employed by the Nairobi Women's Hospital but had left employment therein. The examination results therein revealed that; "TK" had a swollen right cheek, laceration and bruises on the vagina. She also had teeth impression on her trunk. There was also evidence of recent penetration and sexual assault.

12. Dr Joseph Maundu, from the Government Surgery also testified that, he examined the complainant on 18<sup>th</sup> August 2015 and noted a swelling on the left shoulder region; bruises on right lower leg. The injuries were 8 days old. The vaginal walls were inflamed; reddish caused by forceful trauma.

13. It is against this background that, Martin and the appellant were arrested and charged. Martin the first one to be arrested and charged vide; criminal case No. S.O. 38 of 2015. He pleaded not guilty to both the main count of rape and alternative count of indecent act; contrary to section 11(a) of the Sexual Offences Act, No. 3 of 2006. Subsequently, the appellant was arrested and charged vide Criminal Case No. 60 of 2015, with similar offences. Both cases were consolidated.

14. However, as the case was going on, Martin who was the 1<sup>st</sup> accused died. As a result, the case against him was withdrawn under section 87 (a) of Criminal Procedure Code and the charge sheet substituted where the appellant remained the only accused person.

15. At the conclusion of the prosecution case, the appellant was placed on his defence. In a sworn statement, he testified that, on 10<sup>th</sup> August 2015, he was at Amboseli a local pub called "Chris place". He met one Brian Mailu, Martin (the deceased) and a lady called Tracy Kaloki, a girlfriend of Brian. He ordered for a drink and bought each ¼ vodka. At 9.30pm, he left the pub. He called his friend who owns a taxi and paid Kshs, 100.00 to take the others home. He left, but after twenty (20) minutes, Brian Mailu called him and told him that, his father had sent him away from home. He told Mailu to call Martin (the deceased) for help. Mailu then told him the deceased had agreed to accommodate them.

16. The following day, he went to his friends called Christopher at 7.30pm, and found the others still taking blue ice. He again bought them ¼ blue ice and for Muranga. Later he was called arrested and take to Muthangari police station, then Nairobi Women's and Kenyatta national hospital. He was then charged with rape.

17. At the conclusion of the trial, the Honourable trial magistrate pronounced the final decision in the matter vide a judgment rendered on 28<sup>th</sup> January 2020, and stated as follows;

*"I have considered the evidence of the prosecution witnesses. I have also considered the defence by the accused person. He has not denied being with the victim in this case. There were even times when they agreed to negotiate. The victim PW 1 testified and stated*

that the two (2) locked her in 1<sup>st</sup> accused's house and beaten one Brian Mailu. I have analysed the evidence and the facts herein. I do find that, the prosecution have proved their case beyond reasonable doubt. The evidence of PW 1 was corroborated by the exhibits that were produced by the prosecution witnesses and particularly, the doctors evidence. I will therefore, find the accused person guilty as charged on both counts under section 3 (1) (a) (b) (c) of the Sexual Offences No. 3 of 2006. I will proceed and convict him under section 215".

18. Subsequently, the prosecution indicated the appellant was a first offender and the appellant offered his mitigation. The Honourable trial magistrate then ordered for a probation officer's pre- sentence report before sentencing. The same was availed and the trial court and thereafter the trial court stated: -

*"I have perused the report by the probation officer. It is a detailed report that covered all aspects of this case. I do find that, this court's hands are tied, and I will proceed and sentence the accused person to serve a (10) years in jail.*

*Right of appeal 14 days allowed."*

19. As aforesaid, the appellant has now appealed against that conviction and sentence. Having considered the evidence, arguments and submissions advanced and/or tendered by both parties in this matter, I wish to address the grounds of appeal, which I have summarized as follows;

- a) *The charge was incurably defective;*
- b) *The trial offended and contravened the appellant's right to a fair trial;*
- c) *The prosecution did not prove the case beyond reasonable doubt; and*
- d) *The sentence meted was harsh, excessive, and untenable.*

20. However, it suffices to note that, **the role of the first appellant has been summarized in several decisions inter alia; K. Anbazhagan v. State of Karnataka and Others, Criminal Appeal No. 637 of 2015, Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 and Okeno vs. Republic (1972) EA 32, as follows: -**

*"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge"*

21. Be that as it were, the appeal was disposed of vide written submissions, however, the first ground of appeal that; the charge was incurably defective, has not been addressed in the appellant's submissions. The appellant has submitted on the following issues: -

- a) *Whether the evidence of the complainant was solid and the prosecution's case was (sic) proved beyond reasonable doubt;*
- b) *Whether material witnesses were called;*
- c) *Whether doubts ought to be exercised in favour of an accused person; and*
- d) *Whether the defence of the appellant was considered.*

22. However, the Respondent in response to that ground, submitted that, the appellant has not demonstrated how the charge sheet was defective or the particulars of the offence were at variance with the evidence. The Respondent arguing that, although the appellant was not charged with the offence of gang rape, the particulars of the charge disclosed the same. Further the prosecution could not invoke the provisions of section; 179(1) of Criminal Procedure Code, because the offence of gang rape attracts a higher sentence of fifteen (15) years upon conviction, more than the offence of rape, the appellant was charged with which attracts ten (10) years imprisonment.

23. Having considered that first ground of appeal, I find that, with utmost respect, the law is settled "he who alleges proves"> It was for the appellant to support the alleged or purported defect in the charge(s) or charge sheet. It is clear that, although the issue of a defective charge was raised, it was not canvassed at all. Having failed to do so, the Respondent did not even have to respond. In that case, that ground of appeal fails.

24. The 2<sup>nd</sup> ground of appeal relates to an alleged violation of the appellant's constitutional right to a fair trial. This ground again, was not canvassed at all. In that regard, I find that it is not tenable. That leads to the main ground as to whether, the case was proved beyond reasonable doubt. The main argument advanced by the appellant is that, crucial witnesses were not called and therefore the complainant's evidence was corroborated.

25. I have considered the evidence of the prosecution case. The prosecution called four witnesses; the complainant (PW1), one Mugeke (PW3) who is said to have led the police to where the complainant was after the alleged incident and two medical persons from; Nairobi Women's Hospital, Dr Kinuthia (PW2) and Dr Maundu (PW4). It is therefore clear that, the arresting officer and Investigating officer were not called to testify. Even more so, the appellant has submitted heavily on the fact that, Brian Mailu, who was a key witness was not called to corroborate PW1's evidence.

26. The question that arises is whether; these witnesses were key. If so, what is the legal effect of their absence to testify or give evidence. The evidence of the complainant was that, right from the 8<sup>th</sup> August 2015, when she left for a birthday party, to the time just before the offence was committed, she was in the company of one; Brian Mailu who was her old boyfriend. In fact, she testified that, it is the said Brian who informed her that, the deceased Martin and the appellant were his friends and she should not be worried about their alleged “advances” towards her.

27. It is Brian Mailu who was with her throughout from one place and/or pub to the other up to the time they allegedly boarded a taxi that led her to the deceased’s house where she was raped. He is the one who was allegedly thoroughly assaulted and chased away by the deceased and the appellant, creating an opportunity for the complainant to be locked in the house and raped. It is the same Brian Mailu, who the following day, returned to the house with the deceased when the deceased was eventually arrested.

28. In fact, from the evidence on record, the Prosecutor and Investigating officers who initially dealt with the matter found the witness so critical, that they were concerned over the accused’s alleged threat to him. On several occasions they sought for the accused’s bond to be canceled due to the threats meted on the witness. Indeed, the initial learned Honourable trial magistrate was very firm on that issue and even ordered that the issue of threats be investigated.

29. However, while addressing that issue of the absence of the witness the learned Honourable trial Magistrate stated in the judgment as follows;

*“Though one Brian Mailu was not called on court’s record, there is a clear indication by the earlier Magistrate that the accused had threatened the witness hence an order by the trial Magistrate which was granted on 4<sup>th</sup> August 2017. The investigating officer also never testified.”*

30. I have considered the trial court’s record of; 4<sup>th</sup> August 2017, and I find that, the learned trial magistrate Honourable Jane Kamau, Resident Magistrate, delivered a ruling on concern raised on the interference of prosecution witnesses by the defence, and ordered that; “summons to issue to Brian Mailu to attend court on 1<sup>st</sup> September 2017 for hearing.”

32. Indeed, on 1<sup>st</sup> September 2017, Brian Mailu was in court to testify but the 1<sup>st</sup> accused was absent as he was said to be indisposed, having gotten an epilepsy attack at 4.00am. It does appear from the court record that, on 23<sup>rd</sup> September 2019, the case was taken over by learned trial magistrate, Honourable Maroro, Principal Magistrate, although there is no indication on record as to the reasons thereof. Again, the record of the court does not indicate at, all whether Brian Mailu was ever bonded or summoned to give evidence, thereafter and/or before the prosecution closed its case.

33. In fact, on 23<sup>rd</sup> September 2019, the case was adjourned to 22<sup>nd</sup> October 2019. On that date, the prosecution merely addressed the absence of the Investigating officer and then closed its case. The question is; who else apart from the complainant could identify the appellant other than the said Brian Mailu.

34. The evidence adduced simply confirms that, the complainant was raped, whether gang rape or otherwise. It establishes that she was injured in the course of the ordeal. The evidence of rape supports the ingredient of; penetration. However, it was paramount that the perpetrators be identified. The complainant’s evidence required corroboration in that regard and only and only one; Brian Mailu could corroborate that evidence.

35. Further still the investigating officer collected items at the scene including the complainant’s torn pant and condom wrapper, yet despite being identified by the complainant were not produced by the investigating officer and no explanation offered at all.

36. Similarly the arresting officer who should have explained why the appellant was arrested and/or where or even his conduct at the time of arrest never testified. Again no reasons were advanced, and neither did the trial court seek to know why these witnesses who were police officer easily available never testified.

37. It is clear therefore that this matter was treated extremely “casually” after the initial trial court lost control of the matter and whether the casual conduct was intentionally or inadvertently, it is not clear to this court. In fact, from the record the efforts by the first trial court to secure the attendance of the witness Brian Mailu, was swept underneath the carpet and/or drained away.

38. To buttress this observation, it suffices to consider the court’s record of 22<sup>nd</sup> October, 2019, which states as follows: -

“Court prosecutor: I am expecting PC Veronicah Thuo, then I close the case. I pray for the file to be place aside.

Court: Hearing S.O to 11.00 am

Later at 2,47pm

Court prosecutor: I close the prosecution case”

39. In my considered opinion, and with utmost respect, this casual manner of handling the cases makes mockery of the justice system and for the criminal justice system it makes the complaint suffer double jeopardy; as a victim of crime and a victim of injustice. This is a classic case thereof. In the absence of the three key witnesses, the prosecution case was founded on sandy ground and the conviction was completely

unsound.

40. Even if, I were to find otherwise, I find that, although the learned counsels to this appeal did not address the court on this issue, it is not clear on what charge and/or count the appellant was convicted on. The judgement reads:

*“I will therefore, find the accused person guilty as charged on both counts under section 3 (1) (a) (b) (c) of the Sexual Offences No. 3 of 2006. I will proceed and convict him under section 215” (emphasis added).*

41. The section cited creates only one offence of rape. The appellant faced a charge of rape and alternative of committing indecent act, under section 11(1) of the relevant Act. He could not be convicted on both. Subsequently only one sentence was imposed, not clear for which offence. This court cannot not assume the primary role of the trial court and decide on which count to convict the appellant on, and even if it was, the evidence herein does not support a conviction on either of the counts preferred against the appellant.

42. The upshot is that; I find the appeal herein has merit. I allow it and quash the conviction and set aside the sentence imposed by the trial court. I order the appellant be released forthwith unless otherwise detained.

43. It is so ordered

**DATED, DELIVERED VIRTUALLY ON THIS 29TH DAY OF MARCH, 2021**

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

Mr. Swaka for the Appellant

Ms Ndombi for the Respondent

Edwin Court Assistant