



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO. 5 OF 2020

BETWEEN:

MARK ONGURU..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being and Appeal from the Judgment of Hon. Eric Malesi SPM at the CM's Court at Kakamega Cr. Case No. 150 of 2018 delivered on 20th December, 2019)

J U D G M E N T

1. The Court has before it an Appeal against conviction and sentence. The Judgment was delivered on 20th December 2019. The Appeal is dated 24th January, 2020. The date of filing is not apparent on the document.

2. The Appellant was dissatisfied with the Decision of the Trial Court and has appealed on the seven grounds that appear on the Petition of Appeal, namely that:

The Applicant herein Mark Onguru being aggrieved and dissatisfied in the ruling of the Honourable learned Chief Magistrate Hon. Malesi at Kakamega Sexual Offence Case No. 150 of 2018 delivered on 20th December 2019 and hereby prefers his Appeal to this Honourable Court on the following grounds –

1. THAT the learned trial magistrate erred in law and in fact in dismissing the plaintiff's with costs as to the defence.

2. THAT the decision of the trial magistrate was based on wrong premises and gross on the evidence presented before court.

3. THAT the learned trial magistrate misdirected himself by considering the evidence and the submissions on liability before him superficially and consequently erred in dismissing the Appellant's case.

4. THAT the trial magistrate erred in law and fact by failing to consider key exceptional and unusual circumstances crucial to the determination of the case. The applicant was charged and convicted based on insufficient, uncollaborated evidence.

5. THAT the trial magistrate further convicted the Applicant based on evidence that failed to prove beyond reasonable doubt the nexus between the Applicant and the crime.

6. THAT the learned trial magistrate erred in law and in fact in ignoring the applicable principle and relevant authorities in the written submissions presented and filed by the appellant.

7. THAT the learned trial magistrate's decision, albeit a discretionary one, was plainly wrong.

3. In addition the Accused complains about how the prosecution decided to present its case especially its choice of witnesses.

4. The Accused was charged with the offence of "*Rape contrary to Section 3 (1) (a) (b) (3) of the Sexual Offences Act No. 3 of 2010 Laws of Kenya*". The particulars of the Offence were recorded by the Officer in Charge Navakholo Police Station. They are: "*MARK ONGURU: On the 19th day of November 2018 in Navakholo Sub-County within Kakamega County intentionally and unlawfully caused his penis to*

penetrate the vagina of AA without her consent.”. The Charge Sheet also contained an alternative Charge namely; “Committing an indecent act with an adult contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of that offence were that; “MARK ONGURU; on the 19th day of November 2018 in Navakholo Sub-County within Kakamega County, intentionally did commit an indecent act with an adult by touching the genital organ namely vagina of AA with his penis against her will.”.

5. The Appellant pleaded not guilty to both Counts. Clearly, the reference to the Sexual Offences Act 2010 (instead of 2006) was a typographical error and the Accused was not in any way prejudiced as he was able to plead to the particulars. In addition the Appellant’s Submissions contain a quotation from the Act, again showing there was no confusion.

6. The Court heard oral evidence from four witnesses for the Prosecution and three witnesses for the Defence. The Court heard evidence from the complainant, her father, the clinical officer who examined her and the investigating officer. For the defence, the witnesses were the Defendant, his wife and another bodaboda rider who is his friend and relative.

7. The Appellant included 7 Grounds in his Petition. Those grounds appear to be more relevant to civil proceedings than criminal proceedings. The parties filed Written Submissions. The Appellant relies on the dicta in **Okeno v Republic (1972)**. The Appellant is therefore asking this Court to reconsider the whole evidence and come to its own conclusions and make its own findings. The Appellant’s Submissions contain a section entitled “Analysis”. That comprises a series of questions which were not put to the witnesses at trial and therefore are now a mere afterthought. The submissions seek to challenge all the evidence even the medical evidence that the complainant was pregnant. That position would be consistent with the first defence of the parties having a consensual relationship. The Appellant himself resiled from that to say he was a happily married man who was at home with his wife throughout.

8. The evidence the Court heard which was not challenged was that the Accused was known to the Complainant because they were related. She was 20 years old and she was studying/working as a tailor. The Complainant told the Court that when she was leaving work the Appellant and his friend offered her a lift home. She accepted. Instead of taking her home, the appellant made a detour to Simakina village/market. He took her to a room, locked her in, threatened her and raped her repeatedly. The bodaboda rider left them behind and returned several hours later. The two men then took the complainant to Shianda and put her on a vehicle back to Kakamega. She would have been stranded but was assisted by a person she knew and who called her father. The complainant’s evidence was corroborated by the evidence of the medical officer and his examination notes. He concluded that she had been raped. Her evidence was also corroborated by the Investigating officer who gave evidence that the Accused was in possession of the key of the room where the Complainant said she was raped. The Appellant put forward two defences. On the one hand he was saying that the intercourse had been consensual. Then he said that he had been at home throughout. The Defendant’s second witness was his wife. His third witness was a friend of his who says he came to borrow a pump for one hour and the Accused was at home throughout.

9. The trial Court has an opportunity to observe the witnesses and therefore is better placed to assess their demeanour and as a consequence put the appropriate weight on their evidence. In this case it is clear that the Learned Trial Magistrate preferred the evidence of the complainant and the other prosecution witnesses. The Appellant has not put forward any grounds on why that was a misdirection.

10. In the circumstances, the Appellant has failed to put forward any cogent grounds. In relation to the complaint as to how the Prosecution ran its case, it is not for the Accused to determine which witnesses the Prosecution will call. The Prosecution case is within the competence of the Office of the DPP. It is not a good argument for the Appellant to say that his alleged accomplice was not called to give evidence. The Appeal against conviction must therefore fail.

11. In relation to sentence, the Prosecution were asking for a stiff penalty given the circumstances of the case. The Court received a Pre-sentence report which presented a set of facts that were completely at variance with even the evidence of the Appellant himself. The statutory sentence is 10 years. The trial Court decided that, notwithstanding the aggravating factors of the offence, including the abduction, restraint and threats, 7 years was an appropriate sentence. That appears to be on the lenient side. The Respondent has not applied for enhancement of sentence.

12. For the reasons set out above, the Appeal is dismissed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

DELIVERED ELECTRONICALLY, SIGNED AND DATED AT KAKAMEGA THIS 18TH DAY OF MARCH 2021. DELIVERED ON-LINE USING MS TEAMS PLATFORM

In the presence of:

Court Assistant: Owegi

Appellant: said to have been around but has now left

Respondent: Mr Mutua