



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E020 OF 2021

BETWEEN

ISAIAH MWITI alias KIILU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tigania Principal Magistrate's Court Criminal SO Number 12 of 2019 by Hon. P.M. Wechuli (SRM) on 05th November, 2020)

JUDGMENT

Background

1) **ISAIAH MWITI alias KIILU (Appellant)** has filed this appeal against conviction and sentence on a charge of rape contrary to section 3(1) (a) and (c) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed between on the night of 17th and 18th January, 2019 against **RKM**.

2) The prosecution called 6 (six) witnesses in support of the charges. **PW1 RKM**, the complainant stated that on the material night, she went out to answer a call of nature and met the Appellant who raped her. **PW2 BK** complainant's daughter aged 10 heard screams after her mother went out to answer and call out nature and she went out and found Appellant who was their neighbour lying on her mother. **PW4 RK** heard her daughter screaming and she went out and with light from moonlight saw Appellant holding complainant whereas **PW5 JB** who was Appellant's neighbour stated that he found Appellant in the act at about 11 pm. Upon examination a day after the incident, complainant was found with an old tear of the hymen.

3) In his sworn defence, the Appellant denied the offence and stated that he went to the police station after he learnt that he was being sought and was arrested and charged.

4) *In a judgment dated 05.11.2020, the Appellant was convicted and sentenced to serve 10 years' imprisonment.*

Appeal

5) Dissatisfied with the sentence, the Appellant lodged the instant Appeal mainly on the ground that the prosecution case was not proved beyond reasonable doubt, his defence of alibi was not considered and the time he spent in custody was not taken into consideration at the time of sentencing.

6) The state submitted that prosecution case was proved and urged that the appeal be dismissed.

Analysis and determination

7) The Court of Appeal in the case of **Gabriel Kamau Njoroge v Republic [1987] eKLR** described the role of the first Appellate Court on an Appeal from the subordinate Court in the following terms: -

“...As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the Court are entitled, as well on the question of fact as on the question of law to demand a decision of the Court of the first Appeal, and as the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences

and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect.....”.

8) In the case of R v Turnbull, (1976) 3 All ER 551 Lord Widgery CJ observed as follows on identification: -

“the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger”.

9) In the recent case of John Muriithi Nyagah v Republic [2014] eKLR, the Court of Appeal held: -

“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”
(emphasis added).

10) Except for PW4 who stated that there was moonlight on the material night, the complainant and the other witnesses did not explain how they were able to identify the assailant in darkness. The offence having been committed about 11pm in the night, the prosecution failed in its duty to lead evidence as to the nature of the light, the strength of the light, its size and its position relative to the assailant.

11) The evidence on record reveals that the court did not make an inquiry of the strength of the moonlight and its position relative to the Appellant. The circumstances pertaining to the identification of Appellant, at night, was not free from error and the danger of mistaken identification was therefore great.

12) I thus find and hold that the prosecution failed to prove beyond any reasonable doubt that the offence was committed by none other than the Appellant.

13) From the foregoing, I find and hold that the conviction and sentence were unsafe. Accordingly, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that Appellant shall be set at liberty forthwith.

DELIVERED AT MERU THIS 20TH DAY OF MAY 2021.

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Appellant - Present

For the State - Ms. Mbithe