



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E046 OF 2021

BETWEEN

RONNY MUTUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Githongo Senior Principal Magistrate's Court

Criminal SO Number 10 of 2020 by Hon. S.Ndegwa (SPM on 18th February, 2021)

JUDGMENT

Background

- 1) **RONNY MUTUMA (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 02nd March, 2020 against **HN**.
- 2) The prosecution called 6 (six) witnesses in support of the charges. **PW1 HN**, the complainant stated that on the material day at about 2.30 pm, she went to fetch water and met Appellant who was known to her and he raped her and left her for dead. She stated she lost consciousness and came to at 2.00 am while in hospital.
- 3) **PW2 Cyprian Mutea** arrested Appellant after he was informed by an unnamed area manager that Appellant had raped Appellant. **PW3 Doreen Kaburu who** was informed by Jeremano an area manager that Appellant had raped complainant and **PW4 Hellen Gatwiri** arrived at the scene long after Appellant was arrested. They stated they saw complainant who was lying unconsciousness and escorted both Appellant and complainant to the police station.
- 4) **PW6 Moses Bagaine** a clinical officer examined complainant and found she had a bruise on left arm and minimal blood stains on her genitalia but without a tear, bruise or laceration as shown on the P3 form **PEXH. 7**. He also tendered Appellant's treatment card as evidence of treatment for injuries sustained at the time of his arrest. **PW5 PC Safia Jarso** received complainant and Appellant, escorted them both to hospital and later caused Appellant to be charged. She tendered complainant's skirt and biker which were torn as exhibits.
- 5) In his sworn defence, the Appellant denied the offence and stated that he was going home drunk when he was attacked by three young men who robbed him and framed him with rape when he reported them to the area manager.
- 6) *In a judgment dated 18th February, 2021, the Appellant was convicted and sentenced to serve 40 years' imprisonment.*

Appeal

- 7) *Dissatisfied with the sentence, the Appellant lodged the instant Appeal mainly on the grounds that the prosecution case was not proved and that his defence was rejected without any cogent reasons.*
- 8) *The state submitted that prosecution case was proved and urged that the appeal be dismissed.*

Analysis and determination

9) 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.....”.

10) One Jeremano who allegedly informed PW2 and PW3 that Appellant had raped complainant was not called as a witness to explain the basis on which he implicated the Appellant.

11) At the close of the prosecution case therefore, the complainant was the only witness to the alleged rape incident. Appellant denied the offence. There being no corroboration to the allegations of rape, conviction could only be founded on the basis of section 124 of the Evidence Act, that the complainant victim of sexual offence was, for reasons to be recorded was telling the truth as to the allegation of offence.

12) I have carefully considered the P3 form presented by **PW6**. He was meticulous to record all his finding on the Complainant. He however failed to explain where the source of the minimal blood in complainant’s genitalia having found that complainant had no tear, bruise or laceration. That appears to have been deliberate and in my view, the learned trial magistrate should not have let the clinical officer go without an explanation. At the end of the day, the clinical officer’s findings which were vital to the verdict of rape fell short by failing to prove penetration.

13) Having said that, I find that the learned trial magistrate fell into error when she accepted the clinical officer’s evidence that the presence of blood in complainant’s internal genitalia was corroborative evidence of rape.

14) The foregoing notwithstanding, the incident in which complainant suffered a bruise on the left arm happened in broad day light and I am convinced that the circumstances prevailing at the scene were conducive for positive identification of the Appellant.

15) *From the foregoing, I am persuaded that the prosecution proved a lesser charge of assault causing actual bodily harm contrary to section 251 of the Penal Code Chapter 63 Laws of Kenya.*

16) Section 250 of the Penal Code provides that:

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years”.

17) Under the powers conferred on this court by Section 354 (3)(a) (ii) of the Criminal Procedure Code, I find that it would be in the interest of justice to interfere with the sentence imposed on the Appellant.

18) Appellant was arrested on 02nd March, 2020 and was in remand for 8 months during the trial. He has so far served 8 months since he was convicted making an aggregate of 16 months in custody. The assault in this case was not aggravated and as stated in the P3 form, complainant only suffered a bruise on the left arm.

19) Consequently, the appeal succeeds only on sentence. The sentence of **40 years** is substituted with a sentence of **18 months** from the date of Appellant’s arrest on **02nd March, 2020**. It is so ordered

DELIVERED AT MERU THIS 29TH DAY OF JULY 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Appellant - Present

For the State - Ms. Mwaniki