



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 38 OF 2020

MOSES KIMANI KILONZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of the Hon.

M Opanga, SRM dated 5th March, 2010 in Kangundo Senior

Principal Magistrate's Court in Sexual Offence Case No. 26 of 2019)

REPUBLIC.....PROSECUTOR

VERSUS

MOSES KIMANI KILONZO.....ACCUSED

JUDGEMENT

1. The Appellant, **Moses Kimani Kilonzo**, was charged, convicted and sentenced by the Senior Principal Magistrate's court at Kangundo with the offence of rape c/sec 3(1)(a)(c) (3) of the **Sexual Offences Act** No.3 of 2006. The particulars were that on 28th day of March 2018 at Nguluni location, in Matungulu sub-county within Machakos county, he intentionally and unlawfully caused his penis to penetrate the vagina of EM by use of force and threats.
2. He also faced an alternative count of committing an indecent act c/s 11(A) of the **Sexual Offences Act**. The particulars were that on 28th day of March 2018 at Nguluni location, in Matungulu sub-county within Machakos county intentionally touched the vagina of EM against her will.
3. After hearing the evidence, the appellant was convicted and sentenced to serve ten years imprisonment.
4. In support of the prosecution's case, four witnesses were called.
5. PW1, **EM**, testified that on the evening of 28th March, 2018 she was from her child's place in Katine when she met one Kanyeti together with the appellant, both of whom she knew on the path. According to her, prior to this day, she had seen the appellant at Kanyeti's place taking care of cattle. The appellant then asked her to go with him to his place of work since he had some vegetables which he wanted to give to PW1. The Complainant, PW1, obliged and followed the appellant to his house where the appellant raped her. According to her, the appellant pulled her into his house and since she did not have a pant, lowered his trouser and removed it without taking off his shirt. When she screamed, the appellant covered her mouth with his hand and prevented her from screaming further.
6. After the incident, the complainant left, leaving behind her kiondo. However, on the way, she met someone whose name she could not recall and sent him to go get the said kiondo while she proceeded home where she disclosed the incident to JK, PW2. PW2, told PW1 to take her where the incident had taken place but when they went there, they found the door locked so they did not gain entry.
7. After the incident was reported, she was referred to Kangundo District Hospital where she proceeded with PW2. She recorded her

statement at TALA Police Post. It was her evidence that Wambua and PW2 notified the police and the appellant was arrested. According to her, as a result of being pushed by the appellant she still had back pains and was still being attended to at the Hospital.

8. In cross-examination, PW1 insisted that she knew the appellant well having seen him several times herding cattle. and that the appellant raped her though she could not recall the time. In her testimony, she did not see any house nearby and she raised alarm before the appellant inserted his hand in her mouth. She admitted that the appellant gave her onions and potatoes to go and cook at home.

9. PW2, **JKM**, a grandchild of the Complainant was on 28th March, 2019 attending a *chama* meeting. On her return home in the evening, she inquired from her child if the Complainant had returned and was informed that she had returned and was in her house. However, when food was prepared and taken to the Complainant, the Complainant declined to eat and instead asked for porridge.

10. The following morning PW2 saw the Complainant walking in pain and it was upon asking her the problem that the Complaint disclosed to her what had transpired the previous day. According to her, the Complainant informed her that the appellant had informed her that he wanted to give the Complainant some potatoes, onions and tomatoes which were going to waste and when the Complainant followed him, the appellant pulled her by force, took off his clothes and inserted his penis into her vagina. Though the Complainant screamed, no one went to her help and the appellant put his fingers into her mouth pinching her in the process. However, when the Complainant took her to the place, they found it locked. They then reported the matter to the police and upon being treated, the presence of blood was found in the Complainant's urine. According to PW2, the appellant was arrested by the Complainant's grandchildren.

11. It was PW2's evidence that the appellant was working as a gardener. While the Complainant knew the appellant and where she had been raped, she did not know the appellant's name. PW2 identified the Complainant's P3 form and treatment notes.

12. In cross-examination, PW2 insisted that she was not lying and admitted that she saw the tiny potatoes and the onions that the appellant had given to the Complainant.

13. PW3, **Dominic Mbindyo**, a clinical officer from Kangundo Level Four Hospital testified that the Complainant was treated at Nguluni Health Centre following history of defilement on 28th March, 2019 when she was complaining of pain on urinating, chest pains and pain on the lower hip. According to the report, the Complainant saw the culprit who convinced her to accompany him and go and collect vegetables from him.

14. On examination, there were lacerations on the labia major and her pant was blood stained. On urinalysis, she was found to be HIV, VDRL and Hepatitis B Negative. She was placed on post exposure prophylaxis and antibiotics and was referred for counselling. In the opinion of PW3, there was penetration because of the lacerations on labia majora and minora. She signed the P3 form and dated the same and exhibited both the P3 form and the treatment notes.

15. In cross-examination, he confirmed that the Complainant had a pant during the examination which was blood stained.

16. PW4, **PC Tabitha Ongeri**, attached to Tala Police Division, on 30th March, 2019 perused the OB and found the report of this incident which had been allocated to her. By then the appellant was already in the cells. She took the contact of the Complainant and called her and when the Complainant came, she realised that she was an elderly lady aged 80 years. The Complainant was accompanied by her grandchild. She recorded her statement and by then the Complainant had already been to the Hospital. After recording her statement, she gave the Complainant P3 form which was filled at Kangundo Level Four Hospital. After investigations, she preferred the charges against the appellant who was positively identified by the Complainant.

17. Upon being placed on his defence, the appellant in his sworn evidence testified that on the material day, being a hawker, he woke up early in the morning and did his chores and went to Tala to get his PIN. He returned at 6-7pm, went home and slept. The next day, his employer sent him to Nguluni to buy maize seeds and upon his return, he planted the same and slept. The following day, he returned to Tala to the Bank where his PIN had been requested for. However, when at Tala, two men went looking for him and informed him that he was required at Tala Police Post where he was taken on the allegation that he had raped someone. When the Complainant arrived, he was called at the OB where he was told to admit the charges but he refused. He denied that he committed the offence. He denied any knowledge of the Complainant and denied having seen her.

18. In her judgement, the learned trial magistrate found that from the evidence adduced by PW3, there was penile penetration and that the same was obtained without consent but through trickery. It was her finding that the appellant was well known to the Complainant physically though not by name and at the time of the commission of the offence it was still broad daylight. The Complainant had also seen the appellant several other times herding cattle and knew where the appellant lived and where she was raped.

19. In her finding the defence amounted to a mere denial of the offence. Considering the fact that the Complainant was an elderly woman aged 84 years old, the learned trial magistrate did not see any reason why she would fabricate the charge against the appellant.

20. In the premises, she found that the appellant was guilty and convicted him accordingly. The learned trial magistrate proceeded to sentence the appellant to 10 years imprisonment.

Determination

21. In this appeal, the appellant contends that the procedure prescribed for amending the charge sheet was not followed when the prosecution applied to amend the charge sheet to indicate the date of the offence as 28th March, 2019 instead of 28th March, 2019. On 17th October, 2019, the prosecution applied to amend the charge sheet to read 28th March, 2019 instead of 28th March, 2018 an application which was not opposed by the appellant. It was therefore allowed and the hearing proceeded.

22. Section 214 of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya provides for instances where a charge can be amended and what ought to follow once the amendment is allowed. The said section states that:

214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

23. I agree that the aforesaid section was not strictly complied with. I however, associate myself with the position adopted in **Josphat Karanja Muna -vs- Republic [2009] eKLR**, a decision of the Court of Appeal, where the Appellant complained that he had not been given a chance to recall witnesses who had testified and the court stated:-

“On non-compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that non-compliance with the provisions of section 214 of the Criminal Procedure Code resulted in injustice to the appellant.”

24. In the instant case what was being amended was the date of the offence and it has not been contended that the said amendment prejudiced the Appellant. Accordingly, that ground of appeal is for dismissal.

25. It was submitted that the penetration was not unlawful by virtue of having been a consent from the victim hence the ingredients of rape were not proved. In his evidence the appellant denied the very act of having committed the offence. He did not allege that it was consensual. Accordingly, this ground also fails.

26. It was contended that the failure to call Kanyeli who it was alleged with the appellant leads to a lacuna in the prosecution case.

27. Section 143 of the *Evidence Act* provides that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

28. I am guided by the case of **Mwangi vs. R. [1984] KLR 595** where this Court stated:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

29. Therefore, the prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter vs. Republic [2007] 1EA 135** the court was categorical that:-

“

The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

30. In this case, there is no evidence that the said Kanyeli witnessed the alleged sexual intercourse between the Appellant and the Complainant. The Complainant simply stated that she met the appellant who was together with the appellant on the way at which point the appellant requested her to accompany him to his house where the appellant was to give her the said foodstuffs. In those circumstances I do not see what weight the evidence of the said Kanyeli would have added to the prosecution case. In my view nothing turns on the failure to call the said Kanyeli.

31. In this case I have subjected the evidence adduced to fresh scrutiny. The appellant was well known to the Complainant and the offence was committed in broad day light hence there was no possibility of mistaken identity. The medical evidence showed that there was penetration and the Complainant testified that she was forced into the act and even sustained injuries. In the premises the ingredients of the offence of rape were clearly proved to the required standard.

32. As regards the sentence, section 3(3) of the *Sexual Offences Act* provides as follows:

A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

33. In this case the appellant was sentenced to 10 years which was lawful and was not excessive in the circumstances.

34. In the premises while I find no merit in this appeal and dismiss the same, pursuant to section 333(2) of the *Criminal Procedure Code*, I direct that his sentence do run from 29th March, 2019 when he was arrested.

35. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 23RD DAY OF SEPTEMBER, 2021.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Mr Ngetich for the Respondent

CA Martha