REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 118 OF 2016

JMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Senior Principal Magistrate Hon. F. Kombo delivered on 22nd April, 2015 in NAKURU CM Criminal Case Number 2680 of 2012, JMM v Republic)

J U D G M E N T

1. This appeal is brought by the state to challenge an acquittal under **Section 210** of the **Criminal Procedure Code**.

2. The respondent J MM was charged with;

> **"COUNT 1**
>
> ***RAPE CONTRARY TO SECTION 3(1) (b) (3) OF SEXUAL OFFENCES ACT NO. 3 OF 2006:***
>
> ***JMM: On the 5th day of March 2012 at [particulars withheld] Estate in Nakuru District within Rift Valley Province, intentionally and unlawfully caused his penis to penetrate Anus of MWN without his consent.***
>
> **ALTERNATIVE CHARGE:**
>
> **INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11(1) OF SEXUAL OFFENCES ACT NO. 3 OF 2006:**
>
> ***JMM: On the 5th day of March 2012 at [particulars withheld] Estate in Nakuru District within Rift Valley Province, intentionally and unlawfully committed an indecent act to MWN by touching his private parts namely ANUS and BUTTOCKS."***

3. The prosecution called four (4) witnesses, the complainant MWN, then aged 24 years, the doctor, the arresting officer and the investigating officer.

4. The case for the prosecution was that it all began long before 4th March, 2012 with this story. That the accused person had called the complainant to meet him at the [particulars withheld] Church at [particulars withheld]. He went there and the accused came, called him out, telling him that he looked familiar. That the accused person inquired where the complainant worked. The complainant told him that he was unemployed. The accused told him that he was a hotel supervisor and could get him a job. He asked for complainant's number, but complainant did not have a mobile phone so he gave out his sister's Z's number. Two weeks later, the accused called back on his sister's number. On seeing the familiar number the complainant called him back. He told the complainant to prepare his educational documents.

After some time, he did not recall when exactly, they met at Taidy's Restaurant and Club. They met again but apparently the manager at the accused's hotel was still not ready with the job. The Complainant then looked for his own job at [particulars withheld] County Hotel. It is while he was employed there as a casual that he called the accused to ask about the job. The accused told him to meet him on 4th March, 2012. They met around 4.00 pm. and went to the accused's house at Bondeni area. They got there around 8.30p.m. The accused cooked and served the food, upon eating the complainant felt dizzy, then sleepy. The accused removed the utensils and showed him a place to sleep. It was now 10.00 p.m. He felt weak and fell into deep sleep. When he woke up in the morning the accused was also in the same bed and he had pain in his anus. He was feeling weak. He asked the accused why he was feeling weak. The accused dismissed him. Then it dawned to him what had happened. He found himself nude yet he had slept in his clothes, only for accused to tell him that he had removed them and

put them on the table. He woke up and put on his clothes. He said he wanted to leave but the accused insisted that they sit down and talk. He left went to Provincial General Hospital where he found a doctor from Kabatini Dispensary to whom he spoke. He was attended to and given some drugs. He reported to Bondeni Police Station same day and was issued with P3 form. His statement was recorded by a PC Mathenge. Afterwards he made inquiries about the accused at his plot, then he investigated the accused's whereabouts and led the police to his arrest in his presence, from where he was escorted to Kagoto Police Post, and PC Mathenge collected him. Later he learnt from the doctor that he had been infected with HIV. He claimed that accused offered to pay him Kshs. 50,000/=. He was at Kagoto Police Post. He produced laboratory requests, treatment card and Post Rape Care Form.

5. On cross examination the complainant told the court that he was born in 1988, sitting his KCPE in 2007. That his statement was recorded in English and that he read it, and understood it, and signed it. He had no objection to the production of his statement in evidence. He said he attended PCEA Church and on that day he was just watching the prayers when the accused 'whistled him' from a distance. By then he was earning Kshs. 3,500/=, was living at Lanet where he had been provided with housing. The day he met accused at Taidy's he was not at work. He said that although he had said accused lived in Bondeni, his statement said [particulars withheld]. He said he went to accused's place at 6.00 p.m. but did not see anyone else at the plot. Referred to his statement to the police it turned out that he had told the police officer that he had gone to the toilet that night and gone back to the house, that he had struggled with the accused that night, and had even scratched him in the face. He insisted that he just fell asleep and felt nothing until morning. He conceded that he had lied that he had never had sex before yet he had told the doctor on examination that he had sex before. He said when he went to hospital on 5th March 2012 there were no doctors but he was given drugs, neither were there any doctors on 7th March 2012. He only saw doctors on 19th March 2012 because there had been a strike. He denied framing the accused person to teach him a lesson for not finding him a job. On re-examination he denied assaulting the accused. He said he understood his statement to the police.

6. PW2 No. [xxxx] APC Joseph Muturi testified he was stationed at Kagoto AP Post on general duties. On 2nd July, 2012 he was at the post with a colleague when the complainant MWN reported he had been sodomised by JM, and that he had sighted him in Heshima area. They proceeded to Heshima area where they found accused in his aunt's house. The complainant identified him and they arrested him to the police post where they called Bondeni Police Station to come for him.

On cross examination he said that they did not confirm any details from Bondeni Police Station before arresting the accused person. That police from Bondeni came with the OB number and that they spoke to accused's sister during the arrest.

7. PW3 Doctor Thomas Matara testified that he was producing the P3 on behalf of Doctor Karanja whom he did not know. However she had worked at the Provincial General Hospital Nakuru before him, and he was familiar with her handwriting ostensibly from hospital records.

He read the P3 filled on 20th March, 2012. That the doctor found a small tear on the complainant's anal orifice. Specimens showed that he was infected and tested positive for HIV. He produced P3, Post Rape Care forms, lab request and referral note, CD4 count results. On cross examination he said he was the one in charge of the medico-legal unit. There was a tear in the anal orifice of the complainant. That such a tear was not conclusive evidence of rape. Anything physical could cause it. He conceded that the report did not indicate what had caused the tear and nor had it excluded any other cause. The position of the tear in the anal orifice was not indicated. He was shown another report by a Dr. Mbati which he agreed with.

8. PW4 No. [xxxx] PC Stephen Mathenge was stationed at Bondeni Police Station at the material time. On 5th September, 2012 the complainant MWN reported to him that on the night of 4th and 5th he was in the house of the accused who had promised him a job. That at that time he had nowhere to sleep and the accused gave him a place to sleep. That around midnight as he slept, he felt the said Muturi removing his trousers and then raped him. That he did not raise alarm because Muturi threatened to kill him. That he went to hospital the following day and Muturi ran away. Later he was called by Administration Police (AP) from Kagoto AP Camp that Muturi had been arrested. He went there with the complainant who identified him. He recorded the statements and the AP officers took over Muturi to Bondeni Police Station where he charged him.

On cross examination he said that the accused appeared stronger than the complainant that the complainant was looking for a job. That he felt the accused removing his trousers. He said accused was found after five (5) months. No test was conducted on him. He said complainant told him accused lived in [particulars withheld], but did not show him the house. That if he had done so he would have visited the house. He said he did not think it was an oversight for the complainant not to show him the accused's house. The complainant told him he went himself to check whether the accused was there but did not find him.

9. The prosecution closed its case on 18th February, 2015.

10. The trial magistrate upon reviewing the evidence above concluded that the complainant was not an honest witness and did not tell the truth, that his motive for initiating these grave charges against the accused were unknown "but must be ulterior". He proceeded to acquit the accused under **Section 210** of the **Criminal Procedure Code**.

11. On 25th July, 2016 the prosecution filed this appeal on one ground only;-

> ***"That the learned trial court failed to evaluate the prosecution's evidence in its entirety thus arriving at an erroneous decision."***

He sought the order that;

> ***"The acquittal be reversed and the respondent be convicted"***

12. In oral submissions Ms. Nyakira for the state reiterated the evidence arguing that the respondent had a case to answer on the evidence

before the trial magistrate. That the trial magistrate based his finding on the slight contradiction between the evidence of the complainant and that of the investigating officer PW4.

That the **Evidence Act Section 124** provided for the sufficiency of the evidence of a single witness, and that PW4's testimony was only a report of what he had heard.

13. In opposition Ms. Mungai placed reliance on both the written and oral submissions. She attacked the format of the appeal, using "Memorandum" instead of "Petition" citing **Section 210** of the **Criminal Procedure Code.** The counsel submitted that the trial magistrate looked at the demeanour, character and credibility of the complainant. Citing the provisions of **Section 107(1)** of the **Evidence Act, Article 35(1) on the Constitution,** she argued that the appellant had not disclosed the material upon which they formed the view that trial magistrate had erred. No specific errors on the part of the trial court were demonstrated or established. That the appellant had not demonstrated why the trial magistrate erred, or given any reason, leaving the respondent no room to respond, that appeal violated the respondent's right under **Article 50 of the Constitution** on presumption of innocence. She cited the authorities:-

"1. **Republic v Dandson Mguya (2016) eKLR Criminal Appeal No. 21 of 2016**; where the court stated:

> **"Turning now to the merits of the appeal, we must reiterate that the burden was on the prosecution to adduce evidence which would prove its case beyond reasonable doubt. In the absence of credible evidence proving the guilt of the accused, the prosecution cannot invite the trial court to convict on the basis of inferences and conjecture"**

2. **Anthony Njue Njeru v Republic [2006] eKLR Criminal Appeal No. 77 of 2006;**

Where the cited the holding in **RAMANLAL TRAMBAKLAL BHATT V R [1957]**

> **"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one:-**
>
> **Which on full consideration might possibly be thought sufficient to sustain a conviction."**

3. **Dorcas Jemutai Sang v Republic [2018] eKLR Criminal Appeal No. 11 of 2012;**

> **"…. All judicial officers conducting criminal prosecutions should ensure that at no time does the burden shift to the accused person and more importantly, such a judicial officer should not appear in his/her decision to shift that burden."**

14. This is a first appeal and the words of the Court in **Okeno vs. Republic [1972] EA 323** ring true. The court said;

> **"This is the evidence that was presented before the trial court. We are enjoined as the first appellate court to analyse it afresh and come to our own conclusion. It is the appellant's right as much as our obligation to undertake this task. As always we must bear in mind that the trial court had the benefit of hearing and seeing the witnesses and was therefore better placed to assess the witness's demeanor and disposition."**

The position still holds as the same court in **Kiilu &Another Vs. R (2005) 1 KLR 174;**

> **"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. "**

Neither can we lose sight of holding in the classic case of **Bhatt vs R** on the onus of the prosecution to prove its case beyond a reasonable doubt.

15. The offence of rape is set out under **Section 3(1)** of the **Sexual Offences Act**, a person commits the offence if;

- He/she intentionally and unlawfully commits an act which causes penetration with his/her genital organs.
- There is no consent from the other person to be penetrated or
- If the consent is obtained by force on threats/intimidation of any kind.

16. Intentional and unlawful acts are defined at **Section 43** of the same Act. These include as at **Section 43(4)** circumstances in which the victim is incapable in law of appreciating the nature of an act referred to in **Sub-section (1).** These circumstances include where, the victim is asleep, unconscious, in an altered state of consciousness, under the influence of medicine, drugs, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected, mentally impaired, or a child. The state was expected to establish, a prima facie case which includes a case where, the court would be able to convict if the accused chose to keep quiet if put on his defence.

17. This is what **Bhatt v Republic (1957) EA 332** said;

> *"It may not be easy to define what is meant by prima facie case, but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."*

That is the guiding principle in our jurisprudence, the onus is on the prosecution to provide evidence to support the charge.

1. Was there penetration?

2. Without consent of the complainant

3. Was complainant drugged?

18. From the evidence on record it is evident that the court was presented with two scenarios, one where the complainant alleged he had been drugged by the accused person, that something was put in his food, and as soon as he ate it, he became sleepy, and went into such a deep slumber that he only realized what had happened when he woke up, feeling weak, found himself naked in the same bed with the accused person, and some pain in his anus. That he went to hospital and a tear was found in his anal orifice to prove he had been raped. In addition he had been infected with HIV.

19. The 2nd scenario was that he was sleeping when he felt the accused remove his trouser, that he fought back, scratched the accused person but was threatened with death, and hence endured the rape. He went to hospital for treatment the next day and a tear was found in his anal orifice. In this scenario he is also said to have visited the toilet at night and gone back to bed.

20. Which of these two (2) scenarios was the court meant to believe/accept as the true circumstances of the case, when the same complainant accepted, on oath that he had recorded a statement with the investigating officer, that the recorded statement, though telling a different story from what he had told the court on oath is what had actually transpired, and the statement was produced in evidence?

21. The prosecution's argument that the investigating officer's testimony consisted of what he heard and ought to be ignored is not tenable. That would literally be pulling the plug from under all investigations which rely on what the complainant's told them. There is a reason why witness statements are recorded following a complaint. It is put on record, at the earliest when the events are still fresh in the memory of the person recording the statement in order to assist the police in their investigations. That complaint forms that basis of the case for the prosecution. How can they then ask the court to ignore the same?

22. That prosecution's argument taken to its logical conclusion would open a Pandora box, whereby a complainant would be at liberty to tell the investigating officer what he knew at that time of the incident, have it recorded, confirm it was the correct position then turn around and accuse the same investigating officer of having heard and recorded his own things. I think that is stretching it too far. Granted there are exceptions when there could be a slip up on the part of the Investigating officer. But, this was not such a case. The complainant testified on oath that what he had told the Investigating Officer was the truth, because he had read and verified his statement after it was recorded.

23. The importance of the initial report to the police is testified to by the amount of jurisprudence available in case law. The differences in the two (2) testimonies is not a slight contradiction, there are two complete separate scenarios. In the first scenario, the prosecution ought to have established that the complainant was drugged. The accused's house was not visited. No search was conducted, no medical examination of the substance allegedly fed the complainant, no investigation on that allegation.

The second scenario the accused said he scratched the accused, no evidence of effort to obtain that evidence. It is noteworthy that the investigating officer never visited the scene to establish the allegations that the accused lived there because again there was conflicting evidence as to whether it was [particulars withheld] or Bondeni. The medical evidence was inconclusive as to the cause of the alleged tear, in the anal orifice of the complainant. The issue of him having been infected with HIV was also not investigated. If indeed the accused had infected the complainant as alleged, there ought to have been evidence, or at least investigation into the status of the accused person.

24. It is in **Kiilu & another Vs.Republic (2005) KLR 17 at 175** where the Court of Appeal (*Tunoi, Waki, Onyango Otieno JJA*) held;

> **"The witness whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence**".

This complainant's testimony and demeanour clearly created the impression he was not a credible witness. The trial court cannot be faulted for making that finding.

25. The prosecution argued that the court ought to have relied on **Section 124** of the **Evidence Act, Cap 80 Laws of Kenya.**

26. **Section 124** of the **Evidence Act** exempts Sexual Offence proceedings, from the general corroboration required in criminal cases, it states in the proviso;

> **"Provided that where in a criminal case involving a sexual offence the ONLY EVIDENCE is that of the alleged victim of the offence, the court SHALL receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." (emphasis added)**

As stated by this court elsewhere this proviso was not meant to take away the duty of the prosecution to avail to court properly investigated cases with sufficient evidence to support the charges. The duty of the investigating officer to investigate the case, the complaint as availed, is not removed or suspended by this law, the duty to investigate remains. On this duty stands the accused person's Constitutional right to be presumed innocent until proven guilty. On this duty stands the victim's right to justice. On this duty leans the society's expectations that the guilty shall get their due desserts and the innocent their freedom, and ultimately our collective respect and adherence to the rule of law. In sexual offences it takes another sphere due to the nature of the offences. The Directorate of Criminal Investigations, the Police and the Office of the Director of Prosecutions are all clothed with the requisite Constitutional and statutory mandates and powers to do this.

It is my humble view that under this proviso it is the duty of the prosecution to demonstrate to the court, nay persuade the court as to why the court must abandon the well laid principle that in criminal cases there must be corroboration, and rely on the sole evidence of the complainant. These reasons must be there in the proceedings as to why the only evidence available to the court is that of the complainant/victim. In my mind, that means that the investigating officer must demonstrate that he/she investigated the case, made every effort to obtain any other available evidence but for reasons to be supplied to the court and recorded, it was not there.

27. To do otherwise is to leave the belief expected of the court, of the victim, on no reasonable ground but perhaps on whim or emotion, yet the liberty and life of the accused person may depend on it. In this case there is evidence that the case was not fully investigated. Receiving the report, issuing P3, arresting a suspect is not investigation, investigations must go to the root of establishing the ingredients of the offence.

28. Having weighed the evidence on record and even without the appellant pointing out the specific errors committed by the learned trail magistrate the question is whether there is evidence to warrant the orders sought by the appellant, the substitution of the acquittal with a conviction.

29. The appellant was mistaken that the case had reached that stage. However, at the **Section 210** stage, there is no way that the court can proceed to convict an accused person without hearing his side of the story. Even if the court was to find that the appeal had merit this court would not have the powers to grant the orders sought. That would violate the rights of the accused under **Articles 50 (2) (c)** and **(k) as read with Section 211 of the Criminal Procedure Code** to prepare his defence and adduce evidence to challenge the case for the prosecution.

30. In the upshot I find that the appeal has no merit and the same is dismissed.

Dated, delivered and signed at Nakuru this 27th day of February, 2020.

Mumbua Matheka

Judge

In the presence of:-

Edna and Martin Court Assistants

Ms Mungai for Mr. Orege for respondent

Mr. Kamau for state