



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 91 OF 2018**

**JOAB KITARI ANDESO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal against the sentence of the Senior Resident Magistrate's Court at Maseno***

***(Hon. C. N. Oruo RM) dated the 26<sup>th</sup> September 2018 in Maseno SRMCCRC No. 617 of 2015]***

**JUDGMENT**

The Appellant, **JOB KITARI ANDESO**, was convicted for the offence of **Rape** Contrary to **Section 3 (1) (a)** of the **Sexual Offences Act**, and also for the offence of **Assault Causing Actual Bodily Harm** Contrary to **Section 251** of the **Penal Code**.

1. For the offence of Rape, he was sentenced to 10 years Imprisonment, whilst for the offence of Assault he was sentenced to 2 years Imprisonment.
2. In the appeal he lodged before this Court, the Appellant submitted that the prosecution adduced evidence which was contradictory, and which was therefore not credit-worthy.
3. He also submitted that the evidence was, in any event, insufficient to sustain a conviction.
4. The Appellant described the entire trial as having been unfair, because;
  - (a) *he was not given the benefit of doubt;*
  - (b) *the trial court shifted the burden of proof to the appellant; and*
  - (c) *the trial court failed to take into consideration the appellant's defence.*
5. When canvassing the appeal, the Appellant first pointed out that there was an unreasonable delay by the prosecution, before the trial could commence.
6. I have noted from the record of the proceedings that the Appellant was arrested on 16<sup>th</sup> April 2015, but he was not taken to court until 20<sup>th</sup> April 2015.
7. In that respect, the Appellant submitted that the prosecution had violated his constitutional rights, by failing to take him to court within 24 hours of arrest.
8. He asked the court to allow the appeal on that ground, citing the decision in **ALBANUS MWASIA MUTUA Vs REPUBLIC [2006] eKLR**, in which the Court held as follows:-

***“At the end of the day, it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no need for having those provisions in the first place. The jurisprudence which emerges from the case we have cited in the Judgment appears to be, that unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature***

*and strength of the evidence which may be adduced in support of the charge.”*

9. Although most arrested persons would love to still cling to that interpretation of **Article 49 (1) (f)** of the **Constitution**, the same no longer holds true.
10. It is appreciated that an accused person has a right to be brought before a court of law as soon as reasonably possible, but not later than 24 hours after being arrested.
11. However, if the 24 hours ends either outside ordinary court hours, or on a day that is not an ordinary court day, the arrested person should be taken to court not later than the end of the next court day.
12. In the light of the decision in the case of **ALBANUS MWASIA MUTUA** (supra), the delay in bringing an arrested person to court earned him an absolute acquittal.
13. However, it became clear that by so doing, the courts were inadvertently setting free persons who would be convicted, if they were tried.
14. Therefore, there arose a need to balance the rights of an arrested person, (who was taken to court late), against the rights of the victims of crime, who had evidence that would lead to conviction.
15. The well thought-out and proportional solution was to have the trial proceed, whilst granting appropriate compensation or other relief to the arrested person.
16. In this case, the Appellant did not draw the attention of the trial court to the delay in bringing him to court. Therefore, this court does not have the benefit of any information about what may have caused the delay between 16<sup>th</sup> April 2015 (when the Appellant was arrested) and 20<sup>th</sup> April 2015 when the Appellant was taken to court.
17. Such information could have enabled the trial court and this court determine an appropriate compensatory order, in favour of the Appellant.
18. I find that the delay in taking the Appellant to court is not a proper basis for quashing the conviction.
19. The second issue which was canvassed by the Appellant was in relation to the long delay before the trial commenced, as well as the delay in the actual trial.
20. The record of the proceedings shows that the plea was taken on 20<sup>th</sup> April 2015. The trial was then scheduled for 8<sup>th</sup> September 2015.
21. However, on 8<sup>th</sup> September 2015 the prosecution had no witnesses.
22. On the next scheduled trial date, being 5<sup>th</sup> October 2015, the witnesses failed to turn up in court.
23. The Appellant told the court that he was suffering in custody, and that he was therefore in need of a speedy trial.
24. In appreciation of the need for a speedy trial, the court directed that the case would proceed with minimal adjournments. In fact, the court directed that that would be the last adjournment at the behest of the prosecution.
25. Nevertheless, on 26<sup>th</sup> October 2015 the prosecution sought and was granted another adjournment.
26. The court was informed that the Complainant and her mother were both inpatients at the Kenyatta National Hospital.
27. In the circumstances, the court directed the prosecution to provide proof that the Complainant and her mother had been admitted in hospital.
28. There is nothing to show that the prosecution ever made available the evidence to prove that the Complainant and her mother were admitted at the Kenyatta National Hospital in October 2015.
29. Later, on 23<sup>rd</sup> December 2016 the court ordered the prosecution to provide proof that on that date the Complainant had travelled to attend a funeral.
30. The court categorically stated that the trial would not proceed until the prosecution made available the evidence relating to the alleged admission at the Kenyatta National Hospital, and also to the alleged attendance at a burial.
31. However, on 22<sup>nd</sup> March 2016, the trial commenced, although the requisite evidence had not been made available.
32. Thereafter, the case was adjourned numerous times due to various factors, such as the non-availability of a Sign Language Interpreter

and one-time absence of the Complainant when she had just given birth.

33. On 17<sup>th</sup> July 2017 the trial resumed. The Complainant was re-called and she then finalized her testimony. Thereafter, two other witnesses testified.
34. When the trial next resumed, on 26<sup>th</sup> February 2018, there was a change of the presiding Judicial Officer.
35. On that date, one witness testified on behalf of the prosecution and the court then adjourned the trial, at the instance of the prosecution.
36. On 9<sup>th</sup> April 2018 the last prosecution witness testified, after which the prosecution closed its case.
37. The Appellant canvassed his defence on 26<sup>th</sup> July 2018.
38. The Judgment was delivered on 26<sup>th</sup> September 2018.
39. From the history of the trial, there is no doubt that it took a considerable length of time; Three Years.
40. The Appellant asserted that the delay was utilized by the prosecution to “make up” the case against him.
41. I find nothing that could lead the court to conclude that the prosecution delayed the case deliberately, for the purpose of making up a case against the Appellant.
42. However, when the court makes orders, such as;

***“Last adjournment order stands and the court shall not hesitate to dismiss this matter should the prosecution fail to produce the documents”;***

justice would be seen to have been done if the court followed through on the said order.

43. When the trial court allowed the prosecution to lead evidence, yet the prosecution had not made available documentary evidence as had been ordered, the Appellant was entitled to feel that the court was being too lenient on the prosecution.
44. Courts ought to strive to avoid situations which could cause any party before it to feel that the court was being too accommodating to the other party.
45. But the act of allowing the prosecution to proceed with the case herein, even though the prosecution had not complied with the earlier court order, did not render the trial defective.

#### **Charge & Alternative Charge**

46. The Appellant was charged with the offence of **Rape** contrary to **Section 3 (1) (a) (b) (3)** of the **Sexual Offences Act**.
47. He also faced the Alternative Charge of **Committing an Indecent Act with a Child** contrary to **Section 11 (1)** of the **Sexual Offences Act**.
48. A person commits the offence of Rape if;
  - (a) *he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;*
  - (b) *the other person does not consent to the penetration; or*
  - (c) *The consent is obtained by force or by means of threats or intimidation of any kind.”*

49. As the Appellant pointed out, the offence of rape is committed against an **ADULT**, who does not give consent or whose consent was obtained by force or by threats or by intimidation of any kind.
50. If the victim of penetration was a **MINOR**, the offence committed will **NOT** be Rape; it will be Defilement.
51. Therefore, the very fact that the Appellant was charged with Rape, necessarily implies that the victim was an adult.
52. In the circumstances, it is inexplicable how the same set of facts which gave rise to the offence of Rape could also give rise to the offence in which the same victim was a **CHILD**.

#### **The Evidence**

53. **PW1** is the Complainant. She testified that the incident took place on 16<sup>th</sup> April 2015.
54. She testified that the Appellant gained entry into her house by digging a hole in the wall. He pulled out, through the door, dragged her to a bush, where he raped her.
55. According to the Complainant, she recognized the Appellant, as he was common in the neighbourhood.
56. During cross-examination, **PW1** said that on the material night, it was raining, and that the incident took place at about 8pm.
57. She also said that she tried to put on the tin lamp, but the Appellant put it off.
58. After he had had his way with her, the Appellant ran away. This is what **PW1** said;
- “I crawled back to the house as you fled.”***
59. Later, when **PW1** was recalled, in order to enable her produce some exhibits in court, she said that the incident took place around midnight; although she also said that she did not know the time.
60. As regards the light, **PW1** said that when the assailant entered;
- “..... a tin lamp was on but you put it off.***
- I saw you. It is me who lit it. I saw you.***
- I saw your teeth. There was a gap.”***
61. And during re-examination, **PW1** said that there was sufficient light. She explained that the tin lamp was on for a short time. She said that when the assailant wanted to kiss her, she saw his face fully.
62. **PW2, SARAH NALIKA KHANGATI**, testified about the incident having taken place on the night of 15<sup>th</sup>/16<sup>th</sup> April 2015, at about 11pm.
63. **PW2** heard screams coming from the Complainant’s house.
64. **PW2** heard a knock on her door, and upon opening it, she saw the Complainant.
65. It was the evidence of **PW2** that the Complainant was naked, and was bleeding from the face and the head.
66. The Complainant told **PW2** and **PW3 (KEVIN AMBETSA)** that someone had had sex with her.
67. **PW3** testified that when he heard screams emanating from the house of **PW1**, he set off to go to that house.
68. **PW3** saw **PW1** running towards the house of **PW2**, whilst someone was chasing her.
69. When the person saw **PW3**, he turned and ran across the road.
70. **PW3** testified that he followed the person, who is the Appellant herein, until the person entered his house.
71. Once the Appellant had entered his house, **PW3** phoned a police officer known to him.
72. The police officer went to the house of the Appellant, where **PW3** had kept watch.
73. After the police officer had arrested the Appellant, at the Appellant’s house, the officer led him to the Complainant’s house.
74. **PW2** testified that when the police officers took the Appellant to the Complainant’s house, the Complainant screamed when she saw him. She then pulled down his trousers, whilst pointing at his manhood.
75. **PW4, SGT LYDIA MIGWI**, was the Investigating Officer.
76. She testified that the Complainant was dumb.
77. Her investigations revealed that when the Appellant gained entry into the Complainant’s house, the Complainant *“switched on the lights.”*

78. It is the said lights which enabled the Complainant to see the Appellant.
79. The investigations by **PW4** also revealed that the Complainant was raped at an abandoned house, which was close to her house.
80. According to **PW4**, neighbours of the Appellant and AP officers followed foot-prints up to the Appellant's house, where the officers arrested him.
81. **PW4** explained that on the material night, it had rained, thus making it possible for the neighbours and the AP officers to follow the Appellant's foot-prints.
82. In my understanding of the evidence concerning the arrest of the Appellant, all those who testified about it unanimously said that the Appellant was arrested at his house.
83. The arrest was effected by police officers. About that fact, even the Appellant concurred.
84. The Appellant confirmed that Ambetsa (**PW3**) was present when the police arrested him. In effect, the Appellant saw the said Ambetsa when the police were arresting him.
85. **PW3** testified that he had pursued the Appellant, earlier, and had kept watch at the Appellant's house until the police arrived.
86. On the other hand, the Appellant testified that the only reason why Ambetsa led the police to arrest him is that the Appellant was in a group of 4 boys who had disagreed with him earlier that day.
87. I note that when the Appellant was cross-examining **PW3**, he never suggested to him that the reason why **PW3** led the police to arrest him was due to a disagreement between **PW3** and the Appellant. I find that the talk about an alleged disagreement between **PW3** and the Appellant was an afterthought.
88. **PW5, JOHN SHINGAHO**, is a Senior Clinician who was working at the Emuhaya Sub-County Hospital at the material time.
89. He examined the Complainant and found bruises on her vaginal opening.
90. He also found a lot of mud in the Complainant's vaginal area.
91. In his professional opinion, the said evidence was proof of penetration.
92. I find that the evidence adduced by the prosecution was sufficient to prove beyond any reasonable doubt that the Complainant was raped.
93. There was also sufficient evidence to prove that the Complainant was assaulted.
94. The person who assaulted the Complainant is the Appellant. He was recognized by the Complainant.
95. Thereafter, **PW3** chased after him and then kept watch outside the Appellant's house until the police officers arrived.
96. Whilst the police officers may have required to follow footprints so as to get to the Appellant's house, **PW3** had literally followed the Appellant to the house.
97. On the material night, it had rained, and the area was muddy.
98. When the Complainant was examined by the Clinician, there was mud at her vaginal opening.
99. And upon his arrest, the Appellant's clothing were wet and muddy.
100. From the totality of the evidence, there is no doubt that the conviction of the Appellant was founded upon solid, corroborative evidence.
101. I therefore find no merit in the appeal. It is dismissed.

**DATED, SIGNED and DELIVERED at KISUMU**

**This 10<sup>th</sup> day of March 2020**

**FRED A. OCHIENG**

**JUDGE**