



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 48 OF 2019

JOHN KASOA MULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence imposed by the Learned Hon B. Bartoo, Senior Resident Magistrate while sitting at the Machakos Chief Magistrates Court in Criminal Case SOA 8 of 2017 on 21.5.2019)

BETWEEN

REPUBLICPROSECUTOR

VERSUS

JOHN KASOA MULI.....ACCUSED

JUDGEMENT

1. This is an appeal that was lodged herein on **30.5.2019** by the Appellant, **JOHN KASOA MULI**, against the conviction and sentence imposed by the Senior Resident Magistrate, **Hon. B. Bartoo**, in Machakos Chief Magistrate's Court **Criminal Case SOA 8 of 2017**. The Appellant had been charged before the lower court on 26th May, 2017 with the offence of Rape contrary to **Section 3(1) (a) as read with Section 3 (3)** of the **Sexual Offences Act, No. 3 of 2006**. In the alternative, he was charged with Indecent Act with an adult, contrary to **Section 11(a)** of the **Sexual Offences Act**. The particulars of the main count were that the appellant on the 26th day of May 2017 at [particulars withheld] Village, Kiliva sub-location, Mbiuni Location in Mwala sub-county within Machakos county intentionally and unlawfully caused his penis to penetrate the vagina of MNN a woman aged 31 years by use of force.

2. The Appellant, having denied the allegations against him before the lower court, was taken through the trial process and a Judgment was subsequently rendered by the learned trial magistrate on **21st May, 2019**. The learned trial magistrate in her judgement relied on the testimony of Pw1 after warning herself of Section 124 of the Evidence Act and relying on the case of **Chila v R (1967) EA 722**. The court found that the victim was penetrated after being satisfied that the victim was telling the truth. The court placed reliance on the case of **David Mwangi Njoroge v R (2015) eKLR** and found that the victim was penetrated without her consent. It found that the victim saw the appellant with the help of moonlight and recognized him as a neighbor. The court found that the evidence of the appellant related to events of a different date, that was 7.4.2017 and yet the event occurred on 26.3.2017 therefore found his defence did not shake the prosecution case.

3. The Appellant was found guilty of the offence of Rape and after considering the appellant's mitigation sentenced him to serve 10 years' imprisonment in respect of the offence of rape.

4. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal that challenged the decision of the trial court on ten grounds compressed as follows:

a) The prosecution case against the appellant was not proved beyond any reasonable doubt;

b) The prosecution evidence contained inconsistencies;

c) The court failed to consider the evidence of the appellant

5. Accordingly, the Appellant prayed that the appeal be allowed, the conviction be quashed and sentence set aside.

6. In written submissions filed on behalf of the appellant by Janet Jackson & Susan Advocates, learned counsel submitted that the medical evidence indicated presence of spermatozoa and the genital area was normal. It was counsel's argument that the evidence of spermatozoa did not link the offence to the appellant for there was no DNA or any medical evidence that confirmed that the spermatozoa was of the appellant. Learned counsel placed reliance on the case of **Mwangi v R (2008) 1 KLR (G& F) 1134** where the court of Appeal found that mere presence of spermatozoa alone in a woman's vagina was not proof of penetration. Counsel also placed reliance on the case of **Chrisantos Otiemo Omondi v R (2016) eKLR** where the court warned itself that in most rape cases, the only evidence was that of the victim as corroborated by medical evidence and found that there was material discrepancy in the medical evidence hence came to the conclusion that the case of rape was not established against the appellant by the prosecution. Learned counsel further pointed out to court that Pw1 told the court that the appellant tore her pant, however the evidence of Pw3 who attended to Pw1 hours after the incident was to the effect that the complainant had a stained pant. It was therefore counsel's argument that the case was a fabrication and urged the court to allow the appeal, quash the conviction and set aside the sentence imposed by the trial court.

7. The appeal was conceded to by the state. On the issue of proof of the charge of rape, counsel placed reliance on the case of **R v Oyier (1985) KLR 353** and **Mwangi v R (1984) KLR 595** and submitted that the presence of spermatozoa alone or the absence of it in the vagina was not conclusive proof of rape. It was counsel's argument that there was no credible evidence of forced penetration because as per the evidence of the clinical officer (PW3) there were no visible injuries on the vagina of Pw1. Learned counsel invited the court to find that the offence of rape was not proved beyond reasonable doubt and the conviction was therefore unsafe.

8. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa expressed this principle thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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..."

9. The Prosecution called a total of five witnesses before the lower court in proof the particulars of the charges, the first of whom was the Complainant **PW1**. Her evidence was taken by Hon Kibelion and that the prosecution sought to amend the charge sheet to indicate the month of the offence as 26.3.2017 and not 26.5.2017. The application was allowed and the charge sheet was amended. Her evidence was that, on the **26.3.2017** at 4.30 am when on her way to fetch water, she met the appellant, a neighbor who was holding a knife and who used a cloth to cover her mouth. She testified that the appellant threatened to stab her if she screamed and she did not scream. She told the court that the appellant hit her knees with a stick, causing her to fall down then the appellant removed her clothes and had sex with her on the road. She stated that she was able to see the appellant because there was moonlight and after the ordeal she rushed to Mueni's house to borrow a phone that she used to call her husband. She stated that her husband called his father who came to Mueni's house and he asked JN to take her to hospital. She testified that she, Mueni, Joyce and Mutua (Mueni's husband) went to Mbiuni Police Post to report the matter where she was issued with a P3 form that she took to Mwala Hospital and returned the same to Mbiuni Police post. She tendered in court the treatment card and P3 form that were marked for identification. It was her testimony that the appellant was her close neighbor. On cross examination, she testified that she did not scream because the appellant had covered her mouth. On reexamination, she told the court that she did not reach the well and did not know if there were people at the well.

10. **PW2, FMM**, testified and told the court that on 26.3.2016 at 5.00 am he received a call from Pw1's husband that Pw1 had been raped by the appellant on her way to the well so he went to Mueni's house where Pw1 was and after Pw1 recounted the occurrence he called Nduku whom she instructed to take Pw1 to hospital. He told the court that the matter was reported to Mbiuni Police post and Pw1 was referred to Mwala Hospital for treatment and that he paid the hospital bills. He told the court that he knew the appellant as a close neighbor. On cross examination, he told the court that he did not witness the rape. On reexamination he stated that he was with the appellant at the well at 2.00 am and that the appellant left then at 5.00 am when his son called him and alerted him that Pw1 had been raped. He also testified that he did not check if Pw1's clothes were torn.

11. The Clinical Officer, **Zablon Masai (PW3)**, told the lower court that Nancy Kemunto had examined Pw1 at 8.47 am and noted that she appeared worried and that she had a stained pant. The examination revealed that she had tenderness on the neck and bruises on the neck region, there was tenderness on the thighs. He testified that a vaginal swab revealed the presence of spermatozoa and urine infection; He filled the P3 form on 5.4.2017. He produced the treatment notes that were filled on 26.3.2017 and testified that it contained the history details that were the same as those captured in the P3 form. The treatment notes and P3 form were tendered in evidence and marked as exhibits 1 and 2

12. Pw4 was **LM**. She testified that on 26.3.2017, Pw1 came to her home at 5.00 am and reported that she had been raped and she requested for a phone to call her husband. She gave her phone to Pw1 who called her husband Musyoka who called Pw2 and who came to Pw1's house. She testified that Pw1 narrated to Pw2 what had happened and she noted that Pw1's skirt was not torn. She told the court that she went to Mwala Hospital together with Pw1 and they were referred to Mbiuni Police post where the matter was reported.

13. **PW5** was **Pc Wilson Mboi**, who testified that on 26.3.2017 he was assigned a rape case in which the complainant reported that she could identify her attacker. He testified that he issued a P3 form and referred Pw1 to the hospital and that he visited the scene and later recorded statements. It was his statement that he established that the offence was committed on a footpath near the river. He testified that the appellant was later arrested. On cross examination, he testified that he did not recover anything from the scene. The court found that a prima facie case had been established against the appellant and put him on his own defence.

14. It is apparent from the record that the magistrate who took the prosecution evidence was not available during the defence hearing. However the record is not indicative of whether or not the trial court was on transfer or whether there was compliance with Section 200 of the CPC or whether there was any attempts at explaining section 200(3) of the CPC to the appellant who had a right to ask the court to have

the matter commence de novo. In the absence of the exercise of his right, he appears to have regularized what were irregular proceedings. The hearing of the defence commenced before Hon B. Bartoo as it would appear that Hon Kibelion who had heard the case partly had gone on transfer.

15. In his defence, the Appellant told the court that on **7.4.2017**, Philip (DW2) asked him to accompany him to the river at 4.00 am and when he arrived he found Pw2 who later left. He testified that Pw2 came back and informed him that he had raped his wife's son and he denied commission of the offence. On cross examination, he testified that there were many people whom he could avail if required.

16. DW2 was **Philip Makau Musyoka** who testified that he was a hustler who on 7.4.2017 requested the appellant who is his uncle at 4.00 am to accompany him to the river. He testified that on arrival at the river, he saw Pw2 who left and returned whereupon he alleged that the appellant had raped Pw1. He told the court that he did not get any person along the way.

17. From the foregoing summary of the evidence adduced before the lower court, as well as the judgement of the trial court the pertinent questions to pose in this appeal, granted the appellant's grounds of appeal are:

[a] Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of Rape to the requisite standard;

[b] Whether there were any procedural infractions by the prosecution or the learned trial magistrate that would vitiate the conviction that was recorded against the Appellant.

18. On the first issue, **Section 3** of the **Sexual Offences Act** provides for the offence of Rape in the following terms:

"(1) A person commits the offence termed 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) 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."

19. Hence the prosecution was under obligation to prove its allegations that there was penetration of the complainant's genital organ and that consent for such penetration was procured by force. In this respect, the prosecution adduced evidence of Pw1 that she was raped by the appellant.

20. The Clinical Officer who testified on the examination that was carried out on the complainant and filled the P3 Form corroborated the Complainant's evidence that she was subjected to penetration. The Appellant's defence before the lower court was alibi. The trial court seemed not convinced by the same and I agree with the rejection of the evidence and find that there was no reasonable doubt created in the evidence of the prosecution.

21. The evidence on record is direct, cogent evidence that is properly corroborated and I am satisfied that the sexual act did occur. I am also satisfied that the court properly relied on Section 124 of the Evidence Act after warning itself of the evidence of a single identifying witness. I see no reason to doubt the evidence of Pw1 because the chain of events as narrated by her, the persons whom she reported to was consistent as indicated by the testimony of Pw2 and Pw4 and I agree that Pw1 was indeed truthful. On the other hand the account of Dw1 and Dw2 point towards deliberate untruthfulness because they relate to events of a date other than the date of the offence and in that regard the court was right to reject the appellant's evidence.

22. There is evidence produced of menaces or force that was meted on the complainant that is to the effect that she was pushed, her mouth was covered and this is in the P3 form as well as the evidence of Pw3 to the effect that there were bruises on her neck and neck region as well as tenderness on her thighs. This corroborates evidence that there was a struggle. With regard to the identity of the appellant, the evidence on record is that the complainant saw the appellant whilst in the process of going to fetch water; that she saw the appellant waylay her, threaten her and cover her mouth and also when he was having sex with her she saw him and was able to identify that he was a neighbour. She had quite a length of time to see him and take note of him and the attack happened with the aid of moonlight and in totality all these were factors favourable to correct identification. I am satisfied that the appellant was properly identified as the perpetrator. In any event after the ordeal the complainant rushed to a family relative to report and to seek for a phone so as to alert her husband about the incident. The complainant at the same time alerted her father in law and named the appellant as the perpetrator.

23. The inconsistencies noted by the appellant's counsel in the date of the commission of the offence was cured by the amendment of the charge sheet that was consented to by the appellant on 11.9.2017. The other inconsistency pointed out was on whether or not Pw1's pant was

torn and in my view and in placing reliance on Section 382 of the Criminal Procedure Code, the same is not material as to shake the evidence against the appellant. As to whether the pant was torn was not material since the key issue is whether penetration took place. The evidence of the clinical officer plus the exhibits did corroborate the complainant's evidence. I am satisfied that it takes great courage for a woman to come out in the open and disclose about a violation of her person in the form of a sexual act and hence the complainant's testimony was the truth of what had happened. I am satisfied that the conviction of the Appellant for the offence of Rape contrary to **Section 3(1)** was based on sound evidence.

24. With regard to the 2nd issue, Section 200(4) of the Criminal Procedure Code provides that “*Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.*”

25. From the record, I am unable to see the prejudice that the appellant suffered save that his right to elect to have the matter start de novo or seek to recall witnesses was not realized. However he did not point out the same to court and because the provisions of Section 200(3) of the Criminal Procedure Code are to the effect that it is only when the accused person demands for a trial to start denovo that the court is obligated to inform the accused of that right and because no demand was made, I see no reason to set aside the conviction. In any event the appellant readily conducted his defence before the incoming judicial officer and even called his witnesses.

26. The sentence for rape is not less than 10 years. On considering all the evidence and the relevant factors relating to the sentence I find that there is no reason to interfere with the sentence passed by the court.

27. I find no merit in the Appellant's appeal. The same is hereby dismissed. The conviction and sentence is upheld.

It is so ordered.

Dated and delivered at **Machakos** this **30th** day of **April, 2020**.

D. K. Kemei

Judge