



REPUBLIC OF KENYA

IN THE HIGH COURT

AT VOI

CRIMINAL APPEAL NO. 4 of 2019

MARTSON MWAKINA MWATABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Decision of Hon E. M. Nyakundi RM in the RM's Court in Wundanyi delivered on 4th December 2018 in Criminal Case No 20 of 2018)

J U D G M E N T

1. The Court has before it an Appeal against the Decision of Hon E.M. Nyakundi in the SRM's Court made on 4th December 2018. The Accused was convicted of the Offence of attempted rape. The Appellant is appealing against both the conviction and the sentence.

2. The Petition of Appeal was filed on 22nd January 2019 and the Court gave leave to file out of time on 14th June 2019 after receipt of the Lower Court File. In the Petition the Grounds of Appeal relied upon were that:

“1. I pleaded not guilty to the charges

2. That the prosecution failed to proof their case beyond reasonable doubt

3. That the appellant was not provided with witness statement thus my constitutional right was violated

4. Your honour I am the sole bread winner of my family after my parents demise”

5. Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceedings in this case.

6. In view of the circumstances of this case, the custodial sentence of 10 years is harsh, severe and manifest excessive punishment.

7. Your honour I beg your honourable court to reduce the convictio, give option of fine, slash conviction or order retrial or whichever your honourable may deem fit

8. That in the event of my humble appeal may find merits; I would wish to be allowed to be present during the hearing of my appeal.

3. Following receipt of the Certified Proceedings, on 23rd September 2019 the Appellant filed his Amended Grounds of Appeal. They are:

“1. That the pundit trial SRM erred in Law and fact by convicting and sentencing me for ten years imprisonment without properly finding that the circumstances surrounding the entire trial procedure were not based on the Laws constitutionally prescribed to supervise for a fair trial procedure that contravening the provisions of Article 50(2b)(2g) and (2h).

2. That the pundit trial SRM erred in law and fact by convicting me and sentencing me while relying on the evidence of identification and mode of arrest which evidence is greivously perforated to be relied upon as sure foundation for a just conclusion.”

4. The Appellant also filed his Written Submissions on 23rd September 2019. The Written Submissions on behalf of the Respondent, were filed on 31st January 2020.

5. The Appellant was charged with the offence of “Attempted Rape Contrary to **Section 4** of the **Sexual Offences Act No. 3 of 2006**. The Particulars of the Offence recorded on the Charge Sheet are “**MARTSON MWAKINA MWATAMBU**: On the 26th day of September 2018 at around 1445 hours at [particulars withheld] Village Wuningu Location within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of AMK without her consent.”. The Charge Sheet also contains a second less serious offence namely, “Committing an indecent act with an adult contrary to Section 11A of the Sexual Offences Act No. 3 of 2006. The Particulars of that Offence were recorded as “**MARSTON MWAKINA MWATABU**: On the 26th day of September 2018 at around 1445 hours at [particulars withheld] Village Wuningu location within Taita Taveta County, intentionally and unlawfully touched the buttocks of AMK using his hands without her consent.”

6. The Learned Trial Magistrate found the Appellant guilty of the more serious charge. The Judgment records that she was satisfied that the Accused had approached the Complainant and restrained her before forcefully dragging her into the bushes and forcefully removing her underwear without her consent. She said that he clearly showed an intention to commit the full offence of rape. As this is a first appeal, this Court must reconsider and re-assess the evidence that was before the Lower Court and come to its own conclusions, albeit without observing the demeanour of the witnesses giving evidence.

7. The evidence of the offence came from 4 Prosecution Witnesses. The Complainant (AMK) gave evidence first. She said the incident happened on 26th September 2018 at 2:45 pm. She was making her way towards her shamba. A person was following her and he suddenly grabbed her and dragged her towards a hill. She said he was leading her to a bush. She says she was wearing a skirt and he managed to remove her underwear which were pink. She identified her underwear as exhibit MF-1. The person did not undress her. She fought back and she said she fought back and poked her attacker in the eye. She says that she had previously had a C-section and the struggle caused pain. She says that she saw her attacker clearly, did not know him but she could recognise him by the way he was dressed. She did not see a doctor and she did not have a completed P3.

8. The Second Prosecution witness was the Assistant Chief of Wuningu sub-location. He lived in [Particulars Withheld] Village he said. He said he received the report of an attempted rape at 10.30 pm on 26th September 2018. The record shows that the Prosecutor corrected his evidence. It is not part of the function of the Prosecution to give evidence. The Assistant Chief said he proceeded to the scene of the crime and found the Complainant who explained what happened and said that her assailant attempted to rape her. She said she was not hurt but dirty because of the mud. That suggests that she came in contact with the ground, but there is no direct evidence to that effect. He forced her into the bushes and removed her panties. She said she could identify him from “the dress code”. He said following investigations the underwear was found in the home of the suspect. When the Police were informed the Inspector from Wundanyi said he did not need to visit the scene. PW-2 said he was present when the panties were found and he recovered them himself. He described them as pink in colour. The Accused was not able to explain how the Complainant’s underwear were in his bedroom. PW-2 said that he had known the Accused for about two years. He lived by himself and his parents lived in Kishushe. He is a farmer. PW-3 Gibson Mbele Mwanzumbi is also a farmer from Wuningu sub-location. He says that on 27th September 2018 at 10.30 pm he was at his farm. He heard a woman screaming. At first he thought it was children playing. He then received a call from a boda boda rider saying that someone had tried to rape her and ran. PW-3 said he was “the chairman of the village”, Mashishi Village. He said he went to the scene of the crime which was on the road at Mashishi. He saw the Complainant and questioned her. She was muddy and said she could identify her assailant. She said she had scratched his nose and From his shirt of the shoulder. PW-3 said he was related to the Accused. He is not married and is a hardworking person. After hearing the Complainant, PW-3 says he called Dickson Muchila who is a neighbour of the Accused. Dickson said that the Accused had been at his home and had a bleeding nose and was dressed the same. That was when PW-3 went to the home of the Accused and found the panties.

9. PW-4 was the Investigating Officer, Elizabeth Mwatate. She says the crime was reported on 26th September 2018 at 2pm. The Call came from the Area Chief for Wuningu location called Paul Mwangengele. She says the Area Chief said they had captured the Accused. She said she “went to the scene and met the Accused there”. He had been arrested and tied up by members of the public. The exhibit was next to him. She said when she interrogated the complainant she said the accused had grabbed both hand and forcefully removed her underwear. She says “On removing her panty he did not do anything as PW-1 fought him. Later when he was interrogated by the same officer, she gives evidence that the Accused confessed to her that on that date “he wanted to sleep with a woman sexually”. She says, that “he found his chance, where he saw no one was on the road with PW-1. In his Defence the Accused chose to remain silent.

10. It is the function of the first appeal court to re-consider and re-evaluate the evidence and come to its own conclusions. The Appellant was charged with Attempted Rape under Section 4 of the Sexual Offences Act. **Section 4** of the **Sexual Offences Act** provides:

“Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

In addition, the Appellant was charged with committing an indecent act with an adult. Section 11A of the Sexual Offences Act provides “Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both”.

11. Moving onto the evidence before the Court. It is the evidence of the Complainant, (PW-1) that she was attacked by her assailant in the afternoon of 26th September 2018 at around 2.45 pm. She says her assailant grabbed both hands and dragged her towards the bushes. He said only “come with me”. He did not say anything else. He then somehow managed to remove her underwear. The Complainant provides no details on how this happened. For instance, did he throw her down? She said that she fought him off. In her own evidence she said that she poked him in the eye. Other witnesses report her as saying she scratched him nose and it was bleeding. PW-3 confirms his neighbour is the assailant because his nose was bleedings. Again there is a paucity of detail.

12. As to identity she says that she could recognise her assailant. Not one of the witnesses provided any distinctive features of the assailant which were shared with the Accused. Then there is the question of the neighbours who came to her assistance. None of the persons who went to the scene at the time, with the possibility of seeing the assailant were called to give evidence. The Complainant also changed her evidence to say, not that she recognised the Accused but that she recognised his clothes. Again there is no description of those clothes

recorded from the evidence.

13. The evidence that the Court did hear was evidence that the article of clothing that was stolen from the Complainant during the assault was found in the home of the Accused. The Accused provided no explanation whatsoever on how that came about. In addition, there is serious discrepancy between the evidence of the Prosecution witnesses on the date and time of the offence. The State has not submitted that those discrepancies were due to mistranslation from Swahili.

14. The Appellants Amended Grounds of Appeal lists two Grounds (1) that the Appellant did not have a fair trial and (2) that the Trial Court relied on evidence of identification and mode of arrest which did not provide a sure foundation for a conviction. The Appeal is opposed by the State. Both Parties filed their Written Submissions as stated above.

15. As his challenge to the trial process, the Appellant states that he was not provided with an Advocate. **Article 50(g)** of the Constitution provides that an Accused person is entitled “to choose and be represented by an Advocate and to be informed of this right promptly”. The State refutes that right and argues that the Accused must first indicate his wish to be represented. The State relies on the authority of ***Charles Maina Gitonga vs Republic (2018) eKLR*** where the Court stated “... (b) Noting that legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any of the provisions of the Repealed Constitution and that Section 36(3) of the Legal Aid Act No, 6 of 2016, an accused has to first establish that he was unable to meet the expenses of his trial.”. The Appellant did not do so.

16. The Appellant’s claim and the State’s response give rise to several permutations. It is correct that the Constitution provides an inherent right to be represented by an Advocate. It is also correct that at no time did the Accused tell the Court he wished to be represented. In addition, it is clear the Court did not inform him of his right to be represented. However, the right to be provided by an advocate at the expense of the State is a progressive right and at present it is only available for capital offences. To that extent, it is correct that the onus was on the Accused to ask for representation and he did not do so. He cannot now rely on that omission as a ground of appeal.

17. The Appellant also complains that he was charged with an alternative charge. He argues that the alternative charge was not on the charge sheet. However the record shows that the Court received an amended Charge Sheet on 28th September 2018. Therefore, that complaint cannot hold. The Appellant complains about the identification evidence. He states he was arrested first and then identified. That seems to be the case from the evidence of the PW-3 that from the telephone conversation, he knew who the perpetrator was and directed Dickson Muchila to arrest him. It was at the home of the Accused that the Complainant identified him as her assailant.

18. This Court must decide whether the evidence before the Lower Court was sufficiently cogent to found a conviction for an offence which is a serious offence. The uncontroverted evidence of the Complainant was that she was walking to her farm on the afternoon of 26th September 2018. The road was more or less deserted and then someone started following her. That person then stopped her, grabbed both hands and dragged her up the hill into some bushes. There he managed to remove her underwear. She says she fought him off. He suffered some facial injuries and she tore his shirt at the shoulder. She does not describe her assailant nor his clothes. However, he ran away with the underwear that he had removed. Whether that was the sole purpose of the attack is not clear. The assailant also reported that the attacker touched her buttocks however that is not part of her sworn testimony. The Accused is then said to have stopped and run away with her underwear. Later, on the same day she went to the home of the Accused. There she identified him as her attacker. The authorities also found her underwear in his bedroom.

19. The Accused chose to remain silent when required to present the case for the Defence. Therefore the evidence before the Court is not challenged. However, there are several inconsistencies in the evidence of the Prosecution witnesses. A fundamental issue is that the prosecution witnesses are not consistent as to time and place of the attack. It could be [particulars withheld] Village or in [particulars withheld] Village or the road in between. In the circumstances, the Prosecution Witnesses who gave evidence do not corroborate the evidence of the Complainant. They speak of events on a different date a different time of day. The implications of an offence committed mid-afternoon and one committed late at night are significant. The Investigating Officer gives evidence of a purported confession yet the Court was not told that the correct procedure was followed and the confession not properly recorded.

20. Therefore, the Complainant’s evidence is corroborated by fact of her underwear being found in the possession of the Accused. Although that is circumstantial it is sufficient to corroborate. Therefore, the evidence of the Complainant was that she was attacked. The assailant dragged her to a bush and removed her underwear and then stopped. She says she fought him. However, she did not draw a connection with her scratching his face and tearing his shirt and him stopping.

21. In the circumstances, there is no evidence before the Court that demonstrates an a clear intention to commit rape. There is no act that shows that the Appellant did an act that would cause his penis to penetrate the vagina of the Complainant, there is no evidence on which the Learned Trial Court could have found him guilty of that offence.

22. However, what is equally clear is that he did commit the offence of an assault amounting to an indecent act with an adult contrary to **Section 11A of the Sexual Offences Act**. His actions in restraining the Complainant and removing her underwear amount to that.

23. In the circumstances, the Appeal against conviction for attempted rape is upheld. The Appeal in relation to an indecent act with an adult is dismissed. The Appellant is hereby found guilty of the alternative charge. The sentence is accordingly reduced to the five year term provided for in the Act.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated: 30th March 2020

Signed and Delivered in Voi this the 27th day of April 2020

In the Presence of

Court Assistant: Josephat Mavu

Appellant: In person by Skype Video Link to Manyani GK Prison

Respondent: Ms Mukangu by Skype Video Link to ODPP Voi.