



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 16 OF 2020

JOSHUA MUNENE KIRIMANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Hon. P. M. Wechuli SRM,

made on 29/1/2020 in Tigania SO Cr. Case no. 473 of 2014)

J U D G M E N T

1. **JOHN MUNENE KIRIMANA (“the appellant”)** was on 24/3/2014 arraigned before the Senior Resident Magistrate’s Court Tigania with the offence of Rape contrary to **section 3(1)(a)(c) of the Sexual Offences Act No.3 of 2006**.

2. It was alleged that on 9/3/2014 in Tigania West District within Meru County, the appellant intentionally caused his penis to penetrate the vagina of RK by use of force.

3. The appellant denied the charge and the prosecution paraded 6 witnesses in support of its case. After trial, the appellant was found guilty and sentenced to 10 years imprisonment. It is against that conviction and sentence that the appellant has appealed to this Court raising several grounds which can be collapsed into 4 as follows:-

a) That the trial Court erred in convicting the appellant on inconsistent, contradictory and conflicting testimony.

b) That the trial Court erred in failing to note that the investigations were shoddy and inconclusive.

c) That the trial Court erred in convicting the appellant yet the prosecution had not proved its case to the required standard.

d) That the trial Court erred in rejecting the appellant’s defence without giving reasons.

4. In his written submissions filed on 7/5/2020, the appellant submitted generally on his grounds of appeal. He submitted that the prosecution case was not proved beyond any reasonable doubt. That the medical evidence could not be relied on as the complainant was not examined immediately after the alleged rape. That those who arrested him were never called to testify. That crucial exhibits were never produced and that his defence was peremptorily rejected without any grounds. He referred to the case of **Philip Muiruri Ndaruga v. R [2016] eKLR** in support of his submissions. The other cases he referred to were found not to be reported, if they existed.

5. On behalf of the prosecution, it was submitted that the ingredients of the offence were proved to the required standard. That the testimony of the complainant was corroborated by that of Pw2, Pw3 and Pw4. That the medical evidence proved that the complainant had been raped. As for the defence, it was submitted that the same was an afterthought as it had not been put to the prosecution witnesses when they testified.

6. This being a first appeal, this Court is enjoined to review and re-evaluate the evidence afresh with a view to making its own independent findings and conclusions. In so doing, the Court must give regard to the fact that the trial Court had the advantage of seeing the witnesses testify. **See Ekeno v. Republic [1972] EA 32**

7. The prosecution case was that on 9/3/2014, the complainant (**Pw1**) was coming from a local church at about 7pm. When she reached some field, she was accosted by the appellant who bit her on the throat. He tore her biker and pant, and raped her. She screamed and **GK Pw2, JK (Pw3)** and **IMM (Pw4)** came to her rescue.

8. According to **Pw2, Pw3 and Pw4**, when they were coming from church, they heard someone crying for help. When they went near, they found the appellant on top of the complainant. The appellant had removed one leg from his trouser. When he saw them, he took off and they gave chase. He was arrested by the villagers and handed over to the chief and later the police.

9. **Pw6 Geoffrey Muthomi Murithi** examined both the appellant and the complainant on 9/3/2014. The complainant had a human bite on the left side of the chest and right hand. The labia majora was tender and labia minora swollen. The hymen was broken. He concluded that she had been raped. On examining the appellant, his clothes were blood stained. He had bruised lips and a cut wound on the arm.

10. In his defence, the appellant stated that on the material day, he left church with his girlfriend **VM (Dw2)** and went to his home. They had sexual intercourse in his house and then left to the home of K as there was someone sick. They left at 6.30 pm but on the way, they were accosted by people who included **Pw3 and M**. The attackers blamed his father for interfering with their land at the adjudication committee. They caught up with him and cut him. He lost consciousness but came to when at the chief's camp.

11. **Dw2** reiterated having sexual intercourse with the appellant earlier on that day before going to Kaiyongi's home. That when they were attacked on the way home, she ran and informed the appellant's father (**Dw3**) of the attack. **Johnson Keremana (Dw3)** went and found the appellant at the chief's camp. The appellant told him he had been assaulted by, amongst others M. They went to the police and then hospital. Nothing was done at the hospital until the following day.

12. The first ground of appeal is that the trial Court erred in convicting the appellant on inconsistent, contradictory and conflicting testimony. According to the appellant, the complainant had stated that she was a virgin before the alleged rape but later stated that it was secondary virginity. The other contradiction was the evidence of **Pw4** who stated that the incident occurred on a Monday yet 9/3/2014 was a Sunday.

13. The alleged contradictions in my view are not material. The complainant clarified the sort of virginity she was talking about. Further, **Pw4** was giving his testimony three years after the incident and could not have recalled the days properly. In my view, the said contradictions were not material enough to affect the prosecution evidence.

14. However, I note that the complainant testified twice. She first testified on 30/11/2014 when she was not cross-examined. She was recalled again and testified on 8/3/2015. In her earlier testimony, she told the Court that after struggling with the appellant for a long time, she screamed and some people came. They came when he had started the act.

15. When she was recalled, she stated: -

"I started praying and witnesses from the church heard and came. At last minute he raped me. He tore my biker and rapped (sic) me. It took more than 30 minutes since we struggled a lot. ..."

16. It is not clear whether the rape ordeal took more than 30 minutes or shorter. It is also not clear whether at what point the alleged witnesses arrived.

17. The other issue is that all the prosecution stated that there was moonlight that night and one could see well. The complainant stated that she was at the time wearing a white blouse and black skirt. On the other hand, **Pw4** testified that the complainant had a bright dress. **Pw4** was one of those who allegedly rescued the complainant from the ordeal by the appellant. The question is, did he see the complainant or it is someone else he saw?

18. The second ground was that the trial Court erred in failing to note that the investigations were shoddy and inconclusive. The investigations officer who conducted the investigations did not testify. However, **PC Karen Ruto (Pw5)** testified on her behalf and produced the statement made by **IP Agnes Ikiba** the investigation officer.

19. From that statement, she received a call from the area chief that someone had been arrested of rape. She went to the AP's Camp at Kirindine and found the appellant and the complainant. She was informed that the appellant had been found in a field raping the complainant. She took the two to **Miathene District Hospital**. P3 forms were filled for both and she took statements from the witnesses and thereafter charged the appellant.

20. The investigation officer did not visit the scene. She never considered the appellant's explanation. She never recovered the complainant's biker and pant that were allegedly torn by the appellant. The said clothes were also not produced in evidence although they were very crucial to the prosecution case.

21. It is clear to this Court's mind, there were no investigations at all that were undertaken save for the recording of the statements from the witnesses which the investigations believed at face value. That all the prosecution witnesses were coming from the same church. They all ended up at the chief's camp with the appellant who had already been apprehended by the public. The scene would have shown signs of struggle.

22. The third ground was that, the trial Court erred in convicting the appellant yet the prosecution had not proved its case to the required standard. As correctly submitted by the prosecution, in a rape case, the prosecution has to prove penetration of the genital organ, the absence of consent and the accused must be the perpetrator.

23. On penetration, the evidence of the complainant was that after the appellant accosted her, he tore her biker and pant and raped her. That her screams attracted the attention of **Pw2, P3 and Pw4**. That when they came, they found the appellant on top of her whereby he ran away.

24. The medical evidence by **Pw6** was that, the complainant came to their facility on 9/3/2014 with a history of being raped by someone

known to her at 7pm. That she had a human bite on the left side of chest, right hand and the labia majora was tender, minora swollen and the hymen broken. That based on the torn hymen and tender minora and majora, he concluded that she had been raped.

25. **Pw6** produced the treatment notes and P3 forms for both the appellant and the complainant as **Pexh1, Pexh2, Pexh3 and Pexh4**, respectively. From the treatment notes produced as **Pexh4**, there was no evidence of penetration that was noted. All that the doctor stated was that the complainant had a history of having been raped by a person known to her. He then prescribed some drugs.

26. In normal circumstances, the **PRC (Post Rape Care) Form** would be filled and it would have all the details regarding the assault the victim endured. If there was any, it was not produced. In this case its absence robbed the Court the opportunity of ascertaining whether the compliant was examined on her private parts and if so, what injuries if any she had sustained.

27. On the other hand, although **Pw6** stated that the appellant and the complainant came to his facility on 9/3/2014 and were examined, he admitted in cross-examination that he actually examined them on 10/3/2014. This testimony was in line with that of the appellant and **Pw3**. There was no explanation why the two were not examined at the earliest opportunity, on 9/3/2014 when they were presented to **Pw6**. **Pw6** was therefore lying when he stated that he examined the two on 9/3/2014.

28. As regards the P3 forms, they are of little probative value in that the examination of the appellant was done on 10/3/2014. I am alive to the fact that courts have held that there is no set timelines within which a doctor has to examine a defilement victim.

29. In **Republic .v. James Agogo Obare [2017] eKLR**, Ngugi J. held: -

“It is important to address the appellant’s third complaint; it is that the learned trial magistrate should not have relied on the evidence of PW3 – Dr. Eunice Mugweru – because she only examined the victim five days after the alleged offence had taken place.

This complaint is unavailing to the appellant. There is set number of days when a medical doctor is required to see a victim of sexual assault of course, the salutary practice is for such a victim to be examined by a doctor as soon as possible so as to preserve evidence ...”

30. And in **JKK .v. Republic [2015] eKLR** the Court of Appeal held: -

“Also the number of days before a child is examined by a doctor is really not decisive, what matters most is that the child was examined by a doctor and the findings of the doctor revealed that indeed the child was sexually assaulted based on the clinical findings, bruising of the genitalia, perforated hymen with foul smelling discharge”.

31. To this Court’s mind, the fact that the complainant was not examined on 9/3/2014 and was examined the following day, weakened the prosecution case. This is because **Pw6** lied that he had examined the appellant and the complainant on 9/3/2014. The prosecution did not tell the Court where and with whom, if at all the complainant slept with the night of 9/3/2014. The condition of her genitalia was never examined and recorded, if at all on the 9/3/2014. The absence of hymen which **Pw6** placed his opinion on was not evidence of penetration.

32. The issue of lack of consent was proved to the required standard.

33. As regards the perpetrator, the Court has reviewed the prosecution evidence. From the foregoing, it is clear that the complainant cannot be said to be the only one who had the opportunity to have had sexual intercourse with the complainant. She admitted to be sexually active with her then boyfriend. The prosecution did not lead evidence to the effect that the tenderness of the labia minora and swollen labia majora was caused by the appellant on 9/3/2014.

34. The last ground was that the trial Court erred in rejecting the appellant’s defence without giving reasons. The appellant’s defence was that on the material day, he had sexual intercourse with his girlfriend, **Pw2** and went to K’s house for prayers. When he was coming therefrom, he was accosted by amongst others, **Pw2**. They accused him of his father’s evils in the Land Adjudication Committee where his father had adversely affected their lands.

35. His testimony was corroborated in material particular by **Pw2 and Pw3**. The P3 from produced by **Pw6** showed that his penile shaft had some fluids being evidence of recent sexual activity. He and **Pw2** told the Court that they had sexual intercourse in the afternoon of 9/3/2014. The appellant’s evidence was neither challenged nor controverted. The prosecution decided not to cross-examine him.

36. It should be remembered that on the complainant being examined, there was no evidence of spermatozoa. Neither did the appellant have any. The fluids that were found on his penis were as a result of recent sexual activity. He explained it by parading **Pw2** as a witness. Despite the prosecution submissions casting aspersions on her, she was cross-examined but remained unshaken.

37. To this Court’s mind, the appellant’s defence was plausible. It was possible. Although he raised the issue of land grudge at a late stage, that cannot destroy the fact that the defence was plausible and possible. It casted doubt on the prosecution case.

38. The other issue is that the complaint and the prosecution did not call those who arrested the appellant. It is clear that the appellant was arrested by members of the public. None of whom was called to testify nor any explanation given why they were not called. In **James Kuloba Walishe v. Republic [2008] Eklr**, the court was of the view that where it is unclear how an accused is arrested, it is unsafe to uphold his conviction. The court stated: -

“We have noted that the prosecution did not call the person who arrested the appellant in order for us to understand why the appellant was arrested. All the prosecution witnesses confirmed that they did not arrest or participate in the arrest of the appellant. ... The arresting of the appellant and the circumstances that led to his arrest is very difficult to discern from the evidence tendered by the prosecution”.

39. In the present case, those who arrested the appellant were not called. Those who testified were those who the appellant accused of pursuing him because of a land grudge between his family and their families. This further weakened the prosecution case.

40. To this Court’s mind, with a plausible defence and the gaping holes and weaknesses of the prosecution case, there arises a doubt as to the culpability of the appellant. The prosecution cannot be said to have been proved beyond any reasonable doubt. See **Philip Muiruri Nduruga .v. Republic [2016] eKLR**. That doubt obviously must be resolved in favour of the appellant.

41. Accordingly, I find that the appeal is meritorious and I allow the same. I quash the conviction and set aside the sentence. The appellant is to be released forthwith unless otherwise lawfully held.

DATED and DELIVERED at Meru this 28th day of May, 2020.

A. MABEYA

JUDGE