



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 81 OF 2019

VICTOR CHERUIYOT alias KIBENJILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate Hon. Soita .

delivered on 17th December 2019 in Molo CM Criminal Case No. 509 of 2018

Republic v VICTOR CHERUIYOT alias KIBENJILI)

JUDGMENT

1. The Appellant was charged with the offence of **Rape contrary to Section 3 (1)(a),(b) & (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the charge sheet were that on the 10th of January 2018 at [particulars withheld] Township in Kuresoi South Sub County within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of **MC** by use of force /intimidation/ threats.

2. In the alternative, the appellant was charged with the offence of **indecent act contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that, on the 10th of January 2018 at [particulars withheld] Township in Kuresoi South Sub County within Nakuru County, intentionally touched the vagina of **MC** with his penis.

3. The Appellant denied both the main and alternative charge. The case proceeded for hearing with the prosecution calling 4 witnesses in support of their case while the Appellant gave unsworn statement without calling any witness. After hearing, the trial magistrate found the appellant guilty of the main charge, convicted him and sentenced him to 10 years Imprisonment. The Appellant being dissatisfied with the conviction and sentence have appealed to this Court on the following grounds: -

i. THAT he pleaded not guilty to the charges during plea time and still maintain the same to date.

ii. THAT the trial magistrate erred in law and in fact when sentencing the appellant herein and yet the prosecution evidence tendered was not sufficient to warrant a conviction.

iii. THAT the learned trial magistrate erred in matters of both law and in fact when he misled himself to go ahead and convict the appellant in the present case and yet section 176 of the criminal procedure code CAP 75 laws of Kenya was violated.

iv. THAT the learned trial magistrate erred in both law and in fact when he found the appellant herein guilty as was charged and yet failed to observe article 50(2)(p) (4) of the constitution of Kenya.

4. The Appellant relied on submissions that he filed while the state counsel tendered oral submissions.

APPELLANT'S SUBMISSIONS

5. The appellant submitted that the prosecution adduced evidence that the complainant was with two friends namely **Rosy** and **Lucy** and she further alleged that he was taken to a house where she found a woman and a man to whom the assailant introduced the complainant as the appellant's wife but the said people who were crucial witnesses in this case and were not called to testify. He submitted that it is the prosecution's duty to vanish the trial court with the relevant and sufficient evidence to prove the guilt of the appellant.

6. Appellant submitted that in respect to identification, PW1 never led the police to arrest the appellant and she knew where to find the appellant. PW2 claimed to have been called by the appellant to help in reconciliation with the complainant but failed to indicate the phone number used to communicate to him and he was not also accurate with the date vide page 9 lines 20-22.

7. Further that PW3 testified to have examined PW1 at Olenguruone Sub County Hospital but did not fully identify herself as a medical practitioner by indicating her line of profession, registration number and even the university she attended and what she attained in medicine. He stated that there was no medical report in support of PW1's allegations that was lawfully presented at the trial court since PW3 cannot be fully trusted to have qualified the doctor's role as required by law; that the evidence of Pw1, Pw2 and PW3 was not sufficient enough to warrant a conviction.

8. The appellant submitted the trial court violated **Section 176 of the Criminal Procedure Code Cap 75 Laws of Kenya** by failing to take into account the complainant's right to reconciliation as she wanted to terminate her case and forgive the appellant before the testimony of PW3 but the Court failed to respect the said decision; that the appellant was not offered a fair trial and failed to promote **Article 50 (2) of the Constitution**.

9. He urged Court to quash the lower court's conviction, set aside the sentence and set him free.

RESPONDENT'S SUBMISSIONS

10. On identification the state counsel submitted PW1 stated knew the appellant and also identified him in Court and said he knew him by the nickname Kibengini. The complainant also identified the appellant to the investigation officer. PW4 identified the appellant. She stated that the appellant raped her forcefully and threatened to kill her using a knife. She sustained injuries on her head; her face and mouth were swollen, as observed by the clinician PW3. Her hymen was torn as per the P3 form and lab tests produced as exhibits 2. She submitted that the appeal lacks merit and urged Court to dismiss the appeal.

ANALYSIS AND DETERMINATION

11. This being the first Appellate Court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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 conclusions; 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, (See Peters v. Sunday Post, [1958] EA 424.)"

12. In view of the above I have perused and considered the lower court record and find the following issues for determinations: -

- i. **Whether the prosecution proved their case beyond reasonable doubt;**
- ii. **Whether the court erred by failing to allow withdrawal of the case section 176 of the CPC**
- iii. **Whether sentence imposed was harsh and excessive.**

i. Whether the prosecution proved their case beyond reasonable doubt; the Ingredients of the Offence of Rape were proved.

13. The appellant's argument is that the prosecution failed to tender sufficient evidence to secure the conviction; that the prosecution's case was marred with discrepancies, contradictions and inconsistencies the trial magistrate failed to take neutral position while determining this matter.

14. **Section 3 of the Sexual Offences Act** defines 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."

15. From the above the ingredients are as follows:-

- i. Act of penetration of one's genital organ into genital organ of the other
- ii. Forceful penetration/ Absence of consent

(i) penetration

16. PW3 the clinical officer testified to have examined the complainant and filled the P3 form. She observed her face and mouth were swollen. On her genitalia she had discharge which had a foul smell, broken hymen. In her blood test epithelial cells were seen and observed the complainant had sex.

(ii) Forceful penetration/absence of consent

17. It was PW1 testimony that it was at night at around 11:00 pm when she was closing the bar where she worked as a waitress. The appellant came from nowhere as she was standing at the roadside. He grabbed her by her hand and clothes near the breast. He threatened to stab and kill her with a knife if she screamed. He beat and slapped her and he started stepping on her on the ground. He took her to a house where he found a woman and a man who were so drunk and taking bhang. He took her to a room he forcefully removed her trouser and panty and forcefully raped her. She reported the incident at *nyumba kumi* who advised her to report the matter at the police station. It was her testimony the appellant had earlier made advances to her which she declined.

18. 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.

19. From the evidence adduced before the trial court, it is clear the appellant forcefully penetrated his genital organ into the complainant's genital organ. No consent was obtained by the appellant from the complainant. The fact that she sustained injuries (swollen face and mouth) in the process as per evidence of PW3, confirm that the penetration was forceful. The complainant sustained injuries as she had a swollen face and mouth from the blows she received from the appellant in order to give in to have sex with him. There is therefore no doubt that the prosecution proved offence of rape beyond reasonable doubt.

20. In respect to presence of discrepancies and inconsistencies in prosecution evidence, In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992** (Nairobi) **Tunoi, Lakha & Bosire JJA** held: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

21. In respect to discrepancies and inconsistencies the appellant did not expound on the discrepancies and inconsistencies that befell the prosecution's case cause. Upon perusal of the trial court record I do not see material inconsistencies or discrepancies that can be prejudicial to the appellant. This ground of appeal cannot therefore stand.

22. Whether the court complied with Section 176 of the CPC.

Section 176 of the Criminal Procedure Code provides for promotion of reconciliation as follows:-

“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”

23. It is on the record that the complainant was on several occasion willing to withdrawal the case and forgive the appellant. On 24/10/2018 the complainant through a sworn statement notified the Court she would wish to withdrawal the case and forgive the appellant. The investigation officer also notified the Court he was aware of the reconciliation between the complainant and the appellant and did not object to the withdrawal of the case. The Court ordered for a probationa report and the prosecution was given time to consult SADPP. The case later proceeded without the trial court making a ruling on the issue of reconciliation.

24. **Section 204 of the Criminal Procedure Code**, allows withdrawal of complaints and provides as follows:-

“If a complainant, at any time before a final order is passed in a case under this part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”

25. The above section which provide for withdrawal under **Sexual Offences Act is Section 40** which provide as follows: -

“The decision as to whether the prosecution or investigation by the police officer of a complaint that a Sexual Offence Act has been committed should be discontinued shall rest with Attorney General.”

26. Record show that the trial magistrate did not make a finding on it on whether the case should be withdrawn or not. The appellant herein was charged with offence of rape under **Section 3 (1)(a),(b) & (3)** of the **Sexual Offences Act** and is therefore governed by **Section 40 of the sexual offences Act**. However, in my view, the intention of **Section 40** was meant to address situations where parties other than children who are not able to make informed decision would negotiate for withdrawal of the offences notwithstanding the fact that the persons who are traumatized have no capacity to contribute on resolution concerning termination of proceedings affecting them.

27. In the instant case, the offence involved an adult who had capacity to contribute to proposal to terminate the case. In my view an adult who wishes to withdraw a case should not be tied by **Section 40 of the Sexual Offences Act** unless the victim falls in the bracket of vulnerable persons. No such comment was made by the trial magistrate in the proceedings. The trial magistrate failed to record reason for not considering the victims wish to withdraw charges against the appellant.

28. Reconciliation is one of the alternative dispute resolution mechanisms provided under **article 159 of the constitution** and the Court is obligated to promote reconciliation and there were sufficient reasons not allow reconciliation the same should have been recorded by the trial magistrate.

29. From the foregoing, despite the fact that evidence of rape was proved by the prosecution, the Court erred in denying the appellant to benefit from withdrawal of the charges by the complainant who was an adult capable of making independent decision. In view of the above I am inclined to allow this appeal.

30. **FINAL ORDERS**

1. This Appeal is hereby allowed.
2. Conviction is hereby quashed and sentence set aside.
3. Appellant to be set at liberty unless lawfully held.

Judgment dated, signed and delivered via zoom at Nakuru

This 30th day of September, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person