



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.167 OF 2015

(An appeal arising out of the conviction and sentence of Hon E. Kimaiyo Suter SRM delivered on 7th December 2018 in Makadara CMC Cr.C No 74 of 2016)

WYCLIFE OROTI ANGWENYI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant was charged with the offence of **rape** contrary to **Section 3(1)(a)(b)** as read with **Section 3(3)** of the **Sexual Offences Act**. The particulars of the offence were that on the night of 29th and 30th December 2015, at Eastleigh in Kamukunji within Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of SMM without his consent. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with an adult contrary to **Section 11(A)** of the **Sexual Offences Act**. The particulars of the offence were that on the night of 29th and 30th December 2015, at Eastleigh in Kamukunji within Nairobi County, the Appellant intentionally touched the anus of SMM with his penis against his will. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of rape. He was sentenced to serve thirteen (13) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for convicting him, yet the key element of identification was not established by the prosecution to the required standard. He was aggrieved that the trial court failed to observe that no initial samples had been collected by the police from him, and that the collection of samples was an afterthought geared at framing the Appellant of the offence. He took issue with the fact that the trial court convicted him based on circumstantial evidence that was not cogent, and which failed to unerringly point to his guilt. In the premises therefore, he urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, this court heard oral submission from Mr. Magara for the Appellant and Ms. Ndombi for the State. Counsel for the Appellant submitted that none of the prosecution witnesses identified the Appellant as the perpetrator of the alleged sexual assault. He stated that the Appellant was convicted on the basis of medical evidence adduced by the prosecution. He submitted that the manner in which the samples were collected raised questions. PW6 stated that he was the one who took the samples from the Appellant. On the other hand, PW2 told the court that he got the samples recovered from the Appellant from MSF Clinic, where he was instructed to take the said samples to Pangani Police Station.

Counsel for the Appellant asserted that PW2 was not a police officer. He averred that the initial samples were misplaced and fresh samples taken in 2017. He stated that the evidence of the Government Analyst (PW6) established that the blood that was found on the Appellant's penis was his and not the complainant's. He maintained that no DNA samples belonging to the complainant were found on the Appellant. He was of the view that the sentence meted on the Appellant was harsh and excessive in the circumstances. In the premises, he urged the court to allow the Appellant's appeal.

Ms. Ndombi for the State opposed the appeal. Learned State Counsel stated that the Appellant was properly identified as the person who sexually assaulted the complainant. She submitted that all the street boys were stripped, and blood was found on the Appellant's pubic hair and penis. The said finding of blood connected him to the complainant. She submitted that the evidence of the Government Analyst was watertight. She asserted that the Appellant was well known to PW4. He was the one who identified him. She was of the view that the circumstantial evidence relied on by the trial court was sufficient to convict the Appellant. She stated that the element of penetration was established by the prosecution. She was of the view that the sentence meted by the trial court was lawful. She therefore urged this court to dismiss the Appellant's Appeal.

The facts of the case according to the prosecution are as follows. PW2, Simon Muhingu Muthugu, is the complainant. He was 51 years of age at the material time. He told the court that on the night of 29th December 2015, he had just left a bar at around midnight. He was on his way home situated at 5th Street, Eastleigh. He was inebriated. He met two men. One of the men slapped him. He lost consciousness. He woke up at Nairobi Women's Hospital two days later. His anus was torn. He had been sexually assaulted. He stated that he could not recall what happened after being assaulted. He testified that he saw the Appellant for the first time at Pangani Police Station.

PW3, LMN was a resident of 5th Street, Eastleigh. The complainant is his grandfather. He stated that on 30th December 2012, his cousin woke him early in the morning and informed him that the complainant was injured and needed to be taken to the hospital. The complainant had been sexually assaulted. He drove his car to the scene where he found a huge crowd of people. The complainant was carried to his vehicle. He rushed him to MSF Clinic along Juja Road. He received First-Aid treatment and was thereafter transferred to Nairobi Women's Hospital. PW3 testified that the Appellant was also taken to the hospital since he had been badly beaten by a mob. PW3 went back to Nairobi Women's Hospital the following day. He was given the complainant's Post Rape Care Form to take to the police. He also received the complainant's clothes and samples from MSF Clinic which he also took to the police station. He testified that he saw the Appellant at the scene of crime when he was forced by the members of public to carry the complainant to PW3's car. The members of the public accused the Appellant of having sexually assaulted the complainant.

PW4, SKW, worked as a security guard in Eastleigh. He reported to work as usual on the morning of 30th December 2015. Someone told him that the complainant was lying on the street, bleeding from his anus. His trousers had been lowered to his knees. He inquired from the street kids who were sleeping in the next building what happened. All the street kids were asked to undress. When they got to the Appellant, they discovered blood stains on his pubic hair and penis. Members of the public beat up the Appellant. The complainant was rushed to the hospital. Police officers came to the scene and arrested the Appellant. PW4 stated that the Appellant was well known to him as he was among the street kids who spent the nights in a nearby vacant building.

PW5, Simon Nzambu, was a clinical officer at Nairobi Women's Hospital. He adduced evidence on behalf of his colleague, Teresia, who examined the complainant. He stated that he had worked with Teresia for three years and was therefore familiar with her handwriting and signature. PW5 testified that the complainant was examined at Nairobi Women's Hospital on 30th December 2015. He stated that the complainant was bleeding from his anus. He was in a lot of pain. His anus had a tear at 6 o'clock. His clothes were blood stained. The complainant underwent surgery to repair the tear on his anus. PW5 produced the complainant's Post Rape Care Form into evidence.

PW1, Dr. Keziah Shako of the Police Surgery, examined the complainant on 7th January 2016. She stated that the complainant had a tear at 6 o'clock on his anus. His anal region was tender and painful. On the same day, PW1 also examined the Appellant. His genital region was normal. He had a bandage on his head and multiple lacerations on his scalp, arms and knees. She assessed the injuries to be about 8 days old. The injuries were caused by both sharp and blunt objects. The degree of injury was assessed as harm. She produced the complainant's and Appellant's respective P3 Forms into evidence.

PW6, Anna Wangechi Nderitu, worked as a Government Analyst at the Government Chemist in Nairobi. On 11th January 2016 and 24th April 2017, she received several exhibits from Cpl. Michael Tanali of Pangani Police Station. The exhibits included a penile swab, the Appellant's underwear, a blood stained shirt and blue jeans stained with semen belonging to the complainant, two buccal swabs obtained from the Appellant and complainant respectively. DNA profiles were generated from the said items. PW6 told the court that the DNA profile from the blood obtained from the penile swab matched the DNA profile from the Appellant's buccal swab. The DNA profile generated from the Appellant's underwear matched that obtained from his buccal swab. The DNA profile obtained from the complainant's shirt matched that obtained from the complainant's buccal swab. And finally, the DNA profile generated from the blood stain and semen from the complainant's jeans trousers matched the DNA profile from the Appellant's buccal swab. PW6 produced her report dated 13th June 2017, into evidence.

PW7, Cpl. Michael Tanali of Pangani Police Station was the investigating officer in the case. He stated that he was assigned the case on 31st December 2015. The Appellant was already in custody. He interrogated the Appellant who denied the allegation that he had sexually assaulted the complainant. He visited the scene of crime in Eastleigh 5th Street and interviewed the witnesses. PW4 informed him that he found the victim lying on the street on the morning of 30th December 2015. He had been sexually assaulted. He told him that the Appellant was identified as the perpetrator since they found blood on his underwear and penis. PW7 went to MSF Clinic where the complainant and Appellant were treated. He recovered the penile swab collected from the Appellant as well the shirt and trouser the complainant was wearing on the material day. He also recovered the trouser and underwear that the complainant was wearing. He forwarded the exhibits to the Government Chemist for analysis. After his investigations, he preferred the present charges against the Appellant.

The Appellant was put on his defence. In his unsworn statement, the Appellant stated he worked as a loader at Eastleigh. He resided at Mlango Kubwa. On 29th December 2015, he went to work as usual. He went back home at about 3.00 pm. At about 6.30 pm, his friend informed him that there were vehicles that needed to be offloaded. He went to Eastleigh 7th Street and offloaded the said vehicles. He then went to hang out with other loaders as they waited more vehicles that were due to arrive at 5.00 am. While there, he met with PW4. The Appellant stated that there was an existing grudge between him and PW4 due to some containers that had been offloaded near his place of work. PW4 and other street boys took him to 5th street where he was beaten by an irate mob. Police officers came to the scene and rescued him. He was taken to hospital for medical treatment and afterwards escorted to the police station. He was later charged with the present offences.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (*See Okeno vs Republic [1972] EA 32*). In the present appeal, the issue for determination by this court is whether the prosecution established the offence of **rape** contrary to **Section 3(1)** as read with **Section 3(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case as well rival submission made by parties to this appeal. According to **Section 3(1)** of the **Sexual Offences Act**, 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.**

The prosecution was therefore required to establish the following ingredients; penetration, absence of consent, and that the Appellant was the perpetrator of the act.

Section 2(1) of the **Sexual Offences Act** defines penetration as:

“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

The complainant told the court that on the night of 29th December 2015, he had just left a bar at around midnight. He was on his way home. He was inebriated. He met two men. One of the men slapped him. He lost consciousness. He regained consciousness at Nairobi Women’s Hospital two days later. He had been sexually assaulted. His anus was torn. He stated that he could not recall what happened to him after he was assaulted. The medical evidence adduced by the prosecution corroborated the fact that the complainant had been sexually assaulted. The complainant was examined at Nairobi Women’s Hospital the following morning of 30th December 2015.

PW5, who was clinical officer at the said hospital, told the court that the complainant was bleeding from his anus. He was in a lot of pain. His anus had a tear at 6 o’clock. His clothes had blood stains. He stated that the complainant had to undergo surgery to repair the tear on his anus. The complainant was also examined by PW1 on 7th January 2016. She stated that the complainant had a tear at 6’oclock on his anus. His anal region was tender and painful. Taking into consideration the P3 Form and Post Rape Care Form produced in court, as well as the complainant’s testimony, this court formed the opinion that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.

Was there absence of consent? *A person is said to consent, if he or she agrees by choice, and has the freedom and capacity to make that choice.* In the case of **Republic V. Oyier [1985] eKLR**, the Court of Appeal held as follows:-

“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.”

It was PW2’s evidence that he walking home when he was assaulted and lost consciousness. He woke up at the hospital only to discover that he had been sexually assaulted. The complainant was emotional when he testified before court. The perpetrator of the sexual assault left him unconscious on the street, naked and bleeding from his anus. It was clear to this court that the complainant was not in a position to consent to the sexual act since he was attacked and became unconscious before he was sexually assaulted. He was also drunk. The prosecution was therefore able to establish the element of absence of consent.

The third issue is whether the Appellant was positively identified as the perpetrator. In the present appeal, none of the prosecution witnesses witnessed the sexual assault. The complainant testified that he was attacked and became unconscious. He later woke up in the hospital and discovered that he had been sexually assaulted. He did not have a recollection of what had happened after he was assaulted and lost consciousness. PW3 and PW4 saw the complainant lying down on street naked and bleeding from his anus. PW3 stated that when he arrived at the scene, he found members of the public who forced the Appellant to carry the complainant to the car. They accused the Appellant of being the perpetrator of the sexual assault.

PW4 testified that after they found the complainant lying on the street, they decided to inquire from the street boys who were sleeping in a nearby building what transpired. They asked all the street boys to undress. He stated that when they got to the Appellant, they found blood stains on his penis and pubic hair. PW3 and PW4 placed the Appellant at the scene of crime. The investigating officer, PW7, told the court that he took the complainant’s as well as the Appellant’s clothes to the Government Chemist for analysis. The Government Analyst, PW6, testified that the DNA profile from the blood and semen stains recovered from the complainant’s trouser matched the DNA profile from the buccal swab obtained from the Appellant. The presence of the Appellant’s semen on the trouser that the complainant was wearing on the material day established that the Appellant was the perpetrator of the sexual assault.

The Appellant in his defence denied that he sexually assaulted the complainant. He asserted that on 29th December 2015, he went to work as usual and was back home by 3.00 pm. At about 6.30 pm, his friend informed him that there were more vehicles that required to be offloaded. He went to Eastleigh 7th Street and offloaded the said vehicles. He then went to hang out with other loaders as they awaited more vehicles that were due to arrive at 5.00 am. While at the scene, he met with PW4. The Appellant stated that there was an existing grudge between him and PW4 due to some containers that were offloaded near his place of work. PW4 and other street boys took him to 5th street where he was beaten by an irate mob. Police officers came to scene and rescued him. He was taken to the hospital for medical treatment and afterwards escorted to the police station.

This court is of the view that the evidence of the prosecution witnesses taken into totality was corroborative and the Appellant was positively identified as the perpetrator of the sexual assault. The Appellant’s defence was a mere denial and did not dent the otherwise strong culpatory

evidence adduced against him by prosecution witnesses. This court, having re-evaluated the evidence adduced before the trial court, and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. DNA evidence connected the Appellant to the crime. The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

As regards the sentence, **Section 3(3)** of the **Sexual Offences Act** provides for a minimum custodial sentence of ten (10) years which may be enhanced to life imprisonment. In the present appeal, the Appellant was sentenced to serve thirteen (13) years imprisonment. The trial court took into consideration the aggravated nature of the sexual assault incident in enhancing the Appellant's sentence. The trial court also considered the Appellant's mitigation, the pre-sentence report dated 7th December 2018 as well as the time the Appellant had spent in remand custody prior to his conviction, in sentencing the Appellant. In the circumstances of this case, this court is of the opinion that the sentence meted by the trial court was merited. It was neither harsh nor excessive to warrant the interference of this court.

In the premises, the Appellant's appeal on conviction and sentence lacks merit, and the same is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2020

L. KIMARU

JUDGE