



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 5 OF 2018

JILANI BARAWA MWANGOMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 210 of 2014

of the Senior Principal Magistrate's Court at Kilifi – Hon. J.N. Juma)

JUDGEMENT

1. The Appellant, Jilani Barawa Mwang'ombe is currently serving ten years imprisonment after being tried and convicted for rape by the Senior Principal Magistrate's Court at Kilifi. The particulars of the charge being that on 9th May, 2014 within Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of SNN without her consent.
2. Aggrieved by both conviction and sentence the Appellant has appealed to this court on two grounds as per the application for amendment of appeal filed on 13th October, 2018. The Appellant contends that the trial magistrate failed to consider that the circumstances under which the offence was committed were not favorable for identification and that his defence was not adequately considered.
3. On the issue of identification, the Appellant submitted that the offence was allegedly committed at 4.00 a.m. and it was difficult for the complainant to identify her assailant. He submitted that the complainant had instead shifted the issue of identification to her sister who was never called as a witness. He cited the Court of Appeal decision in **Stephen Mungai Macharia v Republic Criminal Appeal No. 432 of 1997** and submitted that an accused person has no obligation to prove his innocence as the burden of proof remains on the prosecution throughout the trial.
4. As for his allegation that the trial magistrate never considered his defence, the Appellant submitted that nowhere in the judgement does the trial court advert to his defence. It is his view that the judgement is bad for failing to consider his defence and the same should be set aside. The Appellant cited the decision of the Court of Appeal in **Richard Kaitany Chemagong v Republic [1984] eKLR; Criminal Appeal No. 150 of 1983 (Nairobi)** in support of his assertion that an appellate court can interfere with the findings of the trial court where it is shown that the trial judge acted on the wrong principles in reaching his findings. He therefore urged this court to allow his appeal.
5. It was submitted for the Respondent in opposition to the appeal that the trial court had given reasons why it found that the complainant had positively identified the Appellant.
6. On the Appellant's assertion that his defence was not considered, it was submitted for the Respondent that the defence was indeed considered and found to be untruthful. Counsel for the Respondent therefore urged this court to find the conviction safe and the sentence appropriate and dismiss the appeal.
7. This being a first appeal, this court has a duty to look at the evidence afresh in order to reach its own independent decision. In doing so, it should be remembered that unlike the trial court, this court did not have the opportunity of hearing and seeing the witnesses testify in order to gauge their demeanour – see **Okeno v Republic [1972] EA 32**. It is also noted that as was stated in **Chemagong** (supra), a “**court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.**”
8. The complainant who testified as PW1 told the court that on 10th May, 2014 at about 4.30 a.m. they were going home from a disco matanga with three others when the Appellant passed them. The Appellant was being carried on a motorbike. After walking for a short

distance the Appellant jumped out of the bush while armed with a knife and a stick and told them to run. The shoes she was wearing impeded her movement and even after she removed them the Appellant nevertheless reached her. He removed her clothes and forcefully had sex with her. She reported the incident to her parents and she was taken to the hospital where she was treated and a P3 form and post-rape care (PRC) form filled for her.

9. PW2 Dr. Hassan Mbacho produced the P3 form and PRC form filled for the complainant. The medical officers who examined the complainant noted that she had a cut on her mouth. There were bruises on her private parts and the hymen was broken.

10. PW3 Emmanuel Gona Nyale told the court that on 10th May 2014 he was in his house when he was woken up by Jackson who informed him that he was in the company of the complainant and others when some boys held the complainant. They proceeded to the scene and they met the complainant along the way. The complainant had bloodstains and dirt on her clothes. The scene which was in a maize field was disturbed. They went and reported the matter at the District Officer's office at Kaloleni before proceeding to Kaloleni St. Luke's Hospital where the complainant was treated. PW3 testified that Jackson told him that it was Jilani Barawa who had held the complainant. The Appellant was later arrested by people who wanted to lynch him.

11. In his defence the Appellant denied committing the offence with which he was charged stating that he was framed by some boys because of village jealousies.

12. In her judgement the trial magistrate correctly identified the two issues in the matter; whether the complainant was raped and if so, whether the Appellant was the perpetrator.

13. That the complainant was sexually assaulted on the material night was not in dispute. The complainant stated how she was attacked by a man armed with a knife and a stick. The man removed her clothes and penetrated her.

14. PW3 told the court that the complainant was bleeding. Her clothes were soiled. PW2 stated that those who examined the complainant noted an injury on her mouth and bruises on her private parts. The complainant's testimony was that she did not consent to a sexual liaison with her attacker. There being no consent from the complainant, the offence of rape as defined by Section 3 of the Sexual Offences Act was established.

15. The question that remains is whether the Appellant was identified as the person who raped the complainant. The only evidence on the identification of the Appellant was that of the complainant.

16. In finding that the Appellant had been satisfactorily identified, the trial magistrate stated that:

“From this evidence I am satisfied that the accused person was positively identified by the complainant on the following grounds: -

1. The complainant identified the accused person when he removed his clothes to rape her as he was her neighbour.

2. The accused spoke to the complainant and asked her if she knew who he was.

3. There was light at the time and the complainant was able to identify the accused.”

17. What was the testimony of the complainant in regard to the identification of the Appellant? She told the court that the Appellant asked her if she knew him and because of fear for her life she told him that she did not know him. He asked her who her parents were and she told him her family name. During cross-examination, the complainant insisted that she identified the Appellant telling him that he had a red cloth. She also testified that her sister clearly saw the Appellant and identified him later. She further stated that the incident took place at 4.30 a.m. and it was beginning to dawn. Still answering questions put to her during cross-examination the complainant told the court she had never had a face to face encounter with the Appellant. The complainant also stated that Delvis and Emmanuel found the Appellant in the act and he started running away. She also testified that she had previously talked with the Appellant prior to the incident.

18. PW3 talked of the recovery of a shirt that he had previously seen the Appellant wearing. The shirt was however not produced as an exhibit.

19. There is something disturbing about the evidence on identification. It was the testimony of the complainant that the incident took place at about 4.30 a.m. and it was already daybreak. Is it possible that there was light at 4.30 a.m.? It is not clear from the evidence whether the complainant was familiar with the Appellant prior to the incident. She talked of not having had a face to face encounter with the Appellant and at the same time testified that she had conversed with the Appellant prior to the incident. In my view there was no sufficient light which the complainant could have used to identify her assailant.

20. Whereas the proviso to Section 124 of the Evidence Act allows a trial court to convict an accused person based on the evidence of the complainant, the said provision does not take away the duty of the prosecution to prove its case beyond reasonable doubt. Where corroborative evidence is available, the prosecution is under a duty to tender the evidence before the court. The proviso to Section 124 only kicks in where the only evidence is that of the victim. In the case at hand, there were several witnesses who witnessed the incident. The complainant stated that she was in the company of three others. Taking into account the testimony of PW3 that Delvis had died, I do not understand why the prosecution never availed the other two eyewitnesses to testify. Could their testimony have contradicted the prosecution case? No explanation was given as to why the witnesses were never called to testify.

21. Looking at the evidence on identification, I find that the Appellant should have been given the benefit of doubt.

22. As already stated, the evidence on identification was not sufficient. There was also failure by the prosecution to avail witnesses who could have corroborated the complainant's evidence. This appeal has merit. The same is allowed. The conviction is quashed and the sentence set aside. The Appellant is thus set free unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT