REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 45 OF 2016

THEOPHILUS JILO AMUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case No. 353 of 2016 by Hon. Njeri Thuku (SRM) dated 19th October 2016)

JUDGEMENT

1. The Appellant was charged with three counts under the Sexual Offences Act, 2006(SOA), the Security Laws Amendment Act, 2014, and the Penal Code respectively. In Count I he was charged with attempted rape contrary to Section 4 SOA. The particulars of the offence were that on the 31st July, 2016 at 6:30am in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of MJK without her consent. He faced an alternative charge of committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act. The particulars were that on 31st July, ,2016 at 6:30 am in Lamu West Sub-County within Lamu County, the Appellant intentionally touched the vagina of MJK with his penis against her will.

2. In Count II, the Appellant was charged with insulting modesty by forcible stripping contrary to Section 251A of the Security Law Amendment Act, 2014.The particulars of the offence were that on 31st July, 2016 at 6:30am in Lamu West Sub-County within Lamu County, the Appellant insulted the modesty of a woman namely MJK by forcibly stripping her naked.

3. In count III the Appellant was accused of stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. The particulars were that on the 31st July, 2016 at about 6:35am at Bajuri area in Lamu West Sub-County within Lamu County, the Appellant stole one mobile phone make Techno T340 valued at Ksh. 2,500/- and cash Ksh. 5,000/- the property of MJK whose total value was Ksh. 7,500/-.

4. At the conclusion of the trial the Appellant was acquitted on count I but was convicted in count II and count III and sentenced to imprisonment for ten years and three years respectively.

5. The Appellant being aggrieved by the conviction and sentence lodged his appeal on the following grounds reproduced verbatim:-

i. “That the learned trial Magistrate did not see that the matter was a made up case as the PW2 herein was my lover.

ii. That the learned trial Magistrate erred in admitting the testimony of the PW2 without considering that she was not a reliable witness.

iii. That the learned trial Magistrate erred in law in not considering that the phone belonged to the complainant not seeing that there was no proof.

iv. That the learned trial erred in law and fact by not considering my defence as the same was reliable.”

6. The Appellant filed written submissions on the 24th October, 2017 in support of his appeal. He submitted that the complainant MJK (PW2), was not a reliable witness for reason that she gave evidence during trial that she had only known him for one month yet they had previously been in a relationship. It was his submission that the evidence given by PW2 was full of lies and fabrications borne out of jealousy.

7. He submitted that there was no need for him to ask PW2 to be his girlfriend yet they had been in a relationship prior to the incident and that he had already gotten into a relationship with another lady. It was also his submission that he did not follow PW2 on the street on the material day but rather it was PW2 who went to his house where she found the Appellant’s new girlfriend while he was in the shower. That

PW2 and the girlfriend got into a fight when PW2's clothes got torn and she removed them and left them there. It was his contention that indeed if he had assaulted PW2 on the path there should have been more witnesses yet no persons who witnessed the incident was called.

8. The Appellant submitted that there was no sufficient proof that the mobile phone belonged to her and that he was the one who bought the phone. Further, he submitted that she was the one who left the phone in his house after she found him with another woman and therefore he did not steal the said mobile phone. He submitted that the sentence was unfair, harsh and excessive and prayed that his appeal be allowed.

9. The Prosecution opposed the appeal in its entirety. When the matter came up for hearing on 24th October 2018, learned Counsel Mr. Kasyoka orally submitted that all the elements of the offences had been proved and that there was sufficient evidence to convict the Appellant. He further submitted that PW2's evidence had been corroborated and that she was able to positively identify the phone.

10. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions as was laid out in the case of **Okeno v R (1972) EA 32.** See also **Eric Onyango Odeng' v R [2014] eKLR.** Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and I can only rely on the evidence that is on record.

11. I have considered the grounds of appeal, the respective submissions, and the record. The only issue for determination is whether the prosecution proved its case beyond reasonable doubt.

12. It was the prosecution's case that PW2 MJK, who was PW2, recognized the Appellant as he had been her neighbor and she had known him for one month. That the Appellant met PW2 on her way to work as his house was along the path. That the Appellant asked her to be his girlfriend and also asked for her phone. That when PW2 refused the Appellant tore her dress, bra and panty leaving her only with her inner wear. That in the process the Appellant stole PW2's techno phone as well as Ksh. 5, 000/-.

13. Lucas Hamisi Jeffa,(PW1) who was PW2's landlord testified that he saw the complainant leave her house in the morning while dressed. That when she came back, she only had inner wear on and on asking her what had happened, she informed him that "ameshikwa na Jillo". He escorted her to the police station to report the incident. PW2 further stated that he knew the Appellant as he had been his tenant. He also identified the dress that PW2 had worn when she left her house in the morning.

14. P.C. Leonard Kipkemei (PW3), who was the investigating officer, testified that after he had recorded the statement of PW2, he was accompanied by other officers to the Appellant's house at night where he asked for the complainant's phone which the Appellant gave him. That PW3 also found the "dera" which was identified as PW2's dress.

15. For a conviction to ensue, the prosecution must prove the case beyond reasonable doubt. The main witness in this case was the complainant (PW2). She told the court that she was dragged by the Appellant from the street into his house where he attempted to rape her and stripped her naked and took away her phone and money. PW2's testimony on the other hand was that he saw the complainant leave while dressed and come back without her dress. The Investigating Officer (PW3) found the dress and the watch in the Appellant's house. No other witness was called to establish the actual factual position of how the Appellant came to be in possession of the complainant's dress and phone.

16. In giving her evidence, PW2, tried to hide the fact that she had had a romantic relationship with the Appellant before the said incident and described him as a neighbor whom she had only known for one month. It was only during cross examination that she admitted to have been in a relationship with the Appellant. While the fact of a pre-existing relationship cannot in any way be an excuse for the alleged violation, it raises the question whether or not the complainant went to visit the Appellant or whether the Appellant dragged her from the street into his house and stripped her. It also raises the question whether the watch and dera which were found by the police inside the Appellant's house had been left there by the complainant on a previous visit or were forcibly taken away or stolen by the Appellant.

17. Secondly, during cross examination PW3, admitted that there were other people who saw this incident but they had not been called to testify. This raises a serious question as to why the prosecution never called the said witnesses who saw the incident to corroborate PW2.

18. This court is well aware that there is no legal requirement in law for the number of witnesses to prove a fact. **Section 143** of the Evidence Act provides that:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

With regard to calling witnesses by the prosecution, the Court of Appeal in **Julius Kalewa Mutunga v Republic**, **Criminal Appeal No.32 of 2005** held that:-

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

19. It is also trite that the prosecution has a duty to call witnesses relevant to the case and who are sufficient to establish a fact beyond reasonable doubt even if that evidence would be adverse to their case. The court of Appeal in the case of **Keter V Republic [2007] 1 EA 135 held that:-**

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish***

the charge beyond any reasonable doubt."

Similarly in the case of **Bukenya & Others V Uganda [1972] EA 549 held that:-**

> ***"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."***

20. It has also been held that where the prosecution fails to call a crucial witness, the court is entitled to make adverse findings and acquit the accused. This was the position stated by the Court of Appeal in **Bukenya & Others V Uganda *(supra)* where it held that:-**

> ***"While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have been tended to be adverse to the prosecution case".***

21. In the present appeal, the prosecution failed to call crucial witnesses who were said to have witnessed the incident and would have corroborated the evidence of PW2. While I might not necessarily infer that such evidence might have been adverse to the prosecution's case, I am clear that the evidence presented was insufficient to prove the prosecution case. This is because the evidence given by PW1 only demonstrates that the complainant came home without her dress but does not prove that the Appellant stripped her. The fact that the complainant's phone was in the house of the Appellant also does not demonstrate the circumstances under which it got there. It may have been left there by the complainant or it may have been stolen from her by the Appellant.

22. The Appellant gave a sworn defence in which he stated that on the 31st July, 2016, PW2 went to his house while he was in the shower. That they argued and she entered his bedroom. The Appellant got her out of the house and by this time she was in tears. That the following week while he was heading home at around 7:30pm he met with police officers whom he recognized. They took him to PW2's house and thereafter took him to the police station where he was remanded before he was arraigned in court on the 8th August, 2016. He further stated that he was not aware of the charges and that he was framed as the case was based on jealousy on the part of the complainant.

23. I have considered the Appellant's defence restated above. He makes a material admission that the complainant was indeed in his house on the material day and that there was a commotion. He however distanced himself from the fight stating that it was between the complainant and another woman who was also his girlfriend. I find this defence as probable as it is not. It however casts doubt as to whether the Appellant was the one who stripped the complainant or whether the complainant was attacked by a third party in the Appellant's house. It is my observation that both the Appellant and the complainant were not candid to the court as to what really transpired on the material day. However, as the law stands, there is no duty placed on the Appellant to prove his innocence.

24. Having evaluated all the evidence on record afresh, I have come to the conclusion that the conviction was unsafe because the Prosecution failed to prove its case against the Appellant beyond reasonable doubt as required by law.

25. I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment delivered, dated and signed at Garsen this 27th day of February, 2019.

.....

R. LAGAT KORIR

JUDGE

In the presence of:

S .Pacho, Court Assistant

The Appellant in person

Mr. Kasyoka for the Respondent