



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 133 OF 2017

JOSEPH CHIRCHIR KABUTIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Kabarnet Cr. Case no. 468 of 2016 delivered on the 19th day of September, 2016

by Hon. E. Ayuka, RM]

JUDGMENT

1. The appellant who was convicted of the offence of rape contrary to section 3 (1) (a) (b) of the Sexual Offences Act and sentenced to imprisonment for 10 years appeals from the decision of the trial Court and raises the following grounds:

“Amended Grounds of Appeal

- 1. That the Trial Court failed in both law and fact by failing to understand that the evidence adduced against the appellant did not meet the threshold of beyond reasonable doubt.*
- 2. That the trial Court failed in both law and facts by having relying on contradictory evidence inconsistent testimony of Pw1 AC which was not corroborated by the evidence of any other witness.*
- 3. That the trial Court failed to note that there was disconnect in the prosecution evidence which rendered the case nugatory.*
- 4. That the trial Court erred in law and facts by disregarding the defence of the appellant in totality which defence appears forthright, vivid, sincere and truthful.*
- 5. That the trial Court failed in both law and facts by failing to understand that the entire prosecution evidence was inconsistent.*
- 6. That the trial Court erred in interpreting that the elements had been met while it's apparent that the complainant suffered an epilepsy attack and that to determine whether there was consent on*

her part to engage in sexual intercourse.

7. That the trial Court failed in law and fact by believing PW1 AC was a truth witness.

8. That the trial Court failed to understand that the children and boda boda rider were crucial witnesses.”

2. In its judgement, the trial Court had found the appellant guilty as charged, as follows:

“Two issues present themselves for determination by this Court. These are;

- 1) Whether the offence of rape has been proved, and if so;
- 2) Whether the accused was the perpetrator.

In the instant case, the complainant was categorical in her evidence that she suffered an epilepsy attack and that when she came to be, she realized that the accused had already penetrated her genital organ. Clearly, in her state of the epilepsy attack, the complainant could not have given consent to a sexual activity between the perpetrator and herself.

Pw6, the clinician who conducted a medical examination on the complainant a day after the rape ordeal was emphatic in his testimony that the complainant had been raped. It was his evidence that the whitish discharge from the complainant’s vagina coupled with presence of epithelial cells and abdominal tenderness was an indication that the complainant had been raped.

As noted above, the complainant, in her state of the epilepsy attack was incapable of giving consent to the assailant to engage with her in sexual intercourse. I therefore come to the conclusion that the offence of rape has been sufficiently established.

I now turn to the issue of whether the accused was the perpetrator. From the proceedings, it emerged that the accused was not stranger to the complainant. The complainant stated that she very well knew the accused prior to the incident in question. She referred to him as “**Kamagima**” which the accused confirmed was his popular nickname in his locality.

Further still, the incident herein occurred in broad day time. The complainant testified that the ordeal took a considerable period of time. It was her evidence that prior to the epilepsy attack, the accused had visited their home and chased away younger children leaving him and the complainant alone. That after she recovered from the epilepsy attack, she got the accused having already penetrated her genital organs and still in the act of having sexual intercourse with her.

The complainant spent considerable time with the assailant as to properly recognize and identify him. This Court observed demeanor of the complainant during trial. She remained steadfast both in examination in chief and on cross examination. She also came across as an intelligent and truthful witness. I am convinced that she properly identified the accused as her assailant. I reach a finding that the accused is the person who raped the complainant.

I find the prosecution witnesses’ testimonies credible, consistent and trustworthy. The defence did not whatsoever rebut and or challenge the prosecution evidence. I do not find any merit in the defense of alibi presented by the accused. Throughout the trial the alibi did not feature. I hold that the alibi raised by the accused is an afterthought and the same does not hold any water.

For the above reasons I make a finding the prosecution has proved its case against the accused to the required standard of proof beyond reasonable doubt. I accordingly find the accused guilty as charged and convict him section 215 CPC.

E. AYUKA, RM

Delivered, Dated and signed in open Court at Kabarnet this 19th day of September, 2016.”

3. At the hearing of the appeal, the appellant urged his written grounds of appeal and the DPP opposed the appeal by oral submissions as set out below:

“Appellant

I do not wish to add to the submissions filed.

Miss Macharia for DPP

Appeal is opposed.

Appellant convicted of rape.

Contrary to section 3 (1) (a) (b) with section 3 (3) and sentenced to serve 10 years on 12/9/16.

Pw1 testified that the appellant visited her had on 23/12/15 and she was with her younger sibling.

Appellant – chased away younger children and at that time the complainant had an epileptic attack. When she came back to her sense the appellant had taken her to the bushes and was in the process of raping her. She screamed and the complainant ran away. We submit that in the complainant’s state of mind during the epileptic state she could not have given consent to have intercourse as she was unconscious.

Pw2 stated she met with Pw1 who was her niece crying on the material date. Pw1 told her that it was the appellant who had raped her.

As she was talking to Pw1, she saw the appellant leaving the scene and going towards her home. She testified that the complainant’s clothes were blood-stained. Appellant was identified by many of recognition as he was a person know to them as a neighbor.

Evidence of Pw1 was further corroborated by evidence of Pw6, the Clinical Officer who explained the complainant. He stated that at the time of examination the complainant’s lower abdomen was painful. There was no hymen and there was whitish discharge and several epithelial cells and formed opinion of rape.

Appellant’s defence is a mere denial raising an alibi that he was worthy at a friend’s place before proceeding to his sisters place the following day where he stayed for 3 days.

The appellant had ran away after committing the offence. The defence should be dismissed for lack of merit.

10 years sentence is minimum sentence. Prosecution has proved its case.

Appellant in reply

I do not wish to add anything to the submissions already filed.”

Re-evaluation of the evidence

4. The Court has considered the evidence presented before the trial Court consistently with its duty as a first appellate Court. The questions to be determined are whether the offence of rape has been proved and whether the appellant has been shown to have been perpetrator.

5. An accused person who raises an alibi does that hereby assume the duty to prove the alibi. It is the

prosecution which must prove the case against the accused beyond reasonable doubt. See *Kiare v. R* (1984) KLR 739 and *Karanja v. R* (1983) KLR 501.

6. The complainant (PW1) described the assault as follows:

“I know the accused. He is Joseph Chirchir. He stays at Maregut. On 23/12/2015, I was at home when the accused came along. I was with my younger siblings.

Accused then chased the children away. I was then attacked by an epilepsy. Accused took me to a thicket. When I came to be my senses, I saw the accused lying over me. He had already raped me. He had removed his penis and inserted it into my vagina. I felt pain. I yelled.

He pleaded with me not to tell my mother what had happened. The accused had lay me down on the ground. When he was done I screamed. He ran away. He left the thicket and met my aunt S who took me to the area chief. Chief referred us to the police at Kinyach.

After reporting at Kinyach I was treated at Kabarnet referral hospital.

I was escorted by my father.”

She referred to the treatment notes and P3 form, Green blood-stained petticoat and blood-stained blouse as the ones she had worn on that particular day and a post-rape form which was completed at the hospital on her examination.

On cross-examination by the appellant PW1 said:

“[1] am on medication for epilepsy. I have shown the Court the blood-stained clothes. You came to my home at about 11.00 am. I have told the truth it is not a frame up.”

7. PW2, the complainant’s auntie testified that she had met her niece on the material day and seen the appellant leave the scene as follows:

“On 23/12/2015 at about 2 pm while heading home from shamba. I met the complainant who was crying. She told me that Joseph (accused) had raped her. She narrated to me that she had an epilepsy attack when the accused had visited their home. That he then took her to a thicket and raped her. I then saw the accused leave the scene. He went towards his home. The complainant’s clothes were blood-stained. I took the complainant to the area Chief at the Centre. Along the way we met the complainant’s mother. We reported the matter to the area chief who referred us to the police station - Kinyach.”

The witness identified the blood-stain petticoat and blood-stained blouse. On cross-examination, PW2 said:

“There are children who saw you at the complainant’s house.”

As submitted by the appellant, the children never testified in the trial Court.

8. PW3, is the complainant’s mother who testified that:

“On 23/12/2015 I went to Marigat to work. I left the complainant at home. As I came back home, I met the complainant with S, PW2. The complainant narrated to me that she had been raped by the accused.”

The witnesses is shown to have identified the bloodied petticoat ad blouse PMFI 3 and PMFI 4.

9. PW4, the complainant’s father came back home at 7.00 pm on 23/12/15 to be told by some children

that the complainant had been taken to Kinyach police station and while going towards Maregut, he met the complainant and her mother PW3, and the complainant narrated to him that accused had raped her.

10. PW5 is the Police Reservist who arrested the appellant on request by the OCS, Kiyach police station. He arrested the appellant on 21/5/2016 at a Monteret, after investigating his whereabouts.

11. PW6, the Clinical Officer who filled the P3 form for the complainant testified and produced the P3 form for the complainant and treatment notes as exhibits. Significantly, on cross-examination by the appellant he testified:

***“There was a whitish discharge from the complainant’s vagina. I formed an opinion that the complainant was raped – due to the presence of epithelial cells, tenderness in the abdomen. The complainant was not in her monthly periods.*”**

The complainant stated that she had been defiled/raped on 23/12/16. I have no evidence to link you to the rape. She however stated that she knew the person who raped her. I did not examine the accused. I did not get any spermatozoa in the complainant upon examination. Even arousal by an object can cause epithelial cells to be produced or present.”

12. In Examination-in-Chief, the Clinical Officer had said ***“I examined the complainant the lower abdomen was painful. Hymen was absent. There were no tears or lacerations. There was a whitish discharge. Laboratory tests were conducted. Numerous epithelial cells were present. I formed an opinion that the complainant had had been raped.”***

13. PW7, the Investigating Officer testified as follows:

“On 23/12/15, complainant A.C. accompanied by the mother reported at the station that on the very day between 11 am to 12 pm, she had suffered an epilepsy attack and when she came back to her senses, she found the accused raping her. He had removed her clothes and was having sexual intercourse with her without her consent. That the accused continued to rape the complaint for about 2 hours. The report was booked in the O.B and I advised her to seek medication. I issued her with a P3 form which was later filled up.”

The Investigating Officer produced as exhibits PEX. 3 and 4, the green petticoat and blouse with blood stains.

14. When put on his defence the appellant gave unsworn statement and called 2 witnesses DW2 and DW3. He set up an alibi as follows:

“On 23/12/15 I went to work on a neighbours shamba in the morning. Later on my way my wife joined me and together with the neighbor worked on the farm upto 1 pm when we took lunch at the neighbors home. At 2.00 pm the neighbor Rhoda got us some vegetables from her shamba. I then went home. The next day I took the vegetables to my sister’s place at Toborai where I stayed for 3 days. I came back home after three days. I stayed home and the next day I went to my original home Monteret from where I went to farm at our shamba. I stayed at the farm upto May 2016 when I came back. While on my way back, I got a call from one of the K.P.R. who asked me to meet him at Kipcher when I met him, he arrested me on allegations of rape. He took me to the police station. I did not commit the offence.”

15. The appellant’s wife, DW2, testified that:

“On 23/12/15 we were at a neighbour’s shamba. She is Rhoda. We worked at the farm upto 1 pm when we ate lunch at Rhoda’s place on 24/12/15, the accused left and went to his sister’s place later on, it was alleged that he had raped the complainant. The accused stayed at his sister’s place for two days then came back. Upon returning, he again went to work at our shamba. The accused used to go to the shamba then back in the evening.”

On cross-examination, DW2 said:

“Accused went to the neighbours shamba at 7.00 am. I followed him at about 9 am. We worked upto 3 pm. We then went back home. The accused then went to the nearby Centre. He came back home in the evening. Rhoda’s shamba is about 1 km from our home. I know the complainant. I know where they stay. They are far from our home. It is about 3 km away. We worked at the shamba alongside Rhoda. We were planting millet. I did not have a watch. Am not exact on the time.”

16. DW3, Rhoda Chepchieng testified as follows:

“On 23/12/15 I was with the accused working at my farm. His wife also found us at about 11.00 am. Accused found me at the farm at 8 am. At about 2 pm we went to my home. At about 3.00 pm they both left home later the accused came back and requested me to give him some vegetables which I did. He took it to his sister. At about 3.45 pm I left to the Centre in Maregut where I saw/met the accused. Later on I heard that the accused had been arrested an accused of rape. I was with the accused the entire day. I do not believe the charges are truthful.”

On cross-examination, DW3 said:

“It was the accused, his wife, myself and my children at the farm. The farm is at Maregut. The shamba is about 5 km from my home. The accused found me at the farm at about 8.00 am. We left the farm at about 2 pm. I had a phone. After the accused and his wife left my home, I do not know where he went.”

Analysis of evidence

17. Although an accused has no duty to prove his alibi, it ought to be raised early in the proceedings to afford the prosecution time to test the alibi. As held in ***Karanja v. R***, supra:

*“In a proper case, the Court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, **take into account the fact that he had not put forward his defence, or alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.**”*

18. In this case, from the cross-examination of the PW1 the complainant, there is no indication at all that the appellant was relying on a defence of alibi. The full text of the appellant’s cross-examination of the lead witness for the prosecution is as follows:

“I know you, I knew you prior to the incident. I used to see you at home area. You chased the children away to have a chance of attacking me. I met my aunt at the foot path. You ran away when I screamed. You raped me in a thicket. I became unconscious due to epilepsy. My aunt saw you as you left the scene. My aunt then took me to the area chief at Maregut Centre. I narrated to the chief what you had done to me. I was very exhausted. The chief hired a boda boda for me to be taken to the police station. I was accompanied to the police station by my mum and aunt. The police referred me to hospital. My aunt saw the police where you raped me.

Am on medication for Epilepsy. I have shown the Court the blood stained clothes.

You came to my home at about 11.00 am. I have told the Court the truth. It’s not a frame up.

That is all.

Ms. Kenei: No re-examination.”

19. This Court, like the trial Court, is entitled to reject the appellant's defence of alibi as an afterthought. However, the Court shall consider the alibi evidence of the appellant and his 2 witnesses together with the prosecution evidence as a whole and to determine whether the prosecution has proved its case beyond reasonable doubt.

Whether offence of rape proved

20. PW1 testified that she came to and found the assailant having sexual intercourse with her and continued and when he was done she screamed and he ran away. According to Pw6, the Clinical Officer who filled the P3 form *"there was a whitish discharge from the complainant's vagina. I formed an opinion that the complainant was raped due to the presence of epithelial cells, tenderness in the abdomen. The complainant was not in her monthly periods."*

21. There was no evidence from any of the prosecution witnesses PW1, PW2, PW3 & PW4 who identified the complainant's green blood-stained petticoat MFI 3 and blood-stained blouse PMFI 4 (later produced by PW7 as exhibits 3 & 4 as to why the complainant's petticoat and blouse were blood stained. There was no evidence of physical injury during the alleged rape. Indeed, the Post Rape Care Form indicated that she had no physical injuries, her hymen was *"old torn"* and only white Pv discharge which the P3 form records as *"whitish discharge on the labia majora."* The treatment chit dated 24//15 at Kabarnet District Hospital Exh. No. I also shows *"no tears or lacerations, absent hymen, whitish discharge visible in labia majora and numerous epithelial cells."*

22. Physical examination record on the Post-Rape Care Form only indicates at the complainant's knee *"septic wound-caused by a fall."*

23. So where did the blood on the blood-stained petticoat and blood-stained blouse of the complainant come from?

24. On treatment notes from Kuikui Health Centre on the 23/12/15, the date of the alleged assault, the complainant's report is shown as follows:

"[complains] of having been allegedly been raped by someone well known to her at a nearby bush to her home. She reported that while she was fetching firewood she happen to get epileptic attack and lost consciousness after some few minutes she regained consciousness, then she noticed someone by molesting her and the accused person immediately told her to keep quiet and blocked her mouth with his hand and he continued engaging in sex with her for close to 2 hours....The lady feels some pain in her lower abdomen and back."

There was no mention of physical injuries from which blood would have oozed.

25. More significantly, the story as to how the complainant found herself in the bush with the appellant raping her is different from what she related before the Court. While she was fetching firewood in this first report to the doctor at Kuikui Health Centre on 23/12/15, she testified that the appellant had gone to her home, chased away the children and when she suffered an epileptic attack took her to a thicket and raped her. And if he had chased away the children, why was it necessary to take the complainant to the bush?

26. Yet in the Post Rape Care form the report is recorded as follows:

"That the perpetrator came to fetch water from the compound, found her, dragged her to the forest where he removed her [clothes] and had penetrating sexual intercourse with her."

There was no report of epileptic attack and, significantly, the Post Rape Care form is signed by a "Murage," Examining Officer on 15/01/2016, about three weeks from the alleged date of incident on 23/12/15. The form shows the *"Date of last consensual sexual intercourse as 9/12/2015."*

27. Why is there so much discrepancy in the evidence as to how the complainant was alleged raped and as to the medical evidence in support thereof. What is the value of examination results done on 15/1/2016 for a rape incident alleged on 23/12/15. Why was it necessary to do the examination in January 2016. If white vaginal discharge as observed on the examination of 15/1/2016, what was the significance of its having been seen on the examination of 23/12/15 at Kuikui Health Centre and of 24/12/15 at Kabarnet District Hospital? And the examination of the Genitalia on 23/12/15 and 24/12/15 did not reveal any “tears or lacerations” from a sexual assault that is recorded in the treatment notes from Kuikui Health Centre to have taken “close to 2 hours.”

28. I respectively agree with the Court of Appeal in **Geofrey Kionji v. R** Criminal Appeal No. 270 of 2010 that even absent medical evidence linking an accused to the defilement, the Court may still “if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, cap 80 laws of Kenya, a Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim and records the reasons for such belief.”

29. But where the medical evidence presented by the prosecution itself appears to raise a doubt as to the defilement or sexual offence, the Court is entitled to weigh it in the consideration of question whether the offence has been proved beyond reasonable doubt.

30. The evidence of the “absent hymen” according to the examination of 24/12/15 at Kabarnet District Hospital, and “old torn” hymen on the Post Rape Care form of 15/1/2016 and the information therein recorded that the complainant had a last **consensual** sexual intercourse on 9/12/15 and the lack of any “tears or lacerations” from the alleged 2-hour ordeal and now set against unexplained blood-stained petticoat and blouse on the complainant’s body, which was shown to have no injuries and not to have been on menses, creates a doubt in the mind of the Court as to make it unsafe to convict on such evidence. While the offence may have been committed, it was not proved beyond reasonable doubt to have been committed and it may well **not** have happened as alleged or at all. The benefit of the doubt must be given to the accused.

31. The Defence’s alibi evidence still left the appellant free time between 1.00 pm (or 2pm according to his wife and 3pm according to his employer) when they came out of the shamba and then went back to the employer to beg for vegetables and the time he was at 3.45 pm sighted by the employer at the Center. It is however not the duty of the accused to prove an alibi and in any event the complainant said the incident happened at 11.00 am and the auntie (Pw2) saw the accused shortly after the rape at 2.00 pm. It was, however, unsafe to convict given the inconsistencies established above.

Conclusion

32. For reason of inconsistencies in the evidence of the complainant herself as to the event of her rape and the medical evidence which does not support the sexual assault and the unexplained motive in apparent embellishment of the evidence in bringing blood-stained petticoat and blouse and a Post Rape Care form whose examination and report is done three weeks after the alleged incident showing the very observation of “whitish discharge” as was observed three weeks before in the examination at Kabarnet District Hospital on 24/12/15 as recorded in the P3 form.

33. Not the least of observations, the Court must point out the improbability of the complainant’s auntie’s conduct when she allegedly met with the complainant after the alleged rape. She said:

“I met the complainant who was crying. She told me that Joseph (accused) had raped her. She narrated to me that she had an epilepsy attack when the accused had visited their home. That he then took her to a thicket and raped her. I then saw the accused leave the scene. He went towards his home. The complainant’s clothes were blood-stained. I took the complainant to the area Chief at the Centre. Along the way we met the complainant’s mother.”

34. It is wholly unusual as to be incredible without explanation, that the auntie Pw2 would have been

heard of the rape of her niece whose clothes were now bloodied so that no question of sexual or physical assault having been visited on her arises, yet she let the appellant who she had seen leaving the scene going towards his home to go scot-free without any attempt to raise a call for help in arresting the assailant, or on her own to confront and attempt to arrest the appellant who was not said to have been armed with anything, and had actually, according to Pw1 only “*pleaded with me not to tell my mother what had happened.*”

35. Unless the incident of rape happened in other circumstances and probably on a different time, the evidence adduced by the prosecution does not, beyond reasonable doubt, prove the charge of rape contrary to section 3 (1) (3) of the Sexual Offences Act.

36. For the same reason, the alternative charge of indecent act is not proved.

Orders

37. Accordingly, for the reasons set out above, the Court makes the following orders:

(1) The conviction of, and sentence of imprisonment for 10 years imposed on, the appellant for the offence of rape contrary to section 3 (1) as read with (3) Of the Sexual Offences Act are quashed and set aside, respectively. The appellant is acquitted of the charge of indecent act.

(2) There shall, therefore, be an order directing his release from custody unless he is otherwise lawfully held.

Order accordingly

DATED AND DELIVERED THIS 25TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.