



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 47 OF 2018

JOHN NDUNGU MOMANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kangundo Senior principal magistrate’s Court Criminal Case No. 572 of 2016, Hon. D Orimba, PM dated 4th December, 2017)

REPUBLIC.....PROSECUTOR

VERSUS

JOHN NDUNGU MOMANYIACCUSED

JUDGEMENT

1. This appeal arises from the conviction and sentence in Kangundo Senior principal magistrate’s Court Criminal Case No. 572 of 2016, dated 4th December, 2017. The appellant was charged with three counts. The first count was Robbery with violence, the second count was gang rape while the third count was robbery with violence.
2. In support of the said charges the prosecution called 4 witnesses. According to the prosecution’s case on 23rd June, 2016, PW1 who had been on duty at [particulars withheld] Restaurant with her friend left the said restaurant after closing at about 2.00 am to go and buy food. Along the way they parted ways. PW1 then met a friend by the name N whom she asked to escort her home. Along the way they met 6 men quarrelling amongst themselves and three of them followed them. On reaching the gate the said men got hold of PW1’s said friend and started beating him. PW1 was also grabbed, dragged to a nearby thicket and raped in turns by four men, including the appellant who was her customer. According to her the said assailants were armed with a pistol.
3. The following day PW1 met the appellant who abused her and PW1 pointed him out to a friend who arrested the appellant and took him to the police station. She went to Mama Lucy Hospital where she was tested and after that reported the matter to the police station where she found the appellant who had been arrested. It was her evidence at the police station, a wife of one of the assailants tried offer money so that the case could be dropped. According to PW1 she was injured on the knee and was issued with a P3 form. According to PW1, she knew the appellant who was their customer and who had tried to make advances to her but she refused to be his friend. It was her evidence that when they met the appellant the following day, he was still wearing the same clothes he was wearing the previous night. It was her evidence that she was robbed of a phone and Kshs 850/- which were never recovered.
4. In cross-examination, she however admitted that the appellant was her boyfriend though she denied this in re-examination. In re-examination she also denied knowing the appellant by name. She testified that since the appellant threatened her she feared hence did not report immediately.
5. PW2 was the one who assisted PW1 in arresting the appellant. According to him, when he requested the appellant to accompany them to the police station, the appellant accepted to do so.
6. PW3, a clinical officer at Kangundo Level 4 Hospital examined PW1 who had a tender knee joint. Her genitals were normal and the vagina did not show any physical injury though her hymen had been broken. On further examination, high vaginal swab revealed spermatozoa as well as the urine test. It was therefore confirmed that she was sexually assaulted.

8. PW4, was the investigation officer. After carrying out the investigations, the appellant admitted that he was in company of other people and that his friends committed the offence. According to him the appellant was arrested by the public.

9. In his sworn evidence, the appellant testified that PW1 was his girlfriend and that they differed when PW1 found him with another girl called M and was unhappy. PW1 warned him. After one week, she called the police and he was arrested with others. He however denied having committed the offence saying he was in Nairobi on the date of the alleged offence.

10. This appeal was conceded by the Respondent, through the learned prosecution counsel, **Ms Mogoi**. According to the respondent there was no evidence on how PW1 identified the appellant since the incident occurred at night and the means of lighting was not disclosed. It was also noted that there was no reason advanced why PW1 never escaped despite her testimony that on two occasions she was left alone. Further, the people who were allegedly with her were never called as witnesses. Despite this the learned trial magistrate still found the appellant guilty of the offence of robbing one of the said persons who never testified. It was further submitted that there was no corroboration of the evidence of PW1.

11. It was therefore submitted that the prosecution failed to call crucial witnesses in the matter. Other than the presence of spermatozoa, no physical injuries were noted in the genital area to support the claim of rape. It was the Respondent's submissions that the appellant's evidence seems to have had some truth in relationship to PW1 which evidence PW1 tried to hide thus raising doubt as to the appellant's involvement in the offence.

12. It was therefore submitted that the prosecution failed to prove the case beyond reasonable doubt and that the appellant was wrongly convicted.

13. I have considered the evidence as well as the submissions made. I respectfully agree with **Miss Mogoi** that the evidence tendered by the prosecution fell short of the required standard of proof in criminal cases. In this case it is true that persons whose evidence could have been crucial to prove the case were never called. While the prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal, it is however another thing where the evidence adduced by him is barely sufficient to sustain the charge.

14. In this case there was no evidence about the intensity of the light that night. After the incident, PW1 did not report the matter immediately. The medical examination itself was doubtful as to whether the evidence of sexual intercourse was consensual or otherwise since there was no evidence of any injury to PW1's genitalia yet it was her evidence that she was a victim of gang rape. Her own evidence was inconsistent and contradictory. It was oscillating from one extreme end to another. In some cases, it was simply incredible. Therefore, the appellant's case that the said case was fabricated by PW1 in order to hit back at him for being found with another girlfriend, may well be believable in the circumstances. The appellant's case therefore raised reasonable doubt as to whether the prosecution's case was credible and believable. It made the prosecution's case fail to meet the threshold required in order to justify a conviction. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

14. In **Sekitoliko vs. Uganga (1967) EA 53** it was held that:

“The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case.”

15. **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 (1970)**, at **pages 361-64** stated:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction... Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

16. In 1997, the Supreme Court of Canada in **R vs. Lifchus [1997] 3 SCR 320** suggested the following explanation:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond

a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond reasonable doubt.”

17. In JOO vs. Republic [2015] eKLR, Mrima, J held that:

“It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

18. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of Hamisi Bakari & Another vs. Republic [1987] eKLR:

“We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved.”

19. In the premises I agree with the learned prosecution counsel that the appellant’s conviction was unsafe. I therefore allow the appeal, set aside the conviction and quash the sentence. I direct that the appellant be at liberty forthwith unless otherwise lawfully held.

20. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 25th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person.

Ms Mogoi for the Respondent

CA Geoffrey