REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 18 OF 2018

MATHIUS MUKUBA CHOMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the Senior Resident Magistrate Court at Mariakani in Criminal Case No. 399 of 2017 in a Judgment dated 7.12.2017 – Hon. L. K. Gatheru)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGEMENT

On the 7th day of December 2017 the appellant was convicted of the offence of rape contrary to Section 3(1) (a) & (3) of the Sexual Offences Act No. 3 of 2006. The prosecution had alleged that **Mathius Mukuba Chombo** raped **K.M.** on the 16.6.2017 at **[particulars withheld]** village, Makamini Location, Kinango District of Kwale County. In execution of the alleged offence, the prosecution claimed that the appellant intentionally and unlawfully caused his penis to penetrate the vagina for K.M. and in so doing he used force, threats and intimidation. He was subsequently sentenced 10 years imprisonment.

Alternatively, while he was charged with the offence of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act. The allegations by the prosecution was that the appellant intentionally touched the buttocks, breast, anus and vagina of K.M. with his penis against her will.

Aggrieving by both his conviction and sentence, the appellant lodged an appeal against both conviction and sentence. The appellant's bone of contention as couched in his petition of appeal is as follows:

i. That the charge sheet was defective.

ii. That his arrest had no connection with the matter in question.

iii. That his rights under Article 50 (2) were not accorded to him.

iv. That his defense was not considered.

v. That there was no sufficient evidence to prove penetration.

vi. That the evidence of a single witness (complainant) which the court heavily relied upon was insufficient.

In support of the instant appeal the appellant filed written submissions expounding on the above outlined grounds of appeal. The same is dated 25.2.2019. Conversely, Ms. Barbara Sombo the Learned Counsel for the state vehemently opposed the instant appeal by way of detailed written submissions dated 25.3.2019. I have considered the record of proceedings, the exhibits tendered by the prosecution and the submissions from both parties. I shall consider the same in my findings, analysis and determination below.

I now resort to the Court of Appeal remarks in **Okeno v Republic [1972] EA 32, 36:**

"An appellant on a first appeal is entitle to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya vs R [1957] EA 336] and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantial M Ruwala v R [1957] EA 570]. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and draw its own conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424."

Issues for determination

What seems to be the issues for determination in this particular case is whether the offence of rape was proved by the prosecution beyond any reasonable doubt, whether the charge sheet was defective and lastly, whether the appellant's defence was reliable and capable of creating doubt in the prosecution case.

Law

The appellant was charged with the offence of rape contrary to Section 3 (1) of Sexual Offences Act. Section 3 of the Sexual Offences Act provides as follows:

a. The intentional and unlawful penetration of the genital organ of a male person to a female genital organ.

b. The absence of consent or where consent is obtained by force, threat, intimidation, fraud or false pretence of any kind.

c. That the accused person was positively identified and placed at the scene.

It is trite Law that the offence of rape is committed where a person has committed an act which causes penetration to the complainant, intentionally, without obtaining consent from the complainant or the consent was involuntary. The onus of proving the necessary ingredients of the offence of rape resides with prosecution is in any other criminal case.

(1). Whether the penetration was proved?

In the quest to establishing the act of penetration, I result to the evidence of the complainant and that of the clinical officer. **The complainant (PW 1)** told the honorable trial court that on the material date she was in the forest looking for cattle, when the appellant came and manhandled her. He shoved her to the ground, forcibly undressed her and proceeded to insert his manhood into her genitalia. The complainant explained that the appellant was dressed in shorts which he pulled upwards, then removed his manhood from the side of the short. In so doing the appellant threatened to visit violence on the complainant if she were to raise alarm and she obliged. He was armed with a knife on his left hand.

The foregoing testimony by the complainant was corroborated by the testimony presented by the clinical officer who testified as PW 3. Upon examining the complainant, PW 3 observed that her hymen was missing. His conclusion was that there was penetration. He produced the P3 Form and treatment notes to that effect which were marked as exhibit 2 and exhibit 1, respectively.

On appeal, the appellant contended that penetration was not proved as the same was not supported by any medical evidence hence this resulted in an unsafe conviction. He sought to discount the prosecution witnesses testimony by saying that the absence of the hymen was not confirmed to be fresh. I equally reject the appellant's foregoing contention for the reason that whether or not the hymen was fresh is not an issue for determination in this particular case. But the fact of a missing hymen is sufficient proof of penial penetration.

I therefore have no reason whatsoever to doubt that penetration is a key ingredient of the offence of rape was proved to the required standard of proof beyond reasonable doubt.

(2). Whether identification was proved?

The principles to be followed are well settled in the case of **Cleophas Otieno Wamunga vs Republic [1989]KLR 424,** as follows:

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a greater extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification."

It is trite that there is need for careful scrutiny of identification evidence before basing a conviction on it. This principle was espoused in the dicta from the case of **Abdullah Bin Wendo vs Rex 20 EACA 166** in the following manner:

"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."

The evidence of the complainant is clear, cogent and straight forward to the effect that the appellant was the author of the complainant's misfortune. The appellant is a person well known to the complainant and her family and this therefore entails that instant case is one of recognition as opposed to identification of a stranger. What this further entails is that the probability of mistaken identity is drastically reduced to its lowest level. Useful guidance is provided in the case of **R vs Turnbull & Others [1973] 3 ALL ER 549** where the Learned Judge observed that evidence of recognition is more reliable than that of identification of a stranger but however the Learned Judge went further to recognize the need to practice utmost caution when a witness purports to have recognized someone known to them as a mistakes in recognition of close relatives and friends are sometimes made.

Having regard to the foregoing position of law I now turn to the analysis of the facts of this case. As I have already determined in the instant case it is a matter of recognition rather than identification. This is because the appellant and the complainant stay in the same village. The recognition in this case is made more certain due to the fact that the offence was perpetrated in broad daylight.

In consideration for the alibi defence raised by the appellant where he averred that on the material day he claimed to have spent the whole day in church. He further claimed that his family and that of the complainant had a grudge prior to the commission of the alleged offence and therefore the charges herein are nothing but trumped up.

As correctly found by the Learned trial Magistrate I find the alibi defence largely unsatisfactory in both defence witnesses made unique and quoting the dates and the times of the events of the material date. They both gave accounts pertaining to the events of Saturday 16.6.2017. While the relevant material date is Friday 15.6.2017 at 4.00 p.m. this shows that the defence case was in account resulting from witness coaching and the whereabouts of the appellant on that day he referred to, were absolutely irrelevant in this case. I therefore reject the defence case for its lack of merit.

In the premises, I am convinced that the evidence on record is enough to ascertain that the appellant was positively identified as the perpetrator of the alleged rape. It is therefore my finding that the Learned trial Magistrate correctly found the same to have been established beyond reasonable doubt.

(3). Whether lack of consent was proved?

On this particular limb the prosecution is required to establish that the appellant used some kind of force, threats, intimidation or false pretenses of any kind to obtain the complainant's consent. The evidence of PW 1 is such that the appellant manhandled her, shoved her onto the ground, undressed her, pulled up his shorts, removed his genital organ from the side of the short and inserted it into her genitalia.

The foregoing chilling account by the complainant does not only show that the appellant resorted to brute force inorder to prevail upon the complainant and satiate his sexual desires but it also goes to show the intention to cause unlawful intentional penetration upon the complainant. I therefore find that the prosecution testimony was sufficient to prove the absence of consent and the intention to rape.

(4). Whether the charge sheet was defective?

The appellant alleged that the charge sheet was defective. The test for whether the charge sheet is fatally defective is a substantive one: was the appellant charged with the offence known in law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him. If the answer is in the affirmative, it cannot be said in any manner other than a contrived one that the charges were defective. In this case, the appellant was charged in terms of Section 3 of the Sexual Offences Act. The substance of the charge is clear. I have no doubt in my mind that the appellant clearly understood the charges leveled against him well enough to understand the ingredients of the offence to enable him to fashion a defence.

As regards the sentence, the appellant was imprisoned to 10 years. In my view this is a very lenient sentence which I am not inclined to interfere with. The upshot, is that for the reasons aforementioned the appeal is dismissed, conviction and sentence of 10 years imprisonment meted out by the Learned trial Magistrate is hereby affirmed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE