



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIIAYA

Criminal Appeal No. 125 Of 2016

(RAPE)

(CORAM: J.A. MAKAU - J.)

DICKSON NAMITI MASIBO.....APPELLANT

Vs

REPUBLIC.....RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 30.06.2016 in Criminal Case No. 599 of 2015 in Siaya Law Court before Hon. H. Wandere – P.M.)

J U D G M E N T

1. The Appellant **DICKSON NAMITI MASIBO** faced a charged of Rape contrary to **Section 3(1)(a)(b) as read with Section 3 of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge is that on the 2nd day of September 2015, at [particulars withheld] **in Siaya Sub-County within Siaya County**, intentionally and unlawfully caused his penis to penetrate the vagina of **LAO**, without her consent. The Appellant also faced alternative charge of committing an indecent act with an adult contrary to **Section II(A) of the Sexual Offences Act No. 3 of 2006**. The particulars of the alternative charge are that on the same day, at the same place, the Appellant intentionally touched the vagina of **LAO**, with his penis against her will.

2. After full trial, the Appellant was found guilty, convicted and sentenced to serve 10 years imprisonment.

3. Aggrieved by the conviction and sentence, the Appellant preferred this appeal setting three (3) main grounds of appeal thus: -

a) That, the Learned Magistrate mis-directed her by overlooking the material factors and putting much consideration into immaterial factors to base a conviction which was unsuitable in the interest of justice.

b) That, the Learned Magistrate erred in both law and fact by failing to appreciate that Prosecution case was full of contradictions hence insufficient and unreliable to warrant a conviction.

c) That, the Learned Trial Magistrate erred in law and fact by ignoring the Appellant sworn defence which was cogent and has probative values to earn the Appellant acquittal.

4. At the hearing, the Appellant appeared in person and in support of his appeal, put in written submissions and had nothing else to add. Mr. Ombati, Learned State Counsel appearing for the State, opposed the appeal urging that if there were any contradictions in the evidence of PW1, PW2 and PW3; the same were minor and did not go to the root of the case; as the Complainant identified her assailant; mentioned his name as Dickson stating how she was able to identify the offender; that her evidence on identification was consistent; that failure of PW1 to state to PW4 when she reported first, that she had been raped was due to the fact that the Complainant being a girl and PW4 being a stranger to her, it would have been shameful to make such a report to a stranger but she was able to make report to a person familiar to her, PW3, her brother; that the evidence of the Clinical Officer and his finding, support the charge as it is clear there was struggle. He therefore submitted the minor contradictions were not material. On the Clinical Officer's examination and report in which the Clinical Officer detailed an examination of the Complainant's vagina, the *labia minora* was normal, he urged the Clinical Officer failed to state what was normal, however, he talked of whitish discharge urging on examination that was not true. He urged the evidence was corroborated as a person who has had encounters would have no bruises and urges there was penetration.

5. I am the First Appellate Court and as expected of me have to subject the entire evidence adduced before the Trial Court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSACK NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the Trial Court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 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 finding and conclusion; 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 Vs. Sunday Post, (1958) EA 424)”

6. The record of appeal contains the Prosecution case and the Defence which I need not reproduce in this appeal.

7. The Prosecution case is that the Complainant LAO, a girl aged 20 years was on 2/9/2015 on her way home from her shop along a foot path, it was about 6:30pm and it had rained, was drizzling and she was able to see very well. She saw two people ahead of her and recognized one as Dickson, who she used to meet often and who was working for Complainant's neighbour as a herds boy. The stranger passed the Complainant going towards the direction she was coming from while the Appellant Dickson was ahead of her walking in the same direction of the Complainant; but as he was walking fast he disappeared and she branched off and after 1 kilometre Dickson emerged from behind, as it was getting dark, she heard footsteps behind; she had a phone which had torch light; which she lit, turned and saw Dickson, who she greeted and who suddenly held her by the throat at the back; took her phone; her bag fell down; dropped her on the ground on the footpath; PW1 struggled as the Appellant lifted up her skirt as she resisted, removed her undergarment and then raped the Complainant. She felt his penis inside her as he took 4 minutes on top of the Complainant raping her and after finishing he asked her whether she knew him, to which the Complainant denied by turning her head. He got up and told her, he was from Anduro and left. PW1 picked her bag and went to a nearby homestead, whereby the owner of the home, Ogola, told

her to report the rape case to the police as he escorted her home. At home, PW1 told her brother, J, what Dickson had done to her; with whom they proceeded to the home, where the Appellant was working; found him but he had changed his clothes. The Complainant later reported the matter with her parents at Barogong Police. APs accompanied the Complainant to Dickson's home; she identified him and he was arrested. She subsequently reported to Siaya Police Station, where she was issued with a P3 form; went to Siaya County Referral Hospital; it was filled by the doctor and she returned it back to the police. She took the clothes she was wearing at the time of incident, full of mud from the place she had been thrown down and raped; marked MFI-2, MFI-2, MFI-3 and MFI-4. Complainant identified Dickson as the accused in the dock.

8. The Prosecution called PW2, P A O, mother to the Complainant, who testified that on 2/9/2015, the Complainant left for salon at [particulars withheld] Trading Centre but did not return home early enough. That at 8:00pm, she came with J O, her brother, and told her, on her way home she had been raped by Dickson, a neighbour's herds boy; then she took her to report at AP's at [particulars withheld], that the APs arrested the Appellant. That they later reported the matter at Siaya Police Station, she identified the appellant stating she had known him before the incident as herdsman of a neighbor and that he was staying at the home of Onyango. That the Complainant went to the hospital and P3 Form was filled at Siaya County Referral Hospital which they returned to the Police Station.

9. PW3, J O O, testified on 2/9/2015 at around 7.45pm, Paul Ogolla, a neighbor, knocked his door in company of LAO, the Complainant, and told him, she had been attacked and robbed by the worker of Onyango at [particulars withheld] of her phone. They then proceeded to Onyango's home and found him and the worker, who LAO identified, and who denied the allegation. That LAO told them, the worker had raped her. He later recorded statement with the Police.

10. PW4, Paul Ogola Owingo, testified that on 2/9/2015 while at his house at around 7:30pm, LAO came to her house crying, and who he had known since she was a small girl, being a daughter of a neighbor; and told him the herds boy of Onyango had taken her phone, then they went to the home of J O (PW3); that the herds boy had also defiled her. He stated the person who had raped her was Onyango Nyamiti. That he, PW3 and LAO then went to the home of employer of Dickson; enquired from the Appellant about the phone and he denied. They then left, PW4 testified he came to know of the rape of LAO later. He identified the Appellant who he had come to know 3 months before the incident.

11. PW5, Area Assistant Chief, testified that on 2/9/2015 at around 8.55pm while at his home, he received a call from J O O (PW3) reporting to him of an attack of his daughter by the Appellant and he called AP from Nyadora. That he received a text message from LAO telling him, she had been raped by Dickson. He then took her and his wife to AP Post and lead AP to arrest Dickson. He was arrested from his shamba and taken to Siaya Police Station. LAO was treated at Siaya Referral Hospital. He identified the accused as Dickson Namiti.

12. PW6, No. 200078553, Valentine Matinda, attached to Bar Agong AP Post, testified that on 3/9/2015 at midnight at AP Camp, he saw a young girl, LAO, in company of her mother and father, (PW5) who reported of having been raped while on her way home from [particulars withheld] at 7:30pm by a person known to her, one Dickson, a neighbour's herds boy. PW5 with AP Francis Waswa were led to Appellant's home, LAO identified him, arrested him and escorted him to AP's Camp, booked him in the OB for the offence of rape. Later they escorted him to Siaya Police Station. He then recorded his statement, escorted LAO and her parents to Siaya Referral Hospital and following day at about 8:00am, they went back to Siaya Police Station for further investigations.

13. PW7, Sila Omondi Oluoch, a Clinical Officer at Siaya County Referral Hospital on 3/9/2015, he received a patient LAO 72612, with soiled clothes, who complained that on 2/9/2015, she had been raped by a person known to her. He observed she had swelling and scratch marks on her neck, and front of her face. On examination of the vagina, the labia minora was normal, the outer genitalia was normal, no tears or bruises noted; there was whitish vaginal discharge on the outer vagina. Laboratory test were done. H.V.S to detect sperms. No spermatozoa were noted though there were cells epithelial indicating an infection. PW7 produced P3 Form as exhibit 1.

14. PW8, P.C. Agatha Wafula, the Investigating Officer, testified LAO on 3/9/2015 in company of her mother reported that Dickson Namiti had raped her on her way home from [particulars withheld]. He issued her with P3 Form, which was returned to him after a doctor had filled it. He took witnesses statements. He visited the scene and noted it was 200 metres from the tarmacked road, Siaya/Bondo and that it had rained. He received LAO's clothes which she had at the time of rape which he produced, yellowish jacket MFI P2 exhibit 2; a blue skirt jeans MFI P3 exhibit 3; a white T-shirt MFIP.4 exhibit 4. That the accused was arrested by APs at Bar Agoro, escorted to Siaya Police Station. PW8 then charged him with this offence.

15. The Appellant on being put on his defence, he opted to give a sworn statement. He stated that he is a shamba boy at [particulars withheld] in Siaya County. That on 2/9/2015, he was at his employer's home, one Thomas Onyango Odora, when at 7:30pm people with a girl came and started asking him questions which he did not know and on being asked whether he was with the girl he denied, and went to sleep. That at 12:45 midnight, he heard a knock on his door; opened and saw police officers, who arrested him for no reason at all. He was then escorted to Bar Agoro AP Post; following day taken to Siaya Police Station and subsequently charged with this offence.

16. The Appellant urged mainly on ground no. 2 of his appeal, that the Learned Trial Magistrate erred in both law and fact in failing to appreciate that the Prosecution case was full of contradictions hence insufficient and unreliable to warrant a conviction. The Appellant's contention in his submission is that the evidence of PW1, PW2, PW3 and PW4 is riddled with contradictions, in that when PW4 reported to PW3, he stated that LAO was complaining of attack by the Appellant, as the person who had robbed her of her phone, however on search, no phone was recovered. He further stated PW7 stated on examination of PW1, all examination was normal. He urged the witness was deceitful and the issue of rape was fabricated against him.

17. In a charge of rape to be proved, the Prosecution is supposed to prove the following:-

(i) Recognition or identification of the perpetrator.

(ii) Penetration.

(iii) Lack of consent of the victim.

In the instant case, there is evidence from PW1 that she saw and recognized the Appellant before it fell dark, and even gave his name in her statement as a herds boy of his neighbor who she had known before the incident. She later recognized the Appellant through her phone torch light when she shone it at him before he knocked her down. She gave his name to PW2, her mother; PW3, her brother; PW4, the neighbour from where she sought help; PW5, her father; PW6, the AP Officer; PW7, the Clinical Officer and PW8, the Investigating Officer. She even took them to the place where Appellant was working as a herds boy and identified him before his arrest. I have examined the evidence of PW1, PW2, PW3 and PW4 and I do not find any inconsistencies or contradictions. PW1 told PW2, PW3 and PW4, she was attacked by the Appellant who did not only rape her but also took her phone at the same time. The fact that PW1 did not immediately tell PW3 and PW4 of the rape, do not in my view amount to contradiction but I find it could not have been easy for PW1 to tell her brother and a neighbour who she was not very free with, of rape, as it is taken as a shameful and degrading act to a woman, which needs one's courage and time to talk of. The Appellant did not state why PW1 would frame him as the person who had raped her. He did not even in his cross-examination or in his evidence state that he was framed and for what reason. I find the allegation that he was framed to be an afterthought. On allegation that no one saw him commit the offence, PW1 was categorical that she saw the Appellant before and after the incident which took 4 minutes. She greeted the Appellant before he grabbed her by the neck and caused injury to her. I find then there were no material inconsistencies or contradictions that would affect the conviction meted against the Appellant; and if any, they are so minor, that they are not material in this case as they do not go to the root of the case.

18. On the issue of penetration, PW1 stated that the Appellant after knocking her down, she felt his penis

inside her and he took 4 minutes raping her and after finishing, he left her. PW1 told PW2, PW3, PW4, PW5 and PW6 that the Appellant had raped her. PW7 on examination of PW1, he found that her *labia minora* normal with no tears or bruises, with whitish vaginal discharge on the outer vagina, and no spermatozoa, exhibit 1, the P3 Form confirms the doctor noted normal *labia majora/minora*, moist vagina, no tear nor bruises noted; whitish discharge noted on the outer genitalia and no blood noted. In proving penetration, there is no need to prove injuries were caused especially where the victim is an adult and where the victim is someone who has had previous encounters nor is it a requirement that spermatozoa be found, for not every penetration need result in ejaculation and/or depositing of sperms in the genitalia nor should penetration be complete. I therefore find PW1's evidence on penetration is corroborated by evidence of PW7 and the medical document, thus the P3 Form.

19. On lack of consent; PW1 stated that when she greeted the Appellant, he suddenly held her by throat at the back and struggled with him, before he dropped her on the ground and raped her. PW4 testified PW1 went to his home crying. PW5 stated PW1, using her cousin's phone send him a text message saying she was feeling embarrassed to say Dickson had raped her. PW7 observed PW1 had a swelling and scratch marks on her neck and also front of face. P3 Form reveals the state of PW1's clothing including absence of tears, stains as of 2/9/2015. They were soiled but not torn and not blood stained. PW8, the Investigating Officer produced PW1's clothes which he noted were mud stained. From the above, it is clear PW1 did not consent to the incident but was forcefully raped as she struggled with the Assailant and as such she suffered some injuries to her neck, face and her clothes got stained with mud as she was knocked down by the Appellant. I find the sexual intercourse committed to PW1 was not consensual but was through violence as she did not consent to the same. She sustained injuries in the process of resisting the rape. She did not therefore consent to the act but was forcefully raped.

20. The Upshot is that the conviction and sentence meted against the Appellant was based on sound finding. The Appeal is without merits and is dismissed. The conviction is upheld and sentence confirmed.

DATED AND SIGNED AT SIAYA THIS 26TH DAY OF JANUARY 2018

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistant:

1. Laban Odhiambo
2. Brenda A. Ochieng

Appellant – Present in Person

Mr. Ombati: for State

J.A. MAKAU

JUDGE