



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**HIGH COURT CRIMINAL APPEAL NO.116 OF 2015**

**BERNARD MUGANDA OPIYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from original conviction and sentence by C. A. S. Mutai, P.M, in Butere Principal Magistrate's Court Criminal Case No.35 of 2015 delivered on 7<sup>th</sup> October, 2015)*

**JUDGMENT**

1. The appellant herein was convicted of the offence of rape contrary to **section 3(1)(a)(c)** as read with **section 3(3)** of the **Sexual Offences Act No.3 of 2006** and sentenced to serve 14 years imprisonment. He has filed this appeal challenging both the conviction and the sentence on the grounds that:-

- 1. He was convicted on a defective charge sheet.**
- 2. The report made to the police was attempted rape but not rape.**
- 3. There was no medical evidence to support the charge of rape.**
- 4. He was convicted against the weight of evidence.**

2. The particulars of the charge of which the appellant was convicted (count 1) were that on the 22<sup>nd</sup> January 2015 at [**particulars withheld**] **Village** in Inaya sub-location in Butere District within Kakamega County he intentionally and unlawfully caused his penis to penetrate the vagina of **RA** by use of force. In alternative to that count the appellant was charged with committing an indecent act with an adult contrary to **section 11(A)** of the Sexual Offences Act No.3 of 2006. The particulars were that on the same day and time as in the main charge he intentionally and unlawfully touched the vagina of **RA** with his penis against her will.

The appellant faced further charges in counts 2 and 3. The charge in count 2 was sexual assault contrary to **section 5(1)(a)(i)** as read with **section 5(2)** of the Sexual Offences Act No.3 of 2006. The particulars were that on the same date and time as in count 1 he unlawfully used his fingers to penetrate the vagina of **RA**.

The charge in count 3 was assault causing actual bodily harm contrary to **section 251** of the Penal Code. The particulars were that on the same date and time as in count 1 he unlawfully assaulted **RA** thereby occasioning her actual bodily harm.

On convicting the appellant in count 1, the trial court did not make any finding in counts 2 and 3.

Case for prosecution:-

3. The prosecution called 5 witnesses - the complainant **RA** **PW1**, **Moses Mapesa** **PW2**, **Samson Okonga** **PW3**, the clinical officer **PW4** and the investigating officer **PW5**.

The prosecution evidence was that in the year 2015 the complainant was a form 4 student at [**particulars withheld**] Secondary School. That on the 22<sup>nd</sup> January 2015 at 6 am she was on the way to school. That on passing [**particulars withheld**] Primary School she met with the appellant. On passing him he ordered her to stop. She continued walking but then the appellant ran towards her. She took to her heels. The appellant caught up with her and ran past her. He stopped. He slapped her across the face. She fell to the ground on her back. The appellant lay on her. He held her on the neck. She started to scream but he covered her mouth with his hand. He inserted his other hand into the side of her panties. He removed his underwear and penetrated his penis into her vagina through the sides of her panties. She struggled with him

as she screamed. Her clothes were torn and got muddy in the struggle. It had rained on the previous night. **Samson Okonga PW3** who was at his home nearby heard the screams. He rushed to the place. He saw a person running away. On getting there the complainant told him that the appellant had attempted to rape her. Her books were scattered to the ground. He took her to her home. She was escorted to the office of the Assistant Chief and then reported at Butere police station. The case was investigated by **PC Habiba PW5**. She escorted the complainant to Butere District Hospital where she was examined by a **clinical officer PW4**. The clinical officer found her with bruises and swellings on the left side of the face. Her pant was soiled with mud and had stains of blood. Her school uniform was stained with mud. A vaginal examination revealed bruises in the labia majora, the vulva and the perineal area. The hymen was partially broken and bleeding on touch. On the following day the clinical officer completed the complainant's p3 form. She made a conclusion that there was penetration by penile shaft. On the 25<sup>th</sup> January 2015, the appellant was arrested by the police in the presence of **Mr Mapesa PW2**. **PC Habiba** charged the appellant with the offences. He denied the charges. During the hearing the complainant's torn and muddy pant and uniform were produced in court as exhibits. The clinical officer produced the P3 form and the treatment notes as exhibits.

4. In his defence the appellant stated in a sworn statement that he had attended the same Primary School with the complainant. That on the 22<sup>nd</sup> January 2015 at 6 am he was at his home and that he never came across the complainant. That he was arrested on 25<sup>th</sup> January 2015 for reasons he did not know. He was later charged with the offence of rape.

#### Submissions

5. The appellant made written submissions that he highlighted in oral submissions in court. He submitted that the complainant gave contradictory evidence when she respectively testified before **Hon. Shimenga** and before **Hon Mutai**. That the complainant is thereby not a credible witness. That some other people who were mentioned in the case did not testify hence raising the inference that their evidence was adverse to the prosecution case. The appellant submitted that there was no evidence of identification on him. That there was no independent medical evidence to prove the charge of rape.

6. The prosecution counsel, **Mr Jamsumba**, in his submissions did not support the conviction on rape. He submitted that the evidence proved a charge of sexual assault. He urged the court to substitute the offence committed to sexual assault and sentence him to the minimum sentence of 10 years imprisonment.

#### Findings by trial court:

7. The trial magistrate convicted the appellant on the grounds that there was light when the incident took place and that the complainant identified the appellant as he was a person well known to her. That the appellant was also identified by Samson PW2. That the evidence of the clinical officer supported the evidence of rape. That the investigating officer found that the offence committed was rape and not attempted rape. The magistrate dismissed the appellant's defence as a sham.

#### Duty of first appellate court:

8. This is a first appeal. It is the duty of a first appellate court to analyse and re-examine the evidence on record and draw its own conclusions bearing in mind that the trial court had the advantage of hearing and seeing the witnesses – see **Kiilu & Another vs Republic** (2005) 1 KLR 174 and **Okeno vs Republic** (1972) EA 32.

#### ANALYSIS AND DETERMINATION:

9. The appellant submitted that he was convicted on a defective charge. He however did not expound on how the charge of rape was defective. The complainant was aged 19 years at the time of the commission of the offence. I have studied the charge and I do not see any defect in it.

10. The complainant initially testified before Hon. Shimenga before she recused herself of the matter upon which the case proceeded before Hon. Mutai. When the complainant testified before Hon Shimenga she stated that the appellant only inserted his three fingers into her vagina. There was no mention that the appellant penetrated her with his penis. Going by her evidence at that stage it would mean that the offence committed was sexual assault.

11. Later on when the complainant testified before Hon Mutai. She stated that the appellant inserted his hands into the sides of her panties and he then penetrated his penis into her vagina through the sides of her panties. The witness never mentioned that the appellant inserted his fingers into her vagina.

12. The question then is why the complainant changed her story when she testified before Hon Mutai that the appellant penetrated her vagina with his penis from the initial story that he had only inserted his fingers into her vagina. Which of these two versions is the truthful one?

13. The investigating officer stated that the initial report made to the police was attempted rape. The report of attempted rape by itself means that there was no rape. The investigating officer did not explain why the story changed from that of attempted rape to rape.

14. The clinical officer PW4 stated that she found the complainant with bruises on the labia majora, vulva and on the perineal area. She found that the hymen was partially broken. This made her to form a conclusion that there was penetration by erect penile shaft.

15. When the complainant testified before Hon. Shimenga, she stated that she felt a lot of pain when the appellant inserted his fingers into her vagina. That she bled from the inside of the vagina as a result of the appellant's act. That would mean that the complainant was injured in her vagina as a result of the appellant inserting his fingers into her vagina. If the clinical officer found bruises on the vulva and the hymen partially broken the injuries were then caused by the appellant's fingers. Since the complainant discarded this evidence before Hon. Mutai

the question that remains unanswered is whether the injuries were occasioned by fingers or by penile shaft penetration.

16. The complainant told Hon Mutai that she went to hospital on the same day of the incident, that is on 22<sup>nd</sup> January 2015. She stated that she was not there when the P3 form was filled. She stated that she was at home when the P3 form was filled. After three weeks the complainant was re-called to the dock to be questioned further on the issue during which time she stated that she was taken to Butere District Hospital on the 23<sup>rd</sup> January 2015 where the P3 form was filled for her. If the witness had categorically stated that she was not at the hospital when the P3 form was filled, why did she change her evidence to that she was there when it was filled? How could the witness have forgotten that she had gone to hospital on the following day when the P3 form was filled?

17. I have carefully analysed the evidence of the complainant as testified before the two trial magistrates. It is clear that the complainant was not a reliable witness. She did not explain why she changed her story from that of sexual assault to that of rape. She did not explain why she changed her evidence from that she was not present in hospital when the P3 form was completed to that she was there when it was completed. The court has to treat the evidence of such a witness with a lot of caution. In the case of *Kimani Ndungu vs Republic* (1979) I KLR 282, the Court of Appeal had the following to say on credibility of witnesses:-

***“The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his truthfulness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”***

The trial magistrate did not address the contradictions in the evidence of the complainant. There were no sufficient reasons into believing her evidence in its entirety.

18. The complainant in her evidence before Hon. Shimenga stated that the incident occurred very early in the morning around 6 am. Before Hon Mutai she at first stated that the time was 6 am and later said that it was 6.30 am. The question then is whether the incident took place very early in the morning at 6 am or it took place at 6.30 am. If the court were to go by the evidence that the incident took place very early in the morning at 6 am the question then would be how the witness identified the appellant at that hour. Though the witness stated that there was light at the time, she was not questioned as to the nature of light that was there at the time. The court takes judicial notice that there are times in the year when it is usually dark at 6 am. The incident occurred in the month of January. We are now in the month of January. The court has noted that this past week it has been dark at 6 am and the darkness has been ebbing away at 6.20 am. It is therefore likely that in January 2015 daylight was coming in late after 6 am. That is the reason why evidence on the prevailing light at the time should have been brought out. Though the complainant knew the appellant before, the court had to ensure that the identification of the appellant was free from the possibility of error - See *Wamunga vs Republic* (1989) KLR 424. The trial court did not ensure this as it did not address the fact that it could have been dark at the time of the alleged commission of the offence.

19. Samson PW3 stated in his evidence that when he was going to the scene he met with the appellant running away. That it was day time and he identified the appellant properly. However this evidence was contradicted by the evidence of the complainant who had stated in her evidence before Hon Shimenga that the appellant had sneaked into a shamba and had not run towards the direction that Samson was coming from. That meant that Samson did not have the opportunity to identify the person. The evidence of the two witnesses on the issue cannot be reconciled. Though Samson said that it was 6 am and that it was daylight he did not explain the nature of light that was there so early in the morning at 6 am. He did not explain the distance that the appellant was from him if at all he saw him. There was therefore doubt that Samson identified the appellant.

In the final analysis there was no sufficient identification on the appellant as the person who attacked the complainant. The conviction on the appellant was unsafe.

20. In the foregoing, it is my finding that the charge against the appellant was not proved beyond all reasonable doubt. The conviction is thereby quashed and the sentence set aside. The appellant is set at liberty unless lawfully held.

**Delivered, dated and signed at Kakamega this 11<sup>th</sup> day of January, 2018.**

J. NJAGI

JUDGE

In the presence of:

..... for appellant

Ng’etich for State

George court assistant

Appellant presente took her to her home. She was escorted to the office of the Assistant Chief and thenHe took her to her home. She was escorted to the office of the Assistant Chief and then reported at Butere Police Station. The case was investigated by PC Habiba PW5. She escorted the complainant