



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 182 OF 2017

(An appeal arising out of the conviction and sentence of the
Hon.S. Jalango - SRM dated 15th December 2017 in Makadara
Chief Magistrates Court, Criminal Case No. 2844 of 2012)

SIMON ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Simon Onyango was charged with **rape** contrary to **Section 3(1)(a)(b) and (3)** of the **Sexual Offences Act**. The particulars of the offence were that on 28th May 2012, at [particulars withheld] Estate, Kasarani in Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of B W M without her consent. The Appellant was alternatively charged with **committing an indecent act with an adult** contrary to **Section 11(6)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an indecent act with B W M (the complainant) by touching her vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging his conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging the said conviction. The Appellant faulted the trial magistrate for relying on inconsistent, contradictory and weak evidence of prosecution witnesses to convict him. He was of the view that there was material gaps in the prosecution's case that rendered the evidence of identification not proved to the required standard. He was particularly irked that the trial magistrate had relied on medical evidence from Nairobi Women's Hospital when the author of the report was not called to testify in the case. The Appellant was aggrieved that the trial magistrate had improperly applied circumstantial evidence to convict him yet the principles governing the admission of such evidence was not established. The Appellant faulted the trial magistrate for failing to take into account his defence before arriving at the impugned decision. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, the Appellant was represented by his counsel Mr. Angaya. He submitted that the prosecution did not establish that the Appellant had indeed sexually assaulted the complainant. The complainant testified that she did not witness the actual sexual assault because she was unconscious at the time. She assumed that she had been sexually assaulted because when she regained her consciousness, she allegedly saw the Appellant wiping his private parts near a dust bin. Learned counsel explained that even after the report of the alleged rape was made, and the complainant was medically examined, it was not established that the complainant had been penetrated. The medical evidence relied on by the trial magistrate to convict the Appellant was improperly admitted into evidence because the author of the particular medical report from Nairobi Women Hospital was not called to testify in the case. In any event, he was of the view that the particular medical report was vague. Mr. Angaya relied on the Court of Appeal decision of **Andrew Apiyo Dunga & Another –vs- Republic [2010] eKLR** to support his submission. He further submitted that the Appellant's defence was not at all considered by the trial magistrate before he reached the verdict that the Appellant was guilty as charged. He explained that the evidence of the complainant, being that of a single witness, required corroboration which was not the case. In support of this contention, Learned counsel relied on the case of **Eric Makau Mutuku –vs- Republic [2016] eKLR**. The Appellant urged the court to allow the appeal.

Ms. Kimiri for the State conceded to the appeal. She submitted that the complainant was sick at the time she alleges that she was sexually assaulted. She claimed that she had been injected with a sedative before she lost consciousness after which she was sexually assaulted. Her

husband was outside the examination room. She submitted that it was not probable that the husband of the complainant left the complainant in the medical examination room for a period of two hours without checking her condition. There was dispute regarding the clothes the complainant wore during the alleged incident. The complainant did not immediately report the incident to her husband but instead told her sister of her alleged rape after she had left the hospital. Ms. Kimiri submitted that the medical evidence that was relied on by the prosecution did not establish penetration. The other medical report that the trial court relied on to convict the Appellant was improperly produced into evidence. Learned prosecutor submitted that taking into consideration the totality of the evidence adduced, there was no cogent or reliable evidence upon which the Appellant could have been convicted. She urged the court to allow the appeal since the evidence adduced raised reasonable doubt as to the Appellant's guilt.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

The issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the Appellant's guilt on the charge of rape contrary to **Section 3(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court re-evaluated the evidence that was adduced before the trial magistrate's court. It has also considered the submission made by the parties to this appeal. The facts of this case are disturbing and disconcerting. The complainant in this case was taken to St. Mary's Hospital by her husband PW2 P K. This was on 28th May 2012. According to the complainant and PW2, the Appellant was suffering from back pains, headache and nausea. The complainant told the court that she was examined by the Appellant in the examination room. Her husband was told to wait outside. She was told to undress. She was injected on her hand. She lost consciousness. When she came to she saw the Appellant standing near a dust bin while wiping his private parts. She formed the view that she had been sexually assaulted by the Appellant. She was then escorted outside the examination room and handed over to her husband. PW2 testified that the complainant was in the examination room with the Appellant for a period of two hours. During this entire period, PW2 did not bother to inquire as to the complainant's condition. The complainant did not tell her husband what had allegedly transpired. Instead, she told her sister PW3 R N M. It was PW3 who told PW2 what had allegedly taken place. A report was made to Kasarani Police Station. The complainant was referred to Nairobi Women Hospital for medical examination. Although the complainant was examined on the same day, no witness from Nairobi Women Hospital was called to testify in the case. The only doctor that testified was PW4 Dr. Zephania Kamau of the Police Surgery. He testified that he examined the complainant on 30th May 2012 and saw nothing remarkable. The person called to testify on behalf of the investigating officer, PW5 PC Susan Wanjiru testified that blood samples were taken from the Appellant to determine if his DNA were in the complainant's panties which had been surrendered to the Government Chemist for analysis. The Government Chemist analysis report confirmed that the said panties were not stained with either semen, spermatozoa or blood. She also produced the medical report prepared at Nairobi Women Hospital into evidence.

In his evaluation of the evidence, the trial magistrate believed the testimony of the complainant. The trial court evaluated that the Appellant had sedated the complainant before sexually assaulting her. Instead of relying on the medical evidence that was adduced by PW4 who was of the view that there was no evidence to support the complainant's contention that she had been sexually assaulted, the trial court relied on the medical evidence from Nairobi Women Hospital that was unprocedurally produced by the investigating officer.

This court's re-evaluation of the evidence adduced leads it to the irresistible conclusion that the prosecution did not establish the charge of rape to the required standard of proof beyond any reasonable doubt. The complainant did not witness the sexual assault. Rather, she assumed that she had been sexually assaulted when she regained consciousness. This assumption was based on the fact that she allegedly saw the Appellant wiping his private parts near a dust bin in the examination room. The complainant's panties were taken for analysis by the Government Chemist. No semen or spermatozoa were found in the said panties. The medical report produced by PW4 did not establish any sexual assault.

The trial court erred when it purported to rely on the medical evidence from Nairobi Women Hospital which was irregularly produced. **Section 77(3)** of the **Evidence Act** requires the production of such medical report to be by the author of the same. The Appellant, who was unrepresented before the trial court, could not have been expected to know that such medical evidence could not be produced by the investigating officer. The Appellant was denied an opportunity to cross-examine the author of the medical report that formed the basis of his conviction by the trial court. There were too many gaps in the narration of the events that allegedly transpired when the complainant was seen by the Appellant at the said hospital. These gaps in the narrative raise reasonable doubt that the events transpired as stated by the complainant. These doubts will be of necessity to be resolved in the Appellant's favour. Ms. Kimiri for the State, correctly in the view of this court, conceded to the appeal.

In the premises therefore, this court finds that the prosecution failed to establish its case on the charge of **rape** contrary to **Section 3(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant is consequently acquitted of the charge. His appeal is allowed. His conviction is quashed. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MARCH 2018

L. KIMARU

JUDGE