



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 28 OF 2017

JOSEPH MWOLOLO NDINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 274 of 2013 in the Principal Magistrate's Court at Taveta delivered by Hon R. K. Ondieki (PM) on 27th November 2013)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Joseph Mwololo Ndinda was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006. The particulars of this charge were that on the 26th day of April 2013, at round 2300 hours at [particulars withheld] Village within Taita Taveta County, in association with another not before court unlawfully caused his penis to penetrate the vagina and anus of G C (hereinafter referred to as "PW 1").
2. The Learned Trial Magistrate, Hon R.K. Ondiek, Principal Magistrate convicted him and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the said judgment, on 26th April 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on four(4) Grounds of Appeal. His Written Submissions were filed on 19th October 2017 while those of the State were dated 5th December 2017 and filed on 8th December 2017.
4. When the matter came up in court on 20th December 2017, both the Appellant and the State informed the court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

6. It appeared to this court that the only issue that had really been placed before it for determination was whether or not the Prosecution had proven its case beyond reasonable doubt. The court therefore dealt with the same under the following head.

I. PROOF OF THE PROSECUTION'S CASE

7. The Appellant submitted that there were inconsistencies and contradictions in the Prosecution's case which the Learned Trial Magistrate ought to have considered before he convicted him. He stated that although PW 1 had stated that she met him, Wambua, Kivoloi and David, she later said that she was gang raped by three (3) people. He also contended that she had earlier said that she was held by Wambua only to say later that she it was him who held her. He also said that No 71952 PC Jackson Mruttu (hereinafter referred to as "PW 3") testified that she had been raped by two (2) people.

8. It was his further contention that PW 1's evidence that she was stitched and referred to Coast General Hospital contradicted the evidence of Dr Walid Mohamed (hereinafter referred to as "PW 2") who told the Trial Court that a swab was taken at Taveta Sub-County Hospital and she was taken to theatre at Coast General Hospital where she was sutured.

9. He relied on the cases of Muiruri Njoroge & Others vs Republic Appeal No 185 of 1987 and Bukenya vs Republic (1972) EA 549 to buttress his argument that the burden of proof was on the Prosecution to prove its case beyond reasonable doubt as a court could not act on mere assertions. He was emphatic that no investigations were carried out as PW 3 did not visit the scene of crime to establish whether he had been positively identified or if he owned a local brew den as PW 1 had contended in her evidence.

10. On its part, the State was categorical that the Prosecution proved its case beyond reasonable doubt as in sexual offences the evidence of the victim was sufficient. It pointed out that although neighbours were not called as witnesses in the case herein did not weaken the Prosecution's case because they did not witness the Appellant dragging PW 1 to his house.

11. It urged this court to disregard the inconsistencies regarding the number of people who attacked her because she clearly identified him as her attacker through recognition as she knew him and there was sufficient light from the moonlight. She therefore urged this court to dismiss his Appeal.

12. A perusal of the evidence showed that PW 1 was walking home at about 7.00pm when she met the Appellant in the company of other people who she knew by name. She also knew the Appellant as he was a neighbour and owned a local brew den. She explained how he removed her lesso which was used to block her mouth so that she could not scream. She identified the Appellant as the first person who raped her before his accomplices raped her in turns. They also inserted a knife in her anus causing a tear that was later sutured.

13. PW 2 testified that PW 1 had observed vaginal lacerations and a tear in the anus whereupon she was referred to Coast General Hospital for anal repair and management. As the State rightly pointed out, it was irrelevant where the tear was sutured. The bottom line was that there was a tear.

14. It was evident from PW 3's evidence that PW 1 mentioned the Appellant's name when she went to report the matter at Taveta Police Station. Her pant and petticoat which were tendered in evidence before the Trial Court were blood stained.

15. This court therefore agreed with the State and the Learned Trial Magistrate that PW 1 properly identified the Appellant as one of her attackers. The Appellant's defence of alibi did nothing to assist his case for the reason that he ought to have adduced corroborating evidence as the burden of proof had now shifted to him due to the weight of the evidence that had been adduced against him by the Prosecution.

16. On its own, PW 1's evidence was sufficient to have sustained a conviction against the Appellant herein by virtue of the proviso to Section 124 of the Evidence Act Cap 80 (Laws of Kenya). The same provides as follows:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

17. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

18. In this particular case, this court found and held that the inconsistencies and contradictions that were relied upon by the Appellant were irrelevant and immaterial as the Prosecution had proved its case beyond reasonable doubt. Indeed, PW 1's was in fact corroborated by the medical evidence that was adduced in the Trial Court.

19. This court was not therefore persuaded to agree with the Appellant that he had been framed as he had contended.

20. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos 2, 3, 4 and 5 were not merited and the same are hereby dismissed.

II. SENTENCING

21. The State was categorical that the sentence of fifteen (15) years imprisonment that was meted upon the Appellant was fair and within the discretion of the Learned Trial Magistrate because under Section 10 of the Sexual Offences Act, the minimum sentence he could mete out to him was fifteen (15) years.

22. In the case of Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No253 of 2003 (quoted in Arthur Muya Muriuki vs Republic (2015) eKLR), the Court of Appeal stated the following on principles of sentencing:-

“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

23. This court therefore came to the firm conclusion that in view of the fact that the Appellant had been rightly convicted for a serious offence, the penalty of fifteen (15) years that had been meted upon them were fair and reasonable in the circumstances of the case. This court was not persuaded that it should interfere with the said sentence as the same was not severe, harsh or manifestly excessive.

DISPOSITION

24. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 26th April 2017 was not merited and the same is hereby dismissed. The conviction and sentence are hereby upheld as the same were lawful and fitting.

25. For the avoidance of doubt, the computation of the sentence will run from 3rd June 2013 as the Appellant’s entire trial proceeded while he was in custody.

26. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20th** day of **April** 2018

J. KAMAU

JUDGE

In the presence of:-

Joseph Mwololo Ndinda-Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk