



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 38 OF 2017

JAMES MUTINDA KITAVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of Hon. L. N. Mugambi (SPM) on 8th May, 2015 in Kangundo Senior Principal Magistrate's Court Criminal Case No. 20 of 2014)

JUDGEMENT

1. The appellant has filed this appeal on grounds that:

- i. That the learned magistrate erred both in law and facts by merely admitting the evidence of the complainant without finding that there was bad intention of ending the relationship between her and the appellant.
- ii. That the learned magistrate erred both in law and fact by failing to notice that there was no investigating officer in the matter.
- iii. That the learned magistrate erred both in law and fact by convicting the appellant yet the prosecution did not prove its case beyond reasonable doubt as the same lacked crucial witnesses contrary to section 150 of the C.P.C.
- iv. That the learned trial magistrate erred both in law and fact by dismissing the appellant's defence testimony which was reasonable to cast doubt on the prosecution case.

2. The appellant was charged with the offence of sexual assault contrary to section 5 (1) (a) (i) (2) of the Sexual Offences Act No. 3 of 2006. The particulars therein were that the appellant on 29th September, 2014 within Machakos County willfully and unlawfully used his fingers to penetrate the vagina of M N M. The prosecution called three (3) witnesses while the appellant was the only defence witness.

3. M N M (PW1) alleged that she was asleep when at about 3. 00 am felt someone caressing her. When she switched her phone torch on and illuminated, she saw the appellant and screamed. The appellant covered her mouth and strangled her. He threw her on the floor, sat on her tummy and told her to take off her pant but she declined. The appellant then inserted three of his fingers into PW1's vagina and pinched her. He further inserted his fingers into PW1's eyes as if to gouge them. PW1's grandson woke up to the commotion and the appellant took off through the window. PW1 went out and raised alarm. She headed toward the village elder's home and met the village elder's son who escorted her to Kangundo District Hospital. She was treated and referred to Matungulu Police Post where she was given a p3 form. She sustained injuries to her face and private parts. The appellant was said to have had a ring on her finger and a screw driver and wore a white T-shirt, green trouser and a coat at the time of the alleged assault. The appellant was arrested by members of the public who found him asleep and handed over to the police. PW1 stated that she did not call out the appellant at the time for the fear that he would know she recognized him.

4. Police Constable Salome Miling (PW2) of Kangundo Police Station received a call from the Officer in Charge of Station informing her that there was a rape case at [particulars withheld] area and that members of the public had arrested the suspect. She and Corporal Okwath and a driver started off for the scene. On reaching airport junction along Nairobi-Kangundo road, they met the member of the public with the appellant whom they took to the police station. PW1 made the report and was escorted to hospital for examination. PW2 recorded statements and charged the appellant. It was her evidence that the examination by the Clinical Officer revealed injuries to PW1's mouth and private parts. That a beaded ring and screw driver were recovered from PW1's house. He upon being re-called stated that the same had fallen during the struggle. The beaded ring and screw driver were produced as P. Exhibit 1 and 2 respectively. She stated that PW1 informed her that the appellant gained entry to her house through the window. He started caressing her legs and she switched on her mobile phone torch. That the appellant touched her private parts and head. PW1 struggled and the appellant dropped the beaded ring and screw driver. That PW1 knew the appellant because he was her neighbour's employee.

5. John Mutua (PW3) a Clinical Officer at Kangundo Level 5 Hospital who examined PW1 confirmed that PW1 was generally in pain. That

on local examination he found that PW1 an open abrasion wound in the hips, tender and blood stained. There were also nail marks on left nasal bridge and she complained of pain. On vaginal examination, PW1 had an abrasive wound at the left labia minora. The injuries were said to be a few hours old.

6. The Appellant was put to his defence for which he gave sworn evidence as follows. He on a date he could not remember at about noon met PW1 at the market. PW1 reminded him about their plans. He and PW1 had intimate relationship and they on the material night met as usual. They had quality time but unfortunately the money he had was less than what PW1 expected. He convinced her to take it and she agreed to take it but complained showing dissatisfaction. PW1 began screaming saying she was done with him. He left the house and in the morning was arrested.

7. It was the appellant's contention that he and PW1 had a secret affair no wonder PW1 could not avail any witness, particularly a woman in support of her case. That PW1's evidence is inconsistent for the reason that while she on the one hand state that she only saw the appellant once and on the other that she knew the appellant had worked at Koki's for three (3) days. He further contended that the investigating officer was not called as a witness and that PW2 did not witness the alleged incident thereby the prosecution case was watered down. That PW3's evidence did not establish any nexus between him and the offence thereby the prosecution case did not discharge its duty of proving the case beyond reasonable doubt. On this aspect he cited **Ndege Maragua v. Republic [1965] E.A.C.A., Kibara Muraya v. Republic Nairobi C.A. Criminal Appeal No. 33 of 2007** and **Woolmington v. DP [1935] A.C. 462**. He contended that it was upon the prosecution to disapprove his defence of alibi.

8. The respondent on its part submitted that PW1's evidence as to injuries sustained was corroborated by PW3. That the trial court adequately considered the defence which was basically a denial and found it not to be credible. It was further submitted that the failure to call the investigating officer was not fatal since the evidence on record was sufficient to sustain a conviction.

9. In determining this appeal, this court is minded of its duty as a first Appellate court to re-evaluate and re-analyze the evidence herein afresh to arrive at its own independent conclusion. It is noteworthy that while the appellant in his evidence claims that he and PW1 had an intimate time as usual, the evidence by the prosecution witnesses reveal otherwise. First, PW3's evidence was that he found PW1 to have an open abrasion wound in the hips, tender and blood stained. That there were nail marks on left nasal bridge and she complained of painful bilateral. That on vaginal examination, PW1 had an abrasive wound at the left labia minora. From the said finding, an inference can be made that there was a struggle occasioning the injuries.

10. It is further noteworthy that in criminal cases, the prosecution is required to avail all relevant evidence to enable the court to make an informed decision based on the available evidence as was pronounced in **Bukenya & Others v. Uganda [1972] EA 549**. There is however no legal requirement on the number of witnesses to prove a fact see section 143 of the Evidence Act amplified in **Keter v. Republic [2007] 1 EA 135**. It follows therefore that the failure to call an investigating officer was not prejudicial as long as the witnesses availed established the material facts. PW.1 and PW.2's evidence was that a beaded ring and a screw driver were retrieved from the scene which things the appellant did not raise a contention about. Further, the appellant admitted to having been with the appellant on the said night. Considering the injuries sustained by PW1 and confirmed by PW3, it is clear that there was a struggle and the injuries were sustained during the said struggle. Section 5 (1)(a)(i)(2) of the Sexual Offences Act provides:

“(1) Any person who unlawfully-

a. penetrate the genital organs of another person with- (i) any part of the body of another or that person; or...

(2) A person is guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”

11. The complainant did not consent to the intrusion and sexual attack by the Appellant contrary to the Appellant's assertions. The prosecution having established the above essentials, it is clear that the case was proved beyond reasonable doubt. The defence case did not cast doubt on the prosecution case. In the end, I find no merit in this appeal. The conviction and sentence is hereby affirmed.

Orders accordingly.

Dated and delivered at Machakos this 17th day of April, 2018.

D. K. KEMEI

JUDGE

In the presence of:

James Mutinda Kitavi - the Appellant

Machogu - for the Respondent

Kituva – Court Assistant