REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 112 OF 2013

JOHN KIHORIO KARUMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Mukurweini Senior Principal

Magistrates' Court Criminal Case No. 304 of 2013 (Hon. Kagendo,

Senior Principal Magistrate) on 29th August, 2013)

JUDGMENT

The appellant was charged with the offence of rape contrary to **section 3(1)(a)(b)(3)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on 21st day of July 2013, at [particulars withheld] sublocation in Nyeri County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of P N N without his consent.

He pleaded not guilty to the charge but he was convicted and sentenced to 15 years imprisonment. He appealed against both the conviction and sentence on the following grounds:

1. The learned magistrate erred in law and in fact in convicting the appellant on a defective charge sheet;

2. The learned magistrate erred in law and in fact in convicting the appellant on insufficient and contradictory prosecution evidence;

3. The learned magistrate erred in law and in fact in denying the appellant a chance to cross-examine PW3 and PW4 who were vital witnesses and thereby violated **section 208 (3)** of the **Criminal Procedure Code**;

4. The learned magistrate erred in law and in fact in considering extraneous matters that were never canvassed by the prosecution or the defence hence arriving at an erroneous finding; and,

5. The learned magistrate erred in law and in fact in failing to adequately consider the defence of the appellant and rejecting it unfairly hence arriving at an erroneous finding.

The learned counsel for the state conceded the appeal and submitted that the offence with which the appellant was charged presupposes penetration of a genital organ but looking at the P3 form admitted in support of the prosecution case, there was no evidence of such penetration. Counsel also urged that contrary to the learned magistrate's finding, there was no evidence of interference with the P3 form or other medical records.

The prosecution evidence was that on 21st July, 2013, the complainant and the appellant together with several of their other pals had been drinking the night away. As they dispersed to their respective homes, the appellant sought refuge at the complainant's house apparently because he was too drunk to walk to his own house which was further away from the bar in which they had been drinking. The complainant accommodated him and the two shared a bed. At about 2 AM the complainant woke up to find somebody on top of him. It was his evidence that though he had his trousers on, he noticed that something had been inserted in what he described as his "rear apart." He suspected that the appellant must have sexually assaulted him and so he locked him in his house and went to call the police; they came and arrested the appellant on allegations that he had sodomised the complainant.

The complainant went for examination at Mukurweini district hospital but the clinical officer, **Anne Kiragu PW2,** who examined him and established that there was nothing unusual with his anal region. She also admitted that no further investigation was done although she prescribed anti-HIV drugs and antibiotics for the complainant. The complainant's P3 form which she filled was reflective of her testimony as it showed that there was nothing abnormal detected on the complainant's genitalia.

Administration police constables **Abdi Raship (PW4)** and **Martin Kago (PW5)** confirmed that they arrested the appellant at the complainant's home. The investigations officer police **Constable Morris Odhiambo (PW6)** on the other hand did nothing more than record what the complainant told him and charge the appellant.

In his unsworn statement, the appellant admitted in his defence that indeed he had spent the night with the complainant but denied having raped him as alleged. It was his evidence that even the doctor's report vindicated him.

This evidence has to be scrutinised from the perspective of **section 3** of the **Sexual Offences Act** which deals with offence of rape which the appellant was charged with; that section states as follows: -

> ***3.(1) A person commits the offence termed rape if –***
>
> ***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;***
>
> ***(b) the other person does not consent to the penetration; or***
>
> ***(c) the consent is obtained by force or by means of threats or intimidation of any kind.***
>
> ***(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.***
>
> ***(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life***.

The appellant was charged under **subsections (1)(a)(b)** and **(3)** and it is these provisions that are of particular relevance here. They are express that in order to establish an offence of rape the prosecution must prove that one intentionally and unlawfully committed an act which causes penetration with his or her genital organs and that the other person did not consent to the penetration.

The act of "penetration" is defined in **section 2** of the **Act** to mean "*the partial or complete insertion of*

the genital organs of a person into the genital organs of another person."

The learned magistrate correctly held that going by the medical evidence there was no proof of penetration of the complainant's genital organs; to quote her this is what the learned magistrate said:

I must say that my first instinct was to dismiss this case based on the medical notes. This is because if there was actual penetration, then, really one would expect some findings of some sought (sic) which was not the case in this case.

Despite her reservations about the prosecution evidence on this particular aspect of the offence, the learned magistrate held that the medical documents were tampered with so as to exonerate the appellant. According to the learned magistrate, the documents were tampered with against the backdrop of the appellant's change of plea from that of guilty to not guilty. She was also not amused by what she termed as the appellant's "extreme confidence" when he told the complainant that his medical examination would not reveal anything unusual. She concluded that there were "some forces" that were out to suppress the truth. Based on this understanding, the learned magistrate proceeded to convict the appellant.

With due respect to the learned magistrate, it was not open to her to look beyond the evidence before her and come up with what in effect was her own hypothesis of what the prosecution case was and proceed to convict the appellant on such hypothesis. Once she established that penetration had not been proved beyond reasonable doubt, there was no place for speculation that there could have been penetration except that the evidence to support it had been tampered with. I agree with the learned counsel for the appellant and the state that in taking this path the learned magistrate clearly misdirected herself on the evidence and the law and ended up with a wrong conclusion.

In **Okethi Okale & Others versus Republic (1965) EA 555**, a decision cited by the learned counsel for the appellant, the appellants were convicted of murder and the only issue in the trial court was that of identification based on the evidence of the deceased's widow and the evidence of a dying declaration. After discounting the evidence of the widow, the learned judge proceeded to put forward a theory of his own which was inconsistent with the widow's evidence and unsupported by the medical evidence; he accepted the deceased's brother's evidence as to the dying declaration without giving any reasons. The judgement also contained a passage suggesting that the judge had accepted the prosecution case and then cast on the appellants the burden of disproving or raising doubts about it.

The Court of Appeal overruled the trial judge and held:

> ***In every criminal trial, a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in the counsel's speeches.***

The learned judges of appeal concluded that the theory put forth by the trial judge was not supported by the medical evidence and acquitted the appellants.

I can do no better than take cue from the learned judges' decision and hold that the learned magistrate fell into error when she disregarded the evidence on record and postulated her own theory on why she thought that the appellant was guilty. For this reason, I will allow the appeal, quash the appellant's conviction and set aside the sentence meted out against him.

I also order that security deposited in court to secure the appellant's attendance in court pending the determination of this appeal be released to the surety.

Dated, signed and delivered in open court this 30th day of January, 2017

Ngaah Jairus

JUDGE