



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 66 OF 2011

PETER NDIRANGU WANG'ANG'A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 44 of 2010 (Hon. D.O. Ogembo, Principal Magistrate) delivered on 21st April, 2011)

JUDGMENT

The appellant was charged with the offence of rape contrary to **section 3(1)** as read with **section 3 (3)** of the **Sexual Offences Act, No. 3 of 2006** in that on the 3rd day of December 2010 at [particulars withheld] village within Nyeri County, he intentionally and unlawfully committed an act of penetration to C W G without her consent.

In the alternative, the appellant was charged with the offence of indecent act contrary to **section 11 (A)** of the **Sexual Offences Act** the particulars being that on the 3rd day of December 2010 at [particulars withheld] village within Nyeri County, he intentionally and unlawfully touched the genital organs of C W G with his genital organs, an act she would not have allowed.

He pleaded not guilty to both the principal and alternative counts; however, at the conclusion of his trial, the trial court found him guilty of the principal count and he was sentenced to serve 15 years imprisonment. It is this conviction and sentence which he has appealed against in this honourable court.

He incorporated his grounds of appeal in his written submissions which he filed in this court on 30th March, 2016; these grounds are as follows:

1. The learned magistrate erred in law and in fact in convicting the appellant based on the evidence of identification by recognition yet no identification parade was conducted;
2. The learned magistrate erred in law and in fact by being persuaded by the evidence of the manner of the appellant's arrest;
3. The learned magistrate erred in law and in fact in convicting the appellant on charges that were not proved beyond reasonable doubt; and
4. The learned trial magistrate erred in law in rejecting the appellant's sworn defence and submissions which were not challenged by the prosecution.

His appeal was opposed by the state whose counsel argued that the appellant was positively identified by recognition through his voice. The complainant identified him because he is a person she had known for 20 years prior to the incident. On the question of the appellant's defence, counsel submitted that it was rightfully rejected because the appellant did not cross-examine the prosecution witnesses on the issues he raised in his defence. He added that the alibi was merely an afterthought and could not displace the prosecution evidence. As for the appellant's arrest, the state counsel submitted that the appellant fled after the incident and was only arrested when he resurfaced.

In order to appreciate the appellant's grounds of appeal, his submissions and submissions by the counsel for the state, it is necessary to look afresh at the evidence adduced at the trial. More importantly, it is an obligation of this court, being the 1st appellate court, to evaluate the evidence afresh and come to its own conclusions but bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) EA 32)**

The complainant's evidence was that on the night of 3rd December, 2010 she heard some commotion in the goat pen. She opened the door to find out what the problem was. Immediately somebody held her neck and threatened to kill her. He pushed her back to house and raped her. She clearly recognised the voice of her assailant as that of the appellant's because she had known him for over 20 years. Soon after the appellant left she screamed for help and one **Mzee Kamau (PW2)** responded and found her in the house. She reported the incident to the police at Gatung'ang'a and was treated at Karatina Hospital.

Samuel Kamau (PW2) testified that he was the complainant's neighbour and on 4th of December 2010, at about 12:30 AM, he heard the complainant screaming. He responded and went to her house where he found her crying. She told him that she had been raped; she did not tell him then who the rapist was but that she mentioned his name when she went to report to the police station. This witness confirmed that the appellant and the complainant were fellow villagers and he had known both of them for a long time.

One other neighbour who visited the complainant's house after she had been raped was **Margaret Gathikia Maina (PW3)**; she testified that she was informed of the complainant's assault by **Kamau(PW2)**. The complainant told her that she had been raped by the appellant. She took her to Gatung'ang'a police station and thereafter went to Karatina hospital where she was treated and discharged. Like Kamau, she testified that the appellant was a fellow villager.

Police Constable Amos Kipngetich (PW4) of Gatung'ang'a police post confirmed that the complainant and her neighbours made a report of rape on 4th of December 2010 in the morning, at 5 AM. The complainant informed him that she had been raped by the appellant. He knew the appellant before and he arrested him on 6th December, 2010.

The Doctor who examined the complainant and filled her P3 form was **Dr. Wilson Gichuki (PW5)** of Karatina district hospital. His findings were that the complainant's labia were normal; the vagina was constricted which to him was also normal; cervix was long and firm and there was no discharge or blood. There were no signs of venereal disease. A vaginal swab, however, revealed spermatozoa and pus cells.

The appellant gave sworn evidence in his defence. He said he was arrested on 7th of December 2010 on allegations that he had raped a neighbour. He said he was never taken to hospital despite his request for medical examination. He testified that he had differences with the complainant because they have a land boundary dispute. On the material night, he was at home with his wife. He said he had nothing to do with the offence. He, however, agreed that he had been the complainant's neighbour for about 10 years.

His wife testified that her husband never left the house on the night he is alleged to have committed the offence. She said that she has been married to the appellant for 16 years and they had 4 children the youngest of whom was 11 years old.

Section 3(1) of the **Sexual Offences Act** under which the appellant was charged defines the offence of rape; it states that:

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.

Subsection (3) thereof prescribes the punishment for this offence and sets 10 years' imprisonment as the minimum penalty for the offender.

The burden on the prosecution was to prove first, that there was an act of 'penetration' caused by the genital organs of another person. The act of penetration is thus an important component of this offence; for avoidance of doubt, it has been defined in section 2 of the Act as follows:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

The complainant's evidence coupled with that of **Dr Wilson Gichiki (PW5)** provided an acceptable degree of proof that the complainant's genital organs were completely inserted by the genital organs of another. According to the complainant she was raped continuously for a relatively long period of time. She was categorical that the rapist inserted his penis into her private parts. The doctor, on the other hand, found traces of spermatozoa and pus cells when he performed a high vaginal swab on the complainant. Taken together, this evidence leads to the conclusion that there was penetration of the complainant's genital organs.

Penetration by itself is not sufficient to mount a prosecution for the offence of rape; it must be demonstrated that it was done intentionally and unlawfully. Again, the terms 'intentional' and 'unlawful' have not be left to speculation; they are defined in **section 43** of the Act as follows:

43.(1) An act is intentional and unlawful if it is committed –

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is –

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

The complainant's evidence was that her assailant forcefully pinned her to the floor of her house and without her consent inserted his genital organs into hers and raped her continuously for several hours. She also testified that the rapist threatened to kill her. It is obvious therefore that the act of penetration was

committed in coercive circumstances that involved use of force and threats. It was therefore established beyond reasonable doubt that the penetration was not only intentional but it was unlawful as well.

Having established that the act of penetration on the complainant's genital organs was intentional and unlawful, the prosecution established, and the learned magistrate came to the correct conclusion that the offence of rape as understood under **section 3 (1)** of the **Sexual Offences Act** had been committed.

The final burden for the prosecution to discharge was whether the appellant was the person who perpetrated the unlawful and intentional act of penetration. Here, the pivotal question was whether the appellant was positively identified. The only evidence of identification was that of the complainant herself; according to her she identified the appellant by recognition. It was her evidence that she had known the appellant for 20 years and they were neighbours in the same village. The appellant himself said that he had known the complainant for 10 years. He also agreed that he was the complainant's neighbour.

What emerged from the evidence of the complainant and the appellant is that regardless of whether it was 10 or 20 years, the two of them had known each other for such a long time that it was certainly possible for the complainant to recognise the voice of the appellant if she heard it.

Being a single identification witness, all the trial court needed to do in these circumstances was to warn itself of the danger of relying on her evidence bearing in mind that it is possible she could be mistaken as to her assailant's identity. I gather from the learned magistrate's judgment that he did warn himself of this danger before he proceeded to convict the appellant.

In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal reiterated the need for the trial court to be cautious when the only evidence against an accused person is that of identification or recognition; it stated thus:

It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

Again, in the Court of Appeal decision in **Ogeto versus Republic (2004) KLR 19** it was acknowledged that a fact can be proved by a single identification witness but the court cautioned that such evidence must be admitted with care where circumstances of identification are found to be difficult; the court said: -

"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".

I cannot find anything from the record that would suggest that the complainant could have been mistaken in her identification of the appellant. It is true that she was attacked in darkness but her identification was not visual but rather audio. She heard the appellant talk and being a neighbour for 10 or 20 years, it is highly unlikely that she could have been mistaken in recognition of his voice.

I must add here that the learned magistrate saw and heard the complainant; it is an advantage which this court does not have. In the absence of any reason manifest on the record, there is no basis for me to reach any conclusion different from that of the learned magistrate.

The appellant testified that he was framed because of a land boundary dispute between him and the complainant or some disagreement over charcoal; however, he never put any of these issues to complainant when he cross-examined her. I am bound to agree with the learned magistrate that the appellant's defence was nothing more than an afterthought in this regard.

He also said that he was in his house at the time the offence is alleged to have been committed; though he was not obliged to respond, it is curious that the appellant could not respond to his neighbour's screams for help if at all he was in his house.

In the final analysis, I am satisfied that the appellant was properly convicted. As far as the sentence is concerned it appears to me that the learned magistrate did not consider the appellant's mitigation when he sentenced him and the fact that he was only a first offender. I think that the sentence of 15 years' imprisonment was harsh in the circumstances; I am inclined to disturb the sentence and reduce it to 10 years instead. Except for the variation of the term of imprisonment the appellants' appeal on conviction is dismissed.

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

Ngaah Jairus

JUDGE