



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 15 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

WILSON OCHOGO KOLA.....APPELLANT

(Being an appeal from the conviction and sentence by Hon. Onsarigo Resident Magistrate in CM CRC 2103 of 2015)

JUDGMENT

1. The Appellant was presented before the Thika Chief Magistrate's Court charged with a single count of rape contrary to section 3(1)(c) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 20/05/2014 at [particulars withheld] area of Ruiru within Kiambu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MS.
2. In the alternative, the Appellant was charged with committing an indecent act on an adult contrary to section 11(a) of the Sexual Offences Act.
3. The evidence adduced at trial was quite straightforward. The victim, MS, testified first. She testified that on 20/05/2014, she was walking door-to-door promoting a lotion called "Gold Body Lotion" when she entered the house of the Appellant. The Appellant was having lunch and asked her to come in. When she did, MS further testified, the Appellant told her that he was a herbalist who could cure many diseases and offer solutions to various problems. Among other things, he offered to give MS a "cure" that her boyfriend would never leave her; and another that would make her promotional business very successful.
4. MS testified that she told the Appellant that she was not interested and wanted to leave his house – but the Appellant blocked her from leaving. He then warned her that if she does not follow his instructions and do exactly as she was told, the Appellant would unleash a snake which was under his bed. By this time, MS was ensnared, intimidated and vulnerable. She compliantly followed instructions when the Appellant removed her blouse and then ordered her to remove her trousers and panties.
5. The Appellant then applied a concoction of a medicine he had placed in a basin with water to his penis after removing his clothes, lay on top of MS, penetrated her vagina and started raping her. Terrified and frightened, MS was able to shove off the Appellant, but not after the rape had gone on for a few minutes.
6. Eventually, MS was able to scamper away, hurriedly put on her clothes sans undergarments and rushed outside. As soon as she made it outside the door, she screamed and drew the attention of the members of the public who responded to her screams. They arrested the Appellant and presented him to the Police at the AP Police Post, Kihunguro. Indeed, the Appellant was saved from a beating by the mob by the Police.

7. MS then reported to the Police from where she was referred to Ruiru Sub-District Hospital where she was examined by Joan Munene, a Clinical Officer. On examination, Joan found an absent hymen, pus in MS' vagina and tears on her vagina – the first an indication that MS had probably had sexual intercourse – and the second and third, indications that the intercourse was recent. Joan presented the P3 Form and the Post Rape care form as exhibits.

8. The Investigating Officer, Mercy Mutisya testified as the last Prosecution witness. She confirmed being assigned the case by the OCS on 21/05/2014. After her investigations, she charged the Appellant having believed the version of events as given by MS.

9. After the presentation of the Prosecution witnesses, the Learned Trial Magistrate found that a prima facie case had been established and placed the Appellant on his defence.

10. Placed on his defence, the Appellant chose to be sworn. He then gave what could count as, perhaps, one of the shortest sworn testimonies by an Accused Person in criminal trial. It is worth reproducing it verbatim: I used to reside at Ruiru Bypass. I am a herbal doctor. I pray that I be released. That is all and I have two witnesses who are not present in court today. One [is] Wilfred Gakua and Fred Ombui. I pray for another date.

11. His request for another date was acquiesced to by the Court. This was on 23/12/2015. Further defence hearing was slated for 28/01/2016. On this new date the Appellant informed the Court that he was not ready to proceed since he had not been able to communicate with his witnesses. The Prosecutor objected and the Court marked the Defence case closed. A guilty verdict followed in a judgment delivered on 18/05/2016. No submissions were made in the case; the Court having not given an opportunity to the parties to make any.

12. On appeal, the Appellant has enumerated at least 15 Grounds of Appeal. In his written submissions delivered to the Court, the Appellant merged some of them and argued them as ten grounds. Most of them are general and un-availing. However, his final ground of appeal is that the Appellant was not given an opportunity to make final submissions to the Court before it delivered its judgment.

13. I have perused the record of appeal. The Appellant is correct. On 28/01/2016, when the case came up for hearing, the Appellant informed the Court that he did not have his witnesses. The Prosecution objected and the Court proceeded to mark the Defence case closed. Neither the Prosecution nor the Defence was given an opportunity to make submissions. At the close of the case, both the prosecutor and the accused are entitled to present submissions, on both the evidence and the law, to the court

– see sections 213; 310-313 of the Criminal Procedure Code. At least two Court of Appeal decisions have extolled the importance of according an Accused Person the opportunity to make submissions. See **Robert Fanali Akhuya v R Court of Appeal at Kisumu, Criminal Appeal No. 42 of 2002** and **Henry Odhiambo Otieno v R, Court of Appeal at Kisumu, Criminal Appeal No. 83 of 2005**.

14. I find this failure to accord the Accused Person an opportunity to make submissions to be fatal. It renders the trial unfair and the conviction unsafe. The conviction must, therefore, be set aside. Consequently, so must the sentence.

15. Having set aside the conviction and sentence, the question I must answer now is whether this is a fit case for a re-trial. The Court of Appeal has given guidance when it is appropriate to order a retrial in **Opicho –Vs- Republic** in the following words:-

In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must

depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice requires it.”

16. Similarly, in *Muiruri –Vs- Republic (2003), KLR, 552, Mwangi –Vs- Republic (1983) KLR 522* the Court held that:- Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it.

17. In the instant case, the defect here was not out of the Prosecutor’s fault and it will not be to give the Prosecution a second bite at the cherry to order a retrial. The question is whether, if *the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result.*

18. I am persuaded here, from my view of the case and a review of the trial court record, that properly prosecuted there might be sufficient admissible evidence to result in a conviction.

19. In the end, therefore, the orders and directions of the Court are as follows:

- a. The conviction entered in Thika Law Courts Criminal Case No. 2103 of 2014 is hereby set aside. In its place a plea of not guilty shall be recorded in the case.
- b. The sentenced imposed on the Appellant is hereby consequently set aside.
- c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates’ Court for a retrial. d. The Appellant shall be presented before the Chief Magistrate’s Court, Thika on Monday, 27th March, 2017 to take plea. The case shall be allocated to a magistrate other than the Learned Onsarigo who initially heard the case.

The Deputy Registrar is directed to send back the Trial Court file in Thika Law Courts Criminal Case 2103 of 2014 and a copy of this file and ruling to the Chief Magistrate’s Court, Thika for compliance.

Dated and delivered at Kiambu this 23rd day of March, 2017.

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JOEL NGUGI

JUDGE