



**PMM v Republic (Criminal Appeal 10 of 2016)
[2017] KEHC 5523 (KLR) (16 May 2017) (Judgment)**

P M M v Republic [2017] eKLR

Neutral citation: [2017] KEHC 5523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 10 OF 2016**

DK KEMEL, J

MAY 16, 2017

BETWEEN

PMM APPELLANT

AND

REPUBLIC PROSECUTOR

*(Being an appeal from the judgment of Principal Magistrate's Court at
Mavoko delivered by Honourable Mumassabba, (Resident Magistrate)
on 29th February, , 2016 in MAVOKO PM.CR.CASE 50 of 2013)*

JUDGMENT

1. The Appeal arises from the conviction and sentence of the Hon. Mumassabba (Resident Magistrate) in Mavoko Principal Magistrate's Court *Criminal case No. 50 of 2013* delivered on the 29/02/2016 whereby the Appellant had been sentenced to imprisonment term of ten (10) years. In the trial court, the Appellant had been charged with the offence of rape contrary to Section 3(1) (a) (b) (3) of the [Sexual Offences Act](#) No.3 of 2006 where the facts were that on 9/1/2013 at Bamburi area of Athi River District within Machakos County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of S M without her consent. The Appellant also faced an alternative charge of committing an indecent act with an adult contrary to Section 11A of the [Sexual Offences Act](#) No.3 of 2006 by intentionally causing his male organ (penis) to come into contact with the female genital organ (vagina) of S M against her consent. The Appellant was acquitted of a second count of deliberate transmission of HIV contrary to Section 26(1) (b) of the [Sexual Offences Act](#) No.3 of 2006.
2. The Appellant was aggrieved by the said conviction and sentence and raised the following grounds of appeal namely:-



- (1) The learned magistrate erred in law and fact by convicting the Appellant on the basis of perceived weakness of the Appellant's defence rather on the strength of the Prosecution's case.
 - (2) The learned magistrate erred in law and fact by convicting the Appellants on wholly fabricated and incredible evidence of the Complainant.
 - (3) The learned magistrate erred both in law and fact by failing to find and hold that it was practically impossible for the offence of rape to be committed in the circumstances narrated to court by the Complainant.
 - (4) The learned magistrate erred in law and fact by convicting the Appellant when the Prosecution had not proved their case beyond reasonable doubt.
 - (5) The learned magistrate erred in law by proceeding to hear some of the witnesses in the absence of the Appellant's counsel which act violated the Appellant's fundamental rights to a fair trial as guaranteed under Article 50 of the constitution of Kenya.
3. The Appellant seeks that the appeal be allowed, conviction quashed and sentence set aside.
 4. As this is a first appeal, this Court is obligated to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. The re-evaluation of the evidence takes into consideration that this court neither saw nor heard the witnesses testify (see *Okeno v Republic* [1972] EA 32).
 5. A brief summary of the evidence adduced before the trial court is as follows:-

The Prosecution called five witnesses in support of its case. PW.1 was the complainant testified that on the 9/1/2012 she was at her sister's place when her friend by the name of Maureen called her and requested her to accompany her to her boyfriend place. She was to meet her at Eastmatt Kitengela. The friend informed her that she would send a taxi driver to pick her up. The taxi driver who happened to be the Appellant herein contacted her that he had arrived and they could then proceed to Eastmatt to meet her friend. On the way, the Appellant changed course and drove into a bushy area and raped the Complainant. The Complainant resisted and in the process of struggling the Appellant's windscreen to motor vehicle KAS 448G was damaged. The Appellant finally subdued her and raped her. The Appellant thereafter demanded that the Complainant compensates Appellant for the damaged windscreen and drove her to her sister's house. She was forced to surrender her ATM and she managed to alert a security guard at the premises to take note of the Appellant's vehicle registration numbers. The Appellant drove the Complainant to Athi River Police Station where the Complainant then reported what had happened. The Appellant was placed in custody and he and the complainant were escorted to hospital for medical examination where it was found that the Appellant was HIV positive.

6. PW.2 Geoffrey Wagura, testified that he was a Clinical Officer at Kajiado County Hospital and that he had examined both Complainant and Appellant on 10/1/2013 and established that the Complainant's vagina had rugged tissues with a sticky discharge and sperms on her genitalia. He gave treatment for prevention of HIV. He also examined the Appellant and established that he was HIV positive.
7. PW.3 Maureen Musau testified that on 9/1/2013 she called the Complainant who was her friend and requested her to accompany her to her boyfriend's place. PW.3 then instructed the Appellant who ran a taxi to go pick her up. PW.3 later learnt that the complainant had been raped by the Appellant.



8. PW.4 Kingondu Mutuka stated that he was a Security guard then guarding residential premises when the Complainant arrived in company of the Appellant. He stated that the Complainant requested him to note the registration numbers of the Appellant's vehicle as she informed him that she had been kidnapped.
9. PW.6 No. 66255 Inspector Rachael Mwangi stated that she was on duty at night when she took up the Complainant's case. She recorded statements and recovered a screw driver that had been issued by the Appellant to threaten Complainant during the rape ordeal. She produced the screw driver and Appellant's motor vehicle that had a broken windscreen as exhibits.
10. The trial court found that the Appellant had a case to answer. The Appellant gave a sworn testimony. He stated that he was at a certain drinking joint within Kitengela Town having drinks with friends when one of them requested him to drop the Complainant to her place. He stated that while on the way the Complainant changed her mind and demanded to be driven back to the bar and sought to open the door while vehicle was still in motion when the windscreen was broken and on being informed that the same would cost about Kshs.8,000/= she had directed that she be driven to her house so as to fetch her ATM. The Appellant further stated that the complainant later refused to pay forcing him to report the incident to the police only for the Complainant to bring up the issue of rape. The Appellant further stated that he was harangued by the police and the Complainant together with her relatives for some money so that the rape charges could be dropped or else he would rot in jail.
11. The Appeal was canvassed by way of written submission. The Appellant's advocates L. N. Ngolya & Co. Advocates filed submissions dated 18/1/2017. It was submitted for the Appellant that the Appellant's right to fair trial under Article 50 of the *Constitution* was flagrantly violated in that three (3) prosecution witnesses testified while the Appellant's counsel was absent and therefore the Appellant's was disadvantaged as he could not get adequate time to prepare his defence and challenge the Prosecution evidence and therefore the trial proceedings and eventual conviction was vitiated and should be rendered null and void.
12. It was also submitted for the Appellant that it was impractical for the Complainant to have been raped inside a saloon car. Further it was submitted for the Appellant's that the Complainant's evidence did not prove penetration which is an essential ingredient requiring proof beyond reasonable doubt and that the Complainant failed to provide further evidence and details as to what exactly happened in the act of having sex. Reliance was sought in the case of *Julius Kioko Kivuva v Republic* – Machakos HCCRA No.60 of 2014 where the court held thus:-

“Evidence of sensory details such as what a victim heard, saw, felt and even smelled, is highly relevant evidence to prove the element of penetration as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal.”
13. Opposing the appeal, the state filed submissions by Cliff Machogu dated 20/02/2017. The learned counsel for the Respondent submitted that the case had been proved against the Appellant beyond any reasonable doubt. It was further submitted that the Appellant's rights to fair trial was not violated. Since the defence had the right to recall witnesses but instead chose to waive that opportunity during the trial. Learned counsel submitted that the appeal be dismissed and the lower Court's conviction and sentence be upheld.



14. I have considered the grounds of appeal, submissions and evidence adduced in the trial court. I find the issues raised in this appeal are as follows:-

- (1) Whether the Appellant's right to a fair trial was violated.
- (2) Whether the Appellant's conviction for the offence of rape was based on sufficient evidence.

15. As regards the first issue, the Appellant claimed that his right to a fair trial as enshrined in Article 50 of the Constitution was violated as he was not accorded adequate opportunity to prepare for his defence and to be represented by his Advocate who had been acting for him previously but was absent during the reception of prosecution's three (3) witnesses namely PW.2, PW.3 and PW.4.

Article 50(2) of the Constitution provides as follows:-

Every accused person has the right to a fair trial which includes the right:

- (c) to have adequate time and facilities to prepare the defence.
- (j) to be informed in advance of the evidence of the prosecution Intends to rely on and to have reasonable access to that evidence."

16. I have perused the record of the trial court and note that on 15/12/2014 matter proceeded with evidence of PW.1 and was ordered to proceed on the next two days as had earlier on agreed by consent. It is noted that the Appellant's counsel was present on the 15/12/2014. On the 16/12/2014 Prosecution indicated it was ready to proceed with three (3) witnesses and the appellant also informed the court that he was also ready to proceed and indeed three witnesses testified. On the 9/02/2015 Appellant's Counsel was present when the Prosecution's last witness testified and the Prosecution closed its case and matter was reserved for a mention date to confirm filing of written submissions on case to answer. The record further reveals that the Appellants Counsel later sought to dispense with the filing of submissions and to rely on the evidence on record. The trial court finally on the 24/04/2015 ruled that the Appellant had a case to answer and defence hearing conducted the defence hearing on 23/11/2015 and further indicated that he did not wish to file submissions and thus left the court to give a judgment date. It is noted that at no time did the Appellant's Counsel seek to recall the three witnesses for further cross-examination. The Appellant having intimated to the court that he was ready and the Appellant's counsel not seeking to recall the three witnesses for further cross – examination, I am unable to see how the Appellant's rights to fair trial was violated. The Appellant had the right to seek recalling of witnesses but they did not do so and therefore he is deemed to have waived that right and raising it at this time on appeal is rather late in the day. In any event the Appellant's indication on cross – examination that he had no questions for the witnesses had fully exercised his right in deciding whether or not to cross-examine any of the witnesses after listening through their testimonies. Hence, the Appellants appeal on lack of fair trial fails.

17. As regards the second issue, I note that the trial court found that the complainant had been raped. The essential ingredients for the offence of rape are penetration, identity of the perpetrator and lack of consent by the victim. The Complainant testified that it was the Appellant who had picked her up in his taxi and who later raped her. She further stated that she had not consented to the sexual intercourse. Indeed the Appellant does not deny that he was in the company of the Complainant on the material date. The Appellant contents that the Complainant brought up allegations of rape so as to avoid meeting charges for the damages of the Appellant's motor vehicle's windscreen. The Complainant stated that the windscreen got broken while she and the Appellant struggled inside the taxi. I find that the Complainant had resisted the Appellant's moves to rape her which led to the damage of the windscreen is a clear indication that the Complainant had not consented to the sexual



intercourse. The Appellant's claim that Complainant deliberately damaged the windscreen in a bid to go back to the bar is not convincing as the Complainant's version that she was resisting the rape is believable. The trial court rightly rejected the defence version. The Complainant was in the company of the Appellant during the alleged incident both inside the taxi upto her residence and the police station. The Appellant confirms to the same and hence the identity of the Appellant as the perpetrator is not in dispute. The remaining issue is on penetration. The doctor examined the Complainant and noted a rugged vagina and whitish discharge and semen. The Complainant maintains that when she went to the back seat, the Appellant came and raped her. She further stated that the Appellant made her lie on the seat and raped her after he had removed his trouser half-way. As noted in the case of *Julius Kioko Kivuva v Republic* (machakos HCCRA No. 60 of 2014) that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. I share the same findings of the learned justice Nyamweya in the above stated case. It was necessary for the Complainant to provide the vivid details of the sequence of how the rape ordeal took place. Even though the doctor noticed the presence of whitish discharge and semen as well as a rugged vagina it was only the Complainant to present sufficient details as to whether penetration did occur. Hence I find the evidence clearly established the alternative charge of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act* No.3 of 2006 which attracts a term of imprisonment not exceeding five (5) years or a fine not exceeding Kshs. Fifty Thousand (50,000/=) or to both.

18. In the result it is the finding of this court that the conviction of the Appellant on the main count of rape was not safe and must be quashed. As it has been found that the evidence in the lower court proved the alternative charge, I hereby quash the conviction for rape and set aside the sentence of ten (10) years and substitute it with a conviction for the offence of committing an indecent act on an adult contrary to Section 11A of the *Sexual Offences Act* No.3 of 2006 and the Appellant is sentenced to serve five (5) years imprisonment or in the alternative to pay a fine of Kshs.50,000/=. The sentence shall run from the date of conviction by the trial court.

It is so ordered.

DATED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 16TH DAY OF MAY 2017.

D. K. KEMEI

JUDGE

In the presence:-

Langalanga for Ngolya for Appellant.

Machogu for Respondent.

C/A: Kituva.

