



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 15 OF 2017
LEKASIA LEMALIA.....APPELLANT
versus
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. C. N. NDEGWA – Ag. PRINCIPAL MAGISTRATE dated 2nd July, 2014 in Maralal Principal Magistrate’s Court Criminal Case No. 344 of 2013)

JUDGMENT

1. **LEKASIS LEMARIA** the appellant was charged before Principal Magistrate Court Maralal with three separate counts. On count 1 he was charged with the **offence of rape contrary to section 3(1)(a)(c) (3) of the Sexual Offences Act**. On count 2 he was charged with the **offence of deliberately transmitting life threatening sexually transmitted disease contrary to section 26(1)(c) of the Sexual Offences Act**. On count 3 he was charged with the **offence of conveying of infection of venereal disease contrary to section 49 of the Public Health Act Cap 242**. The trial court after conducting a trial convicted him on all counts and sentenced him to 6 months imprisonment on count 1 and 2 and 6 months imprisonment on count 3. Those sentences were ordered to run concurrently.

The appellant was aggrieved by both conviction and sentence and has hence filed this appeal.

2. The prosecution’s case is that SL the wife of JL was raped by the appellant on 1st May 2013. On that day JL had gone on a business trip to Rumuruti. On his return to his home on 7th May 2013 he had sex with his wife SL. On 12th May 2013 JL felt unwell and went to Maralal district hospital to seek treatment. At that hospital he was informed that he was suffering from gonorrhoea. On 13th May 2013 he took his wife SL to the same hospital and she too was diagnosed to have gonorrhoea. On asking SL where she got the infection SL told him that she had been raped by the appellant.

3. A doctor from Maralar district hospital produced P3 form in respect of SL, JL and the appellant. The P3 forms showed that the three were diagnosed as suffering from gonorrhoea and were treated for the same.

4. The appellant on his defence denied raping SL and instead he raised an alibi defence to the effect that on 1st May 2013 he was at his home in the company of many people. In his view the charges were levelled against him because there was a misunderstanding between SL and JL.

5. The trial magistrate in his judgment stated that he had an opportunity to see the complainant as she testified and he believed her testimony in view of her demeanor.

ANALYSIS AND DETERMINATION

6. I have considered the appellant submissions in support of his appeal. I am also aware as the first appellant court I am required to re-evaluate the trial courts evidence and reach my own independent conclusion.

7. I will begin by considering the evidence adduced in respect of the first count. Both SL and JL testified in chief and were cross examined by the appellant when he was acting in person and subsequently as the trial proceeded and the appellant retained a counsel to represent him SL and JL were again cross-examined by that counsel. In my consideration of that evidence in totality I formed the view that there was doubt in the prosecution's evidence which doubt ought to go the benefit of the appellant.

8. SL was the second wife of JL. On 1st May 2013 when JL went on a business trip the appellant visited the home of SL. He arrived at 11 p.m. According to SL this visit was not the first visit by the appellant. The appellant according to her had visited her and it seems those visits were in the absence of JL. SL confirmed in her testimony that she opened the door for the appellant. She noted that he had a bottle of alcohol. SL testified in chief as follows:-

“He (the appellant) gave me the alcohol to drink and I drunk he alcohol. I became drunk. The accused, (the appellant) then had sex with me without my consent. He had sex with me several times until 4 am when he left.”

9. On being cross examined by the appellant, SL respondent thus:-

“You raped me. You gave me alcohol which I drunk before you had sex with me. You had been looking for opportunity to have sex with me and that the way you took advantage of my drunkenness and have sex with me.”

10. When SL was cross examined by counsel for the appellant she stated:-

“When accused (the appellant) came to my house I had not invited him. He came on his own. He entered into the house and woke me up. He used to come to my house whenever my husband (JL) was not around. I never told my husband about the visits by the accused..... That was the third time for me to see the accused. Every time he (the appellant) came, he asked me to be his lover. I refused to be his lover on the first two days I did not tell my husband that I had been raped.”

11. The offence of rape is undoubtedly a terrible violation of one's body. It is a terrible and traumatic wrong against the victim. With that in mind SL failed to explain if indeed she had been raped why she failed to tell anyone of that rape. She only told her husband after he questioned her where she had gotten the gonorrhoea infection from. Interestingly the visit on 1st May 2013 by the appellant to SL's home was not the first one. It seems from her testimony that he had visited her other times and on those visits the appellant had propositioned SL to have sex with him. In her cross examination SL said that on 2 previous occasions when the appellant had propositioned her for sex she declined. The question that arises is whether on 1st May 2013 when the appellant this time asked her to have sex with him whether she agreed.

12. When JL felt unwell and was diagnosed with having gonorrhoea infection he said he asked SL where she got that infection. It seems that it was then that SL told JL that the appellant had some 11 days previously raped her. The doubt that I entertain in considering the prosecution's evidence is whether SL out of fear of her husband questioning her about the gonorrhoea infection may have said that the appellant raped her when that was not the case. **Section 3(1)(a)(b)(c)** of the Sexual Offences Act under which count 1 falls provides :-

“Section 3(1) a person commits the offence termed rape is-

(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 means of threat or intimidation of any kind.”

13. **Section 42** of the Sexual Offence Act defines consent. Under that section consent is seen where a person agrees by choice and has the freedom and capacity to make that choice. **Section 43 (1)(4)(d)** defines intentional and unlawful. It provides that intentional and unlawful is proved when a victim is incapable in law to appreciate the nature of the unlawful act or where during the commissioning of the act he or she is under the influence of drug medicine or alcohol.

14. SL when she gave evidence in chief stated that the appellant had sex with her severally up to 4 am when he left. In that evidence she did not intimate that she was unconscious at the time. When however she was cross examined by the appellant's counsel she stated that she was unconscious when the appellant raped her.

15. On the whole the evidence of SL shifted from time to time. It was doubtful whether she did or did not give consent when having sex with the appellant. As stated before, SL kept mum about the incident with the appellant until she was asked about the gonorrhoea infection. The appellant is entitled to benefit of reasonable doubt occasioned by the unreliable evidence of SL. The prosecution failed in its duty to prove the offence of rape beyond reasonable doubt. The appellant is entitled to an acquittal on the first count.

16. Count 2 and 3 will be considered together. The first point to note is those two counts are duplicate of each other and rely on the same evidence. Let me demonstrate what I mean by reproducing the charges and the particulars of count 2 and count 3 as follows:-

COUNT II:

Deliberate transmission of life threatening sexually transmitted disease contrary to section 26(1)(c) of Sexual Offences Act No. 3 of 2006.

PARTICULARS

LL: On the 1st day of May 2013 at Lowabere area on Samburu County having actual knowledge that he was infected with Gonorrhoea sexually transmitted disease, intentionally, knowingly and wilfully had unprotected sex with SL which infected JL with a sexually transmitted disease (gonorrhoea).

COUNT III

Conveyance of infection of a venereal disease contrary to section 49 of the public health act cap 242 laws of Kenya

PARTICULARS

LL: On the 1st day of May 2013 at Lowabene area in Samburu County wilfully or by culpable negligence infected S. L. with venereal disease

17. It is clear that count 2 and 3 rely on the same evidence and it will seem that when charging the appellant on both counts the appellant may have suffered prejudice because he needed to know whether he was defending himself on the offence of deliberately infecting SL with gonorrhoea as charged in count 2 or with the offence of conveying a gonorrhoea infection to SL as charged in count 3. One would ask, is there a difference in deliberately infecting or conveying and yet those two counts relied on the same evidence?

18. But perhaps more importantly the two counts will fail because the prosecution failed to prove the ingredients of the charges in count 2 and count 3. **Section 26** of the Sexual Offences Act under which count 2 was drawn is in the following terms:-

“26.(1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and wilfully does anything or permits the doing of anything or permits the doing of anything which he or she knows or ought to reasonably know –

(a)

(b)

(c) Will infect another person with any other sexually transmitted disease,.....”

Under that section the prosecution ought to have proved that the appellant had ‘actual knowledge’ he was infected with gonorrhoea. The black law dictionary 8th edition defines:-

“actual knowledge as direct and clear knowledge as distinguishes from constructive knowledge.”

19. Prosecution failed to prove the appellant knew that he was affected with gonorrhoea. As a consequence the essential ingredient of count 2 having not been proved causes this court to find that the prosecution did not prove count 2.

20. **Section 49** of the **Public Health Act Cap 242** under which count 3 was drawn:-

“Every person who wilfully or by culpable negligence infects any other person with venereal disease or does or permits or suffers any act likely to lead to the infection of any other person with any such disease shall be guilty of an offence and liable to a fine not exceeding four thousand shillings or to imprisonment for a term not exceeding six months or to both.”

The prosecution needed under count 3 to prove that the appellant was wilful by culpable negligence in infecting SL. Wilful is defined in the Black Law Dictionary 8th edition as:-

“Voluntary and intentional but not necessarily malicious.”

21. In other words the prosecution needed to prove the appellant state of mind to show the intention to infect SL. In the same dictionary ‘culpable negligence’ is defined as:-

“Negligent conduct, act, while not intention, involved, disregard of the consequence likely to result to one’s action.”

22. Again the prosecution failed to prove negligent conduct or disregard on the part of the appellant.

23. In this court’s view the trial courts erred first of all to have convicted the appellant on count 2 and 3 when the said counts relied on the same facts, and secondly the court erred because the prosecution failed to prove the ingredients of both those counts.

24. In the end the **appellants appeal against conviction and sentence in view of what is stated above succeeds. The trial court’s conviction on the three counts is quashed. The sentences on the three counts are set aside. The court orders that the appellant LL be set free from custody unless he is otherwise lawfully held.**

DATED AND DELIVERED AT NANYUKI THIS 28TH DAY OF JUNE 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: LL

For the State:

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE