



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 173 OF 2014

BETWEEN

EM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon. F. Makoyo, Resident Magistrate, delivered on 21.03.2014 in Kakamega CMC Criminal Case No. SO 26 of 2013)

J U D G M E N T

Introduction

1. The appellant herein was arraigned before the Chief Magistrate Court at Kakamega charged with incest contrary to Section 20(1) of the Sexual Offences act, Act No. 3 of 2016. The particulars of the charge were that on the 10th April, 2013 in Shinyalu Division Kakamega East District within Western Province being a male person intentionally and unlawfully caused his penis to penetrate the vagina of KK, a female person who was to his knowledge his aunt. The appellant was also charged in count II with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal code. The particulars being that on the same day in the same place, he unlawfully assaulted KK thereby occasioning her actual bodily harm.

2. The appellant denied both counts and the case went for full trial during which the prosecution called four (4) witnesses.

The Prosecution Case.

3. The complainant herein, KK testified that on 10.04.2013 at about 8.00pm she was at home eating supper when she noticed that the door to the appellant's house was ajar. The appellant is a son to KK's brother and while KK lived in the appellant's fathers' house, the appellant had his own house. On noticing that the door to the appellant's house was open, KK got up and went to lock the door, but as she was about to do so, the appellant grabbed her and pulled her into the house. KK was surprised by what the appellant did to her. It was raining heavily at the time and so KK's cries for help did not yield any result.

4. The appellant then locked KK inside the house where she was staying and ordered KK to remove her clothes. By the time the appellant was ordering KK to remove her clothes, he had already removed his own clothes. She resisted, but he took the knife which he had in his hand and cut her skirt and petticoat and proceeded to rape her. The appellant threatened to kill KK as he also asked her to wash his clothes. He also told her that after washing the clothes, he could continue having sex with her until morning just the way he used to do with his wives.

5. KK also stated that during the time she was washing his clothes, the appellant cut her thumb (though there is no note in the record that KK showed the cut thumb to the court.) KK also stated that as she washed his clothes, the appellant stood over her naked and still armed with the knife. Eventually, KK managed to escape and to report the incident to her brother, KS (not called as a witness). She spent the night at K house.

6. On the following morning, KK reported the matter to the area Assistant chief and thereafter to Kakamega Police Station. She later sought treatment at the Kakamega County General Hospital before returning to the police station to record her statement. She denied that the appellant was her lover.

7. During cross examination, KK denied a suggestion that her testimony against the appellant was false, but stated that the village elders advised her to go slow in prosecuting the case against the appellant. She also stated that the appellant threatened the village elder with a

knife.

8. KK's report to the police on 11.04.2013 was received by No. 86281 CPL Phoebe Oluoch of Kakamega Police Station. CPL Phoebe Oluoch testified as PW3. She stated that KK told her that due to the heavy rain, her cries for help on the day of the incident did not elicit any help. PW3 said she saw bruises on KK's neck and after recording KK's statement, PW3 issued an order for the appellant's arrest as she also issued K.K with a P3 form.

9. PW3 admitted during cross examination that she did not visit the scene of crime.

10. PW2, Patrick Nambiri, senior Clinical Officer at Kakamega County General Hospital examined KK on 11.04.2013. He saw KK's torn green skirt and a black petticoat which was also torn. According to PW2, KK had bruises on the neck, pains in the chest and a cut left thumb. On virginal examination, which was done some five days after the incident, PW2 established that KK's hymen was absent; there was no discharge but laboratory tests revealed the presence of pus cells which was the sign of an infection. PW2 also stated there was presence of epithelial cells which was a sign of recent sexual activity. PW2 produced the P3 form – PEXH 3, the result for high vaginal swab – PEXH4, pregnancy test – PEXH 5, urine test- PEXH 6 and HIV test as PEXH 7. The post rape care form was produced as PEXH 9.

11. On cross examination, PW2 told the court that it appeared KK had had sex with another person prior to the incident. The prosecution closed its case after testimony of CPL Oluoch. Upon consideration of the evidence on record, the learned trial court ruled that the appellant had a case to answer. The appellant was accordingly put on his defence.

The Defence case

12. The appellant gave sworn evidence. He called no witnesses. He denied the allegations made against him and stated that he and KK who was his aunt had a dispute over land. Further that KK had previously tried to frame his brother on allegations that the appellant's brother had raped her. He further testified that he had offered KK his home as a place of refuge for her, but when they disagreed with her after he poured out her changaa, she decided to frame him with this case. He asserted that KK was bent on destroying him.

Judgment of the learned trial court

13. After carefully considering the evidence on record, the learned trial magistrate concluded that the prosecution had proved its case against the appellant beyond any reasonable doubt on both counts. The appellant was thus found guilty as charged, convicted and sentenced to imprisonment for 10(ten) years and 12 months respectively.

The Appeal

14. Being dissatisfied with both conviction and sentence, the appellant preferred this appeal on grounds that; the trial magistrate fell in error in relying on the evidence of a single identifying witness; no medical evidence was produced to confirm if he had committed the alleged offence. There were no proper investigations into the case and finally, the trial court erred in law when it rejected the appellant's alibi defence. The appellant prays that he appeal be allowed; conviction quashed and sentence set aside.

Duty of this court.

12. This being a first appeal, this court is under a duty to reconsider and evaluate the evidence with a view to reaching its own conclusions in the matter, the only caution being that this court had no opportunity of seeing and hearing the witnesses. This court is also to act cautiously in its duty and should be slow to overturn the findings of the trial court unless it is confirmed that the trial court misapplied the law or when it is abundantly clear that the findings made by the trial court are not supported by the evidence, generally see **Okeno – vs – Republic [1972] EA 32 and Peters – vs – Sunday post & another [1957] EA.**

Submissions

16. The appellant filed written submissions in which he indicated the grounds of appeal and urged the court to allow his appeal. The appeal was opposed by Mr. Samson Ngetich prosecution counsel on grounds that the grounds of appeal raised by the appellant are lacking in merit. Counsel also submitted that the prosecution is under no duty to examine the appellant, that the prosecution discharged the onus upon there was penetration and that it was the appellant who had caused the penetration. Counsel also submitted that the investigating officer reasonably investigated the case before charging the appellant with the two counts. He urged the court to find no merit in the appeal and to dismiss it.

Issues for Determination

17. In his judgment, the learned trial magistrate framed three issues as follows;-

- a. Whether the complainant and the appellant are related.
- b. Whether there was penetration and
- c. Whether the appellant was responsible for the penetration
- d. Whether the appellant was also responsible for the assault upon KK.

18. The above issues are also valued for this appeal and are covered by the appellant's grounds of appeal. I now proceed to consider each issue in turn.

Whether the complainant and the appellant are related.

19. The evidence is clear from both the prosecution and the defence that the appellant is a nephew to the complainant, KK. KK told the court that the appellant is her brother's son and the appellant himself conceded that KK was his aunt that issue is settled.

20. Closely connected to this issue is whether the evidence on record proves that the appellant committed an act that caused penetration against the complainant. In his defence, the appellant stated that K.K. framed him first because of a land dispute and secondly because he poured out KK's chang'aa. Was the evidence of KK sufficient in identifying the appellant as the perpetrator of the offence? In her evidence in chief, KK stated that she and the appellant stayed in the same compound. She knew her nephew and he knew her. When she noticed that the door to his house was ajar, she became concerned and went to close it, but no sooner had she tried to close the door than the appellant grabbed her, and pushed her back into her house, which was the appellant's father's house. A lamp was on in the house, because KK says, "when he switched off the lamp, I managed to run away while I was naked." Thus the ordeal took place when the lamp was on.

21. Though it is clear that the evidence penning the appellant to the offence is that of a single identifying witness, the learned trial Magistrate said the following about KK " my assessment of the complainant is that she was truthful credible and consistent and her evidence was not shaken upon cross examination. She told the court that the accused used a knife to threaten her into submission and to cut her clothes in order to have his way with her. Though the evidence on record is that of a single identifying witness, her testimony is corroborated by the torn skirt noted by the attending physician which was produced as an exhibit in this case. Her testimony is further supported by the clinical officer's findings that the complainant was raped."

22. I am thus satisfied that the learned trial Magistrates applied the correct legal principles in accepting the testimony of KK as being sufficient in identifying the appellant as the perpetrator of the crime. Further the proviso to Section 124 of the Evidence Act, Cap 80 laws of Kenya also gives courts the liberty to accept the evidence of a single identifying witness as long as the reasons for doing so are given. In this case, the trial court was satisfied that the witness was truthful credible and consistent. The trial court saw the witness and observed her demeanor and from where I sit, I have no reason to doubt the trial court's assessment. In any event prosecution is under no duty to call any specific number of witnesses, as long as it discharges the onus case upon it of proving its case beyond any reasonable doubt.

Whether there was penetration

23. Under Section 2 of the Sexual Offences Act, "penetration" is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

24. PW2, the clinical Officer testified that on examination of KK, he established a missing hymen; there were pus cells showing an infection and she also had epithelial cells indicating recent sexual intercourse. The offence was committed on 10.04.2013 and KK sought medical help on 11.04.2013. From PW2's evidence, compiled with KK's own testimony, there was penetration in terms of the definition under the Sexual Offences Act. It was not necessary, in my considered view, to medically examine the appellant to confirm the fact of penetration.

Whether the appellant assaulted K.K

25. PW2 testified that when he examined KK she had bruises on her neck pains in the chest and her left thumb had a cut which had been dressed. KK explained how she sustained those injuries. "After he raped me, he forced me to wash his clothes and he cut my left thumb,----- As I was being forced to wash his clothes, that I when he cut my thumb.....he was standing over me naked as well while carrying a knife." This evidence of a "truthful, credible and consistent." Witness clearly shows that it was the appellant who inflicted the injuries suffered by KK.

26. One other issue raised by the appellant is that the trial court failed to consider his sworn defence. I have myself carefully evaluated the appellant's defence and find that it did not shake the prosecution's case.

27. One final issue for mention before I conclude this judgment is that it appears from the record that the appellant was supplied with witness statements after the complainant had testified. I mention the issue because if I were to find that the appellant had been prejudiced by the non-supply of the statements, such a finding would have had serious consequences on the prosecution case.

28. As things are, that does not appear to have been the case. As things stand, the appellant was able to clearly cross examine KK just like he did with the other witnesses and therefore I find that no prejudice was caused to him.

Conclusion

29. At the end of it all, I find that the appellant's appeal lacks merit and the same is dismissed in its entirety. The appellant has a right of appeal within the next 14 days.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 22nd day of June 2017

RUTH N. SITATI

JUDGE

In the presence of;-

present in person.....For Appellant

Mr. Juma Ochieng.....for Respondent

polycap.....Court assistant.