



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU
CRIMINAL APPEAL NO.36 OF 2017
(FORMERLY NKR HCRA.18/15)

(Appeal Originating from Nyahururu CM's Court CMCR.1337/13 by: Hon. D.K. Mikoyan – P.M.)

MUSA CHESUM KUNYAT.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

Musa Chesum Kunyat, the appellant herein, was convicted for the offence of ***Rape Contrary to Section 3(1)(a-c) as read with Section 3(3) of the Sexual Offences Act*** and was sentenced to serve 20 years imprisonment.

The particulars of the charge were that on the night of 14th and 15th August, 2013 at [particulars withheld], of Margat District Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of T C without her consent.

In the alternative, he faced a charge of committing an indecent act Contrary to Section 11(1) of the Sexual Offences Act. It was alleged that the appellant intentionally and unlawfully touched the private parts of T C on the night of 14th and 15th August, 2013 at [particulars withheld].

Being dissatisfied, the appellant has challenged both the conviction and sentence through this appeal based on grounds filed in court on 12/1/2015 and amended grounds filed in court on 23/3/2017. He filed submissions in support of the appeal. He prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

The grounds can be summarized as follows:

- (1) That the offence of rape was not proved to the required standard;***
- (2) That there was no medical evidence linking him to the offence;***
- (3) That the sentence is too harsh;***
- (4) That the case is a fabrication.***

Mr. Mutembei, learned counsel for the State opposed the appeal. Mr. Mutembei submitted that the

complainant identified the appellant whom she knew since childhood; that there was a lantern on, in the house; that the complainant's evidence was corroborated by PW4; that there was sufficient proof of the complainant having been raped as she suffered injuries in the act and there was presence of pus cells in the complainant's urine. He urged the court to dismiss the appeal.

This is the first appellate court and it is its duty to examine all the evidence afresh, assess and analyse it and arrive at its own findings and conclusions. See *Okeno v Republic (1972) EA 32.*

In this case, the prosecution called a total of four witnesses whereas the appellant made an unsworn statement in his defence.

The complainant **T C (PW1)**, aged about 70 years testified that she was alone in her house on the night of 14/8/2013; that the appellant went, knocked her door opened, grabbed her on the bed as she screamed, he pulled her skirt up, removed her pant and then his genital organ penetrated her and when he finished, he stood up. She tricked him that she wanted to urinate, covered herself with a lesa and went out and alerted the sons of K, who waited for the appellant to come out of the house but he did not. She reported at Marigat Police Station and was sent for treatment at Marigat Hospital; that the appellant was arrested in the village and taken to Police Station.

PW2 S K recalled that on 15/8/2013 at 9.00 a.m., he sent his wife S K to check on his mother, PW1, because the father was away; that the wife returned having not found PW1 and reported that the mother had been attacked by **Musa**

Kunyat. He went to the home of PW1 who repeated the same story. He started to look for the appellant and arrested him when going to the market.

PW3 PC Simon Mburu of Muchongoi Police Station was at the Police Station on 16/8/2013 about 2.30 p.m. when the appellant was taken there by the son of PW1 on allegations of rape. He saw the treatment notes and P3 form issued to the complainant. **PW4 Kigen Bomen** a clinical officer at Marigat Hospital examined the complainant who was aged about 70 years. He found that she had tenderness to the neck inflicted by a blunt object, a foul discharge in the vagina with pus cells in the urine; that the presence of pus cells in the urine was evidence of recent sexual intercourse.

In his unsworn defence, the appellant stated that he was at home in August, 2013 when the sons of the complainant went to his home alleging he had raped their mother. He denied committing the offence and said he could not have committed the offence because he had had an accident and his hand was injured; that he had a grudge with the sons of the complainant because their father had grabbed his land; that their parents had disputes before this incident.

The appellant was charged under Section 3(1) of the Sexual Offences act which provides as follows:

Sec.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;

3(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

The two ingredients that the prosecution needs to prove in a charge of rape are penetration and proof that the victim did not consent to the sexual act.

In the instant case, PW1 gave a detailed account of how her door was knocked open and she was attacked and that the perpetrator pinned her on the bed and penetrated her genitalia with his genital organ. She was examined on 16/8/2017 by PW4 who found pus cells in her urine, which was evidence that she had taken part in a recent sexual activity. The complainant was also found to have tenderness to the neck which was evidence of force.

The complainant was raped at night. She is the only identifying witness. The assailant found her asleep. Before the court can act on such evidence, it has to test the reliability of the said evidence of identification because it was under unfavorable conditions. It is essential that the court make an inquiry of the circumstances such as the light, the strength of the light, the size the room e.t.c. See **Turnbull v Republic (1976) 3 others 549.**

The evidence of PW1 had to be closely examined to ensure that it cannot, but be true, before a conviction can be founded on it. In the case of **Kiilu and Another v Republic (2005)1 KLR 174**, the court said:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from probability of error.”

The Court of Appeal had earlier in the case in **Maitanyi v Republic (1986) KLR 198**, stated that when considering the evidence of a single witness under unfavorable conditions, the court must warn itself of the danger of relying on evidence of a single identifying witness. In another case of **Republic v Eria Sebwato CRA.37/1060**, the court held that if the court entirely relies on evidence of a single identifying witness under unfavourable conditions, that evidence must be watertight. In this case, the trial court did not warn itself of the said danger but since this court has the duty to look at the evidence afresh, it will do so.

The complainant was asleep in her house alone. According to her, there was a lantern lamp in the house and fire still burning. The court has no idea what time of night it was. The court was not told the size of the house or where the fire and lamp were in relation to the complainant’s bed where this act took place. However, PW1 told the court that she had known the appellant since childhood and that he spoke back to her telling her to surrender as she tried to resist. It was not revealed for how long he spoke to PW1. They also had a conversation when PW1 asked him to go to relieve herself. She specifically said that she recognized his voice.

In Karani v Republic (1985) KLR 290, (Page 293) the court said;

“Identification by voice nearly always amounts to identification by recognition. Yet here, as in any other case, care has to be taken to ensure that the voice was that of the appellant; that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favoring safe identification.”

In this case, apart from there being light from a lantern and fire in the house, the complainant was sure that the voice was that of the appellant, a person she had known all his life. I am satisfied that the complainant was able to identify and recognize the appellant as the assailant.

The appellant did not take long to report that it is the appellant who raped her and therefore had no time to change her mind that it could have been somebody else other than the appellant. PW2 the son of the complainant learnt of the ordeal on 15/8/2014, next morning and started to look for the appellant. He did not say when he arrested him but PW4 told the court the appellant was taken to station on 16/8/2013, only 2 days after the incident.

The clinical officer found that the presence of pus in the complainant's urine was evidence that she took part in a sexual activity. That being the case, maybe the police should have taken a step further to take specimens from the appellant for comparison but they did not. That notwithstanding, the trial court saw PW1 testifying and the court believed her. I am satisfied that PW1 did identify/recognize the accused as the assailant and reported immediately.

In the case of Kassim Ali v Republic CRA.84/2005, the said:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence”.

The appellant's defence is that he was framed over a dispute over land. Incidentally, when PW1 testified, the appellant never put any question to her over the alleged dispute. Likewise, the appellant never put such a question to PW2. In my view, the appellant's defence is an afterthought and a sham and not believable. I dismiss it as such. I find that the conviction is well founded and I find no reason to disturb it.

The appellant has also complained that the sentence of 20 years is excessive and harsh. After conviction, the state said that the appellant had no previous records and he is therefore deemed to be a first offender. He prayed for a pardon. The appellant raped a person old enough to be his mother because he was circumcised with PW1's son. The court did not say whether or not it took into account the mitigation and the fact that the appellant was a first offender. Under Section 3(3) of the Sexual Offences Act, upon conviction for rape, one is liable to a sentence of not less than 10 years. The trial court should have indicated what it took into account before handing the appellant 20 years imprisonment. In the end I find 20 years to be on the higher side. I will reduce the sentence to 12 years imprisonment and the sentence will run from the date that the appellant was sentenced on 27/11/2014. In the end the appeal partially succeeds on sentence but not on conviction.

It is so ordered.

Dated and Signed at NYAHURURU this 28th day of July, 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Shiundu - Court Assistant

Appellant – present