



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 80 OF 2016

(Being an Appeal arising from Kitale Chief Magistrate's Court Criminal Case No. 3948 OF 2014 delivered by M.I.G. Moranga Principal Magistrate on 17/2/2016)

RONALD EMAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. Ronald Emae the appellant was charged with the following offences:

Count 1 – Rape contrary to section 3(1) as read with Section 3(4) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 10th day of October 2014 in Trans Nzoia County intentionally and unlawfully caused his penis to penetrate into the vagina of D. W. D. by use of threats.

Alternative count

Committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006.

The particulars being 10th day of October 2014 in Trans Nzoia County caused the contact between your genital organ namely penis and genital organ namely vagina of D.W.D by use of threats.

Count 2 : Assault causing actual bodily harm contrary to section 215 of the Penal Code. Particulars being that the appellant on 10th day of October 2014 in Trans Nzoia County unlawfully assaulted DWD thereby occasioning her actual bodily harm.

2. He denied all the charges and the case proceeded to full hearing. He was thereafter found guilty, convicted on both counts and sentenced to 10 years imprisonment and 2 years imprisonment respectively.

The sentences were to run concurrently. Being dissatisfied with the judgement he filed this appeal raising the following grounds:

i) That the learned trial magistrate erred in law and fact by basing his conviction on evidence that was entirely inconsistent and contradicted.

ii) That the learned trial magistrate erred in law and fact by failing to note that the circumstances of identification were not conclusively proved to be capable of supporting a safe conviction.

iii) That the learned trial magistrate erred in law and fact by disregarding the fact that important exhibits mentioned were not availed by the prosecution.

iv) That the learned trial magistrate failed to consider that the appellant herein was not taken for medical examination to prove his participation in the commission of the offence nor as any DNA report produced.

v) That the learned trial magistrate erred in law and fact by proceeding to convict the appellant on allegations that were not proved beyond reasonable doubt, the standard of proof desirable in criminal offences.

vi) That the learned trial magistrate disregarded the truthful and credible defence without giving cogent reasons for his decision to do so.

3. The appellant in his written submissions has stated that the evidence of the witnesses was inconsistent and contradictory.

He pointed out the evidence of PW1 and Pw2 concerning the condition of the door when they went to sleep and what happened in the house that night. He also raised issue on the issue of identification by the torch light; and the identification at the police station.

He asked the court to consider the circumstances that could favour a positive identification. He was of the view that PW1 and PW3 could have been mistaken, in their identification.

4. He argued that the medical evidence was one sided since he was never subjected to any medical examination.

It was his view that not much weight should have been put in the evidence of PW1 because she was said to have a mental condition.

5. Mr Kakoi for the State opposed the appeal.

It was his submissions that the basic elements of penetration, lack of consent and identification were established. That the prosecution had proved that the complainant (PW1) was beaten and raped by the appellant. The medical evidence by PW4 corroborated PW1's evidence. Further that PW3 had confirmed PW1's evidence. There was sufficient light from the bright torch that the appellant had come with. When PW2 came they told her who the attacker was.

6. He further submitted that there was evidence of assault and the appellant offered a mere denial without challenging the evidence.

7. The evidence by the prosecution witnesses is that **PW1 D.W.D.** was in her room sleeping in a bed with her niece (PW3) when at 2 am she saw someone in her house. This was on 10th October 2014. The house has two rooms, whereby she cooks in one room and sleeps at the back of the other room. The intruder who was a man and had a bright torch. He was asked who he was and he responded saying:

“You want to know who I am? He then asked if she had a husband and she responded in the negative.”

8. The man then tore her underpants and raped her. He threatened to kill her if she screamed. He lay on her as he raped her and she was able to see and identify him as his face was not covered. The light from the torch assisted her identify him. She had been seeing the man watching over maize belonging to

Express.

9. The man had been armed with a rungu and a panga which he placed near the bedroom entrance. He then hit her with a rungu in the middle of the head, right and left side of the temple area. He was doing this after the rape ordeal, and she fell down unconscious, and woke up to find her sister in the house. The man was identified as the appellant.

10. **PW3 (L.O.)** gave similar evidence to that of PW2. She watched her aunt being raped and beaten by the appellant whom she knew as a watchman. She was able to see what was happening by use of the light from the big torch which the appellant came with and it was "on". PW1 screamed and her sister who is PW3's mother came. She used to sleep in the next room. A neighbour came with a motor bike and took PW1 to hospital. The matter was then reported.

11. **PW2 MNB** is a sister to PW1 and mother to PW3. On this night she heard PW3 screaming saying PW1 had been beaten up. She woke up her husband and they went to the kitchen. She found PW3 crying on the bed while PW1 lay on the ground crying and bleeding. PW2 described who the attacker was and she identified him as Ronald. He was the only one among the watchmen who used to wear a Marvin. PW1 had injuries and was taken to hospital and to the police.

12. **PW4 Chrisantus Masinde** a clinical officer examined PW1. He found her to have a cut on the face, right side of the head and a swelling on the head which was tender; she also had a tender swollen right forearm with pain in the right knee and leg which was swollen. She had a torn hymen and old looking, bruises on labia majora, pus cells with no discharge. She produced the treatment notes and P3 form (Exhibit 1 and 2).

13. **PW5 PC Michael Michiri** was the investigating officer. On 10th October 2014 while at the Kitale police station gender and Children officer she received a report of rape from PW1 and PW2. The appellant had been arrested by officers from Kiungani police station. PW1 identified the appellant at Kiungani Administration Police Camp and Kitale police station as the perpetrator.

14. The appellant gave an unsworn statement of defence. He said he was a caretaker at one of the shambas of Eldoret Express. He denied the charges saying on 10th October 2014 he was up in the morning as they were harvesting maize, and explained how he had worked. He was arrested by Administration Police from Kiungani while he rested at 2pm.

15. As a first appeal court I have a duty to reconsider the evidence afresh and arrive at my own conclusion. I should also bear in mind that I did not see or hear the witnesses and give an allowance for it. **See Okeno V Republic 1972 EA 32; Boru and another V Republic [2005] 1 KLR 649.**

16. I have considered the evidence on record, the grounds of appeal and the submissions by both parties as is the duty of a first appeal court.

From the evidence adduced there is no dispute that pw1 was raped and injured on the night of 10th October 2014. The evidence of all the prosecution witnesses attest to the fact of the visible injuries that have been confirmed by the medical reports. PW1 and PW3 stated that the former was raped, with witnessing PW3 the rape. The medical evidence by PW4 confirmed that PW1 was indeed raped. (See Exhibit 1 and 2.)

17. The only issue I find falling for determination is the issue of identification. The persons who witnessed this incident were PW1 and PW3.

PW1 woke up at 2 am to find a man with a rungu, panga and torch with bright light in her house. The torch was on, and say it was a big torch. There was sufficient light in the room but the appellant has challenged this form of identification. I must point out that from the evidence given the attacker was not a stranger to pw1 and PW3.

18. He was one of the guards of maize belonging to Eldoret Express. PW3 used to meet him on her way to school at 6 am and on her way from school.

She describes him as the only guard who used to wear a marvin and on this fateful night he still wore his favourite marvin. This was a case of recognition and not just identification.

See Anjononi & others V Republic (1976 – 1980) KLR 1866; Matiany V Republic V. Republic (1986) KLR 1984 – 2000.

19. PW3 was watching everything that was happening as there was sufficient light. She described the man to her mother (PW2) who quickly knew who she was talking about. They reported the matter to the police and gave the particulars of the culprit to the police. The appellant confirms that he was arrested at 2.00 pm.

20. This is what the trial court stated of the witnesses at Page 41 lines 3-8

“I have noted the demeanor of the complainant who is the key witness as well as PW3 the eye witness. In my view they appeared to be honest and forth right. There is no evidence that they had any prior interactions that would point at any malice or differences that would influence their identification of the accused.”

The conduct of the witnesses in particular PW3 in describing and telling the mother (PW2) who she had seen injure and rape PW1 assisted the police act very fast.

21. PW1 was in a lot of pain and was bleeding and crying but she too was able to identify her attacker.

PW2 did not see the attacker but once he was described she immediately knew who it was and the police from Kiungani Administration Police Camp went for him.

22. I appreciate the many authorities the appellant has cited but they do not apply to the circumstances of his case. The appellant's defence did not address the issue as to where he was on 10th October 2014 2.00 am when he is said to have been in PW1's house raping and beating her. The prosecution proved its case by placing the appellant at the scene. . The sentences passed by the trial court are lawful and cannot be interfered with by this court.

22. The upshot is that the appeal is unsuccessful and is dismissed.

The conviction and sentence are upheld.

Orders accordingly.

Delivered, signed and dated on 29th August 2017 at Kitale.

H. ONG'UDI

JUDGE

In the presence of:

Ms Kagai for for Mr Kakoi for State

Appellant present

kirong Court Assistant

Court- Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

29/8/2017