



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI

HCRA NO. 22 OF 2017

KYALO MUINDI APPELLANT

-VERSUS-

REPUBLICPROSECUTION

JUDGEMENT

1. The Appellant **Kyalo Muindi** was charged with offence of:-

MAIN CHARGE: RAPE CONTRARY TO SECTION 3(1) AS READ WITH SUB-SECTION 3 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

Particulars are that on the **9th** day of **March 2015** at [particulars withheld] Village, Wambiti Su-location, Waia Location, in Mbooni East District within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of **E K M**, without her consent.

ALTERNATIVE CHARGE: COMMITTING AN INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11 (A) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

Particulars are that on the **9th** day of **March 2015** at [particulars withheld] Village, Wambiti Su-location, Waia Location, in Mbooni East District within Makueni County intentionally and unlawfully did an indecent act to **E K M** by touching her private parts namely vagina with his penis without her consent.

2. The Appellant pleaded not guilty and the matter was fully heard. He was convicted and sentenced to serve **20 years**.

3. Being dissatisfied with the decision above, the Appellant lodged the appeal and set out the 5 grounds of appeal namely:-

a. That the evidence relied upon by the trial magistrate as a basis for his conviction was not sufficiently trust worthy to have been acted upon due to inconsistencies and contradictions.

b. That the case for the prosecution was not proved beyond reasonable doubt.

c. That the learned magistrate made an error in both law and facts and grossly misdirected himself by convicting the appellant on the evidence which was full of contradictions and inconsistencies.

d. That his defence statement was not properly considered as per the provisions of section 169(1)

of the CPC.

e. That he pray to be supplied with a copy of court proceedings and wish to be present in court during the hearing date of this appeal.

4. Subsequently, the Appellant filed amended grounds containing 8 grounds namely:-

a. That the learned trial magistrate erred in matters of law and fact by holding that the case against him was proved beyond reasonable doubt whereas penile penetration of the complainant's genitalia was not spelt out by evidence.

b. That the learned trial magistrate erred in law and fact in not appreciating that his fundamental and constitutional rights were grossly violated contravening Articles 25(c), 49(1) (f) and 50(2) of the new constitution.

c. That the learned trial magistrate erred in matters of law and fact by failing to find that the prosecution case relied on dock identification, inadmissible at law.

d. That the learned trial magistrate made erred in matters of law and fact prematurely admitting evidence of bad character during the proceedings in contravention of Section 57 (1) and (2) of the Evidence Act.

e. That the learned trial magistrate made erred in matters of law and fact by contravening Section 124 of the Evidence Act, which did not apply to the facts of the case.

f. That the learned trial magistrate erred in matters of law and fact by failing to declare PW1 an incredible witness whose testimony could not be trusted.

g. That the learned trial magistrate erred in matters of law and fact by exceeding the minimum statutory sentence. Thus the 20 years imprisonment sentence is harsh and un-proportionate.

h. That the learned trial magistrate erred in matters of law and fact by failing to order the commencement date for the sentence to comply with the provisions of Section 333 (2) of the CPC.

5. The parties agreed to file and exchange submissions. The appellant filed and served same but the state counsel opted to rely on oral submissions.

6. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

7. In reaching its decision, the reaching its decision this court has to bear in mind the reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

8. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364**. See also **OKENO – VS- REPUBLIC**.

9. The prosecution evidence was in brief as set out hereunder:-

10. PW1, EKM is the complainant and the victim of the alleged sexual offence. PW1 informed the court that on 09/03/2015, during evening hours, she drove a cow to the river to drink water. On the way, she met a young man.

11. The young man told her that he was looking for a cow. The young man was holding a panga and he

held her hands and throat and tripped her and she fell down. PW1 further testified that the young man held her throat and threatened to kill her if she screamed.

12. It was PW1's further testimony that the young man tore her clothes including her underpants and held her throat as he raped her. The young man had opened his trouser zip and penetrated her vagina with his penis. After the ordeal, the man ran towards the bush and PW1 ran to her home and narrated to her mother what had transpired.

13. PW1 further informed the court that she reported the incident to the assistant chief who called the police. Later she reported the incident at Mbumbuni police station and also went to the hospital the same day but found there was no electricity at the hospital. PW1 also stated that she handed over the clothes she was wearing on the material day during the ordeal.

14. The clothes included a pale dirty cream skirt with a stain at the hem, a dirty blue and brown blouse and a red dirty under pant torn on the front right side. When cross examined, PW1 stated that she knew the accused as a domestic worker of one Mbithi and in court identified him as Kyalo and as the man who had accosted and raped her.

15. **PW2**, Riseva Mbatha Wambua is the assistant chief Wambiti sub-location. She informed the court that on 09/03/2015 before she left the office she was called by one Mwangangi with a report that a girl called E.K.M had been raped by a young man called Kyalo. PW1 thereafter entered PW2's office and narrated how she was raped by one Kyalo who used to work with one Mbithi Teti.

16. PW2 boarded a motor bike and went to Mbithi Teti home. She found Mbithi wife who told her that Kyalo was working in the home of one Winfred Muli. PW2 then went to Winfred Muli home where she found Kyalo. Kyalo denied raping PW1 but PW1 identified the said Kyalo as the young man who had raped her. PW2 arrested the accused and later handed him over to police officers from Mbumbuni police station.

17. **PW3**, S M is the mother to PW1. She informed the court that on 09/03/2015 at 3.00 p.m., she was at home when PW3 took the cattle to the dam. PW1 later came back and informed her that she had been raped by Kyalo. PW1's clothes were dirty and stained with donkey's dung. PW3 stated that PW1's clothes were not dirty and torn when she drove the cattle to the dam. PW3 accompanied PW1 to PW2's office to report the incident.

18. **PW4**, Sarah Njoroge is a clinical officer at Kisau Sub-district hospital. She produced PW1's P3 form. She noted PW1 had a blouse torn on the right side of the neck and there was tenderness on the neck. The genitalia examination revealed burnt lasions along the labia majora and a foul smell in the vagina. However, no injuries were noted to the labia majora, labia manora and vagina cervix. In the P3 form, it was noted that there were no signs of struggle though the assailant had a torn shirt and it was hard to tell if there was penetration since the victim was an adult.

19. High vaginal swap revealed presence of epithelial cells and pus cells. No spermatozoa were seen. **PW5**, PC Ntongai Robbin visited the scene accompanied by I.P. Wambua and recorded the witness statements. He also made arrangements for the complainant to be taken to hospital.

20. He produced the clothes belonging to PW1 which included a cream dirty skirt (Exhibit No. 1), a blue with brown patterns blouse (Exhibit No. 2) and a red underpant with black lines torn at the front right side (Exhibit No. 3) When placed to his defence, the accused gave unsworn evidence. He stated that he was maliciously charged and when arrested by the assistant chief, he denied committing the offence.

SUBMISSIONS

21. The Appellant submitted:-that there was ***Lack of conclusive proof of penetration***, this was because there was no evidence of spermatozoa upon vaginal swab even though it was alleged that the medical examination was conducted an hour after the rape.

22. The complainant in this case was an adult who should have explained whether the assailant had used a condom or not.

23. Further the appellant submits that **Article 25(c)** of the constitution provides for fair trial thus **“25. Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited - (a).....(b).....(c) the right to a fair trial”**

24. Further to that article 49.(1) An arrested person as the right

-To be informed promptly, in language that the person understands, of-(i) The reason for the arrest;.....(b).....(c) To communicate with an advocate,(f) To be brought before a court as soon as reasonably possible, but not later than-(i) Twenty-four hours after being arrested; or(ii) If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

25. This coupled with article 50(2) on fair trial was overtly contravened. The appellant was arrested on 9th March which fell on Monday and was not arraigned in court until the 11th of March 2015 being a Wednesday. No reason or explanation was tendered in total contravention of his fundamental and constitutional rights.

26. He contends that the failure to be brought to court as provided for in the constitution denied the appellant his right to articles 25(c), 49(1), a, c, and f. This was a fatal to the prosecution’s case. He relies on case law in **THOMAS PATRICK CHOLMONDELEY –VS- REPUBLIC [2008] eKLR.**

27. The remedy to such a violation can only be an acquittal since the rights as envisaged under the relevant articles as above are fundamental, barest minimum and are inalienable or non-derivable and humbly submit so.

28. On identification, the Appellant submits that he was not properly identified as the perpetrator of the heinous crime as charged and that the only identification done on him amounted to dock identification, bad and worthless in law.

29. He submits that, the complainant was mistaken as to the assailant identity. The victim said that, she had been raped by a certain man who worked for one Mbithi; whereas it turned out that He was not that man and he did not work for the said Mbithi.

30. Further the complainant’s first report varied with her subsequent testimony. The first report, all medical examination report and the doctor’s [PW4] evidences, all indicated that she claimed to have been assaulted by **a person unknown to her.**

31. It is settled that a complainant’s initial description of their assailants bears paramount significance in determining the question of identification in all manner of cases.

32. In relation to the failure of accurate description during the first report, see **VICTOR MWENDWA MULINGE –VS- REPUBLIC [2014] eKLR,** and **MAITANYI –VS- REPUBLIC(1986) KLR 198 CASES.**

33. In view of that discrepancy, applicant submits that the subsequent identification in court amounted to no more than a dock identification, grossly prejudicial and bad in law. He relies on **GABRIEL KAMAU NJOROGE –VS- REPUBLIC, [1982-88] 1 KLR, P134.**

34. The appellant submits that there was *Contravention of Section 57 (1) and (2) of the Evidence Act and cites ELIZABETH WAITHIEGENI GATIMU –VS- REPUBLIC [2015] eKLR,* at Para. 17, which held: - *“An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.”*

35. He submits that, section 57(1) and (2) of the Evidence Act provides that:-

57. Bad character in criminal cases. (1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless- (aa) such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue; or (a) the proof that he has committed or been convicted of such other offence is admissible under section 14 or section 15 of this Act to show that he is guilty of the offence with which he is then charged; or (b) he has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or (c) the nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or (d) he has given evidence against any other person charged with the same offence; provided that the court may, in its discretion, direct that specific evidence on the ground of the exception referred to in paragraph (c) of this subsection shall not be led if, in the opinion of the court, the prejudicial effect of such evidence upon he person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial. (2) Notwithstanding the provisions of subsection (1) of this section, evidence of previous conviction for an offence may be given in a criminal trial after conviction of the accused person, for the purpose of affecting the sentence to be awarded by the court.

36. As per the trial record, in response to the prosecutor's examination-in-chief, PW2 testified, see **Pg. 10 lines 15-16** that; **"The person I arrested is before court. I knew him. In 2014 he had an assault case and we had arrested him."** Then at lines 20-21; **"I knew Kyalo. He was sentenced in the assault case."**

37. This is clearly evidence of the defendant's bad character admitted in violation of law. The admission of evidence of bad character was therefore unlawful and prejudicial. The only time when evidence of an accused's bad character is admissible is after conviction and for purposes of sentencing (see S. 57 (2) Evidence Act).

38. The appellant submits that there was *Contravention of Section 124 of the Evidence Act*. The Section 124 relates to evidence of children as an exception to the general exclusionary rule against children's single evidence. The proviso states: **PART 111 – EVIDENCE OF CHILDREN 124. Corroboration required in criminal cases. Notwithstanding the provisions of section 19 of the Oaths and statutory declarations Act (Cap.15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him; Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.[Act No. 5 of 2003, s. 103, Act No. 3 of 2006, Second Sch.]**

39. He submits that the trial magistrate's invocation of that section, see at **J. 26**, was a misinterpretation of law and further contributed to the prejudice suffered by him, the appellant herein. Under the normal rules of evidence, the evidence of PW1 required corroboration which was not forthcoming.

40. It is also submitted that pw1 was alleged to be mentally retarded without any medical prove. The appellant contend that, If at all she was so retarded as per the prosecutors own word, that would only serve to confirm that she was an incredible witness whose testimony cannot be trusted.

41. The appellant also complained of the Harshness of sentence.

42. He submits that, the sentence pronounced by the trial court was excessive in the circumstances of the

case. He relies on the Sentencing Policy Guidelines.

43. Consistent with those objectives, the Kenya courts have generally adhered to the minimum sentences for consistency. The sentence pronounced on appellant is even harsher than most of the sentences prescribed for defilement of minors. He implores this Court to reduce the sentence to the minimum statutory provision in consideration of appellant age and future prospects of raising a family.

44. He submits further that, there was *None-compliance with section 333 (2) of the C.P.C.*

45. The relevant provision states; **(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.**

46. The **Sentencing Policy Guidelines** recommended that courts implement that provision. Indeed most courts at trial and in appellate jurisdiction are now taking account of time spent in custody. See said guidelines at Pg. 5 thus: Time served in custody prior to conviction. 7.10 The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial.

47. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

48. An offender convicted of a misdemeanor and had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely under section 35(1) of the Penal Code.

49. Guided by those directives, and without prejudice to the instant appeal, he implores this Hon. Court to invoke that section and deduct the time he spent in remand i.e. from plea taking on **11/03/2015** to date of conviction on **29/10/2015**.

50. In that respect see the findings of the court of appeal in *Musyeki Lemoya eKLR [2014]*, where the court gave effect to the proviso of S. 333 (2) the C.P.C.

51. The state counsel Mr. Kihara submitted that the offence of rape was proved and the perpetrators identified. He submits that the Appellant concedes commission of offence but complains of excessive sentence. He was not remorseful as he never even mitigated.

52. After going through the evidence on record and parties submissions, I find the issues for determination are:-

- 1. Whether the ingredients of rape contrary to section 3(1) Sexual Offences Act No. 3/2006 was proved as set out in the charge sheet?**
- 2. Was Appellant identified as the perpetrator of the offence?**
- 3. Was Appellant prejudiced by evidence of character tendered?**
- 4. Were Appellant rights under Article 50(2) violated as he was not taken to court within 24 hours after arrest? And if yes what is the consequence?**
- 5. Was the sentence excessive?**

53. On ground one, the evidence to prove rape was adduced vide;

54. PW1 informed the court that on 09/03/2015, on her way to take cattle to the dam, she was accosted by a young man who she identified later as Kyalo. The said young man strangled her and fell her down, pulled her skirt and tore her underpant, and while strangling her and threatening to kill her proceeded to have carnal knowledge with her.

55. The ordeal, in accordance with PW1 took three hours. When PW1 reported the incident to her mother (PW2), they reported the offence to PW3 and to the Mbumbuni police station and she was taken to hospital the following day.

56. The complainant gave a graphic explanation of how the incident occurred. What is apparent is that it is only the complainant, the victim of the unlawful sexual act, who identified her assailant. The credibility and truthfulness of her testimony goes to the root of the prosecution case and which trial court shall endeavor to determine.

57. The trial magistrate was alive to the proviso under **section 124 of the Evidence Act** which provides as follows;

“provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

58. The law on the cited provisions changed to the effect that the second schedule of SOA no 3 of 2003. The same states;

“Sect 2.(1) This paragraph amends the Evidence Act.(2) Section 124 of the Evidence Act is amended deleting the words “a child of tender years who is” and substituting therefore the words “alleged victim” and by deleting the word “child” wherever it appears thereafter and substituting therefore the words “alleged victim.”

59. The provisions no longer talk of child of tender age but an alleged victim. The appellant is relying on repealed law.

60. The issue of a single identifying witness has been dealt with by the superior courts in the past. In **RORIA –VS- REPUBLIC (1967) E.A**, the court stated;

“that danger is, of course greater, when the only evidence against an accused person is identified by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

61. PW1 testified that on the way to the river, she met a young man who told her that he was looking for a cow. In examination in chief, PW1 stated that the young man was a domestic worker at the home of Mbithi.

62. PW2, the assistant chief went to the home of Mbithi and was directed by the wife of Mbithi where to find the said young man known as Kyalo.

63. PW1, as confined by PW3, had left her home at about 3.00 p.m. The incident occurred during evening hours. It was not yet at night and the circumstances were ideal for positive identification.

64. When cross examined by the accused, PW1 stated that she knew the accused and PW2 also testified that when she found and arrested the accused, PW1 identified him as the young man who had raped her.

65. The trial court made a finding that the complainant positively identified the accused person as the man who accosted her on 09/03/2015. The trial court made a finding that the main issue for determination was whether the accused had carnal knowledge on the complainant without her consent.

66. PW1, who was alleged to suffer from a degree of mental retardation (not proved), graphically explained how the accused pulled her hands and fell her down while threatening her with a panga and proceeded to tear her underpants before having sexual intercourse with her.

67. In the P3 form, the clinical officer noted that the complainant had tenderness around the throat region. This corroborates PW1's testimony that the sexual act was not consensual but forced on her. The PW1's testimony remained credible and unshaken in cross examination. The prosecution also produced as evidence several clothes.

68. The clothes were dirty and stained with donkey urine and dung. This corroborates PW1's testimony that the accused person fell her down. A torn red under pants was also produced as evidence.

69. The accused person used a panga to force the complainant into submission. A sexual act is said to be intentional and unlawful when it is committed;

In any coercive circumstance, under false pretenses or by fraudulent means or in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

70. Coercive circumstances are evidenced through use of force or threat of harm. In this case the accused person used both force and threat to subdue the complainant. He held the throat of the complainant.

71. The medical evidence revealed that the complainant had tenderness/pain on her throat. Further, use of force is evident from the torn red pant (Exhibit No. 3) which the complainant identified as part of the clothing she was wearing on the material day and which was torn during the sexual ordeal.

72. The trial court considered the medical examination produced by PW4 and made a finding that, the clinical officer concluded that it will be difficult to tell whether there was penetration as the victim was an adult. High vaginal swap did not reveal presence of spermatozoa and no injuries were noted on the labia minora and labia majora.

73. Presence of spermatozoa is not the only evidence of penetration. Similarly, an adult who has severally engaged in sexual intercourse may not suffer vaginal injuries. Even though the medical evidence was not conclusive on whether penetration was proved.

74. Further the trial court did find the testimony of PW1 remained credible and was corroborated by other evidence. IT believed the complainant in her testimony that the accused had sexual intercourse with her without her consent. The sexual act was not consensual and therefore unlawful.

75. The accused denial was a mere denial. He did not demonstrate any malice and thus did find there was no possibility that PW1 or her mother conspired to maliciously frame the accused.

76. On identification, the PW1 knew Appellant as a worker of Mbithi. She recognized him as it was in the evening daytime and there was daylight. He was positively identified as the young man who committed the offence. There was no need for parade where the circumstance of identification was recognition and she had already indicated that the attacker was the Mbithi's worker.

77. On issue of character evidence, the PW2 on evidence in chief, he stated that he knew Appellant as in 2014 he had arrested him on assault charge. The aforesaid evidence would appear to violate **section 57 (2) and 2 of the Evidence Act.**

78. However the trial magistrate did not even allude to it in arriving at his conclusion and deliver verdict of guilty.

79. The Appellant further complains that he was arrested on 09/03/2015 on Monday but was taken to court on 11/03/2015 on Wednesday. The prosecution has not disputed that ground. The law prescribes that the Appellant should have been taken to court by 10/03/2015. Thus his constitutional right was violated. However, the aforesaid violation does not vitiate the proceedings but can be remedied by a claim in different forum.

80. In the case of **JULIUS KAMAU MBUGUA -VS- REPUBLIC, CRIMINAL APPEAL NO. 50 OF 2008** it was held on 8th October, 2010 after reviewing several local and foreign decisions on this constitutional issue, the Court of Appeal came to the conclusion that violation of an accused's constitutional right does not render the trial a nullity. The accused's remedy in such circumstances lies in a claim for compensation by way of damages...

81. In view of the decision in **JULIUS KAMAU MBUGUA -VS- REPUBLIC (SUPRA)** I find and hold that the violation of the appellant's constitutional rights did not render his trial a nullity.

82. On the issue of sentence, the appellant submit that the period from arrest to date of sentence ought to have been taken to account and credited to him to reduce the 20 years sentence thus violates Section 333 (2) CPC as the court did not order sentence to commence from date of arrest as he was in custody for 3 years thus also violated the sentencing policy guidelines which emphasizes the same principle.

83. The court notes the said anomaly and finds that the same grounds succeeds and will adjust sentence accordingly. The minimum sentence is **10 years**. The Appellant was a first offender though he did not offer any mitigation. The court did not state any justification for a sentence for 20 years. The court did not consider Appellant was in custody since **09/03/2015**.

84. The court thus makes the following orders:-

1. The appeal is dismissed on conviction and conviction affirmed.

2. The appeal on sentence succeeds to the extent that it is reduced to 10 years and to commence from 09/03/2015.

SIGNED, DATED AND DELIVERED THIS 20TH DAY OF SEPTEMBER, 2017.

C. KARIUKI

JUDGE

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