



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO.6 OF 2008

JAVAN ANYANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from conviction and sentence by Hon E.K. Makori, SRM) in Mumias SPM's Court Criminal Case No.65 of 2007 dated 21st February 2008)

JUDGMENT

1. The appellant herein was charged and convicted of the count of rape and two counts of defilement contrary to **sections 140 and 145(1)** of the Penal Code. He was sentenced to serve 20 years imprisonment on each count. He was aggrieved with the judgment of the trial court and has now appealed raising the following grounds of appeal:-

1. That the learned trial magistrate grossly erred in law in convicting the appellant on evidence of a single witness without corroboration.
2. That, the trial magistrate grossly erred in failing to find as a fact that charge sheet was defective.
3. That, the learned trial magistrate grossly erred in law in not reaching a finding that the prosecution evidence was incoherent, incredible un-reliable to find a conviction.
4. That, the learned magistrate grossly erred in law in convicting the appellant without the evidence of a doctor who first treated the complainant as alleged.
5. That, Hon Makori, grossly erred in law convicted the appellant relying on the evidence of PW4 and PW6 whereby the evidence was a hearsay evidence.
6. That the trial magistrate grossly failed to observe that the incident took place at night time, the light used was not enough for the complainant to identify somebody.
7. That, the learned trial magistrate grossly erred in both fact and law by convicting the appellant and that scientific proof had not been undertaken confirming the appellant as the man who had committed the offence.

The prosecution opposed the appeal on the grounds that the charges against the appellant were proved beyond all reasonable doubt.

2. The particulars of the charges against the accused were that on the 16th day of February 2006 at Elukokho village in Ebushitinji sub-location in Butere District within Western Province he unlawfully had carnal knowledge of Beatrice Okutoyi without her consent and that at the same time defiled her daughters Janet Okutoyi and Maureen Okutoyi who were girls under the age of 16 years.

Case for prosecution:

3. The prosecution called 6 witnesses, three complainants, PW1, 4 and 5, the administration policeman who arrested the appellant, PW2, the doctor who produced the P3 forms, PW4 and the investigating officer PW6.

4. The prosecution case is that on the evening of 16th February 2006, the three complainants were in their house at Elukokho village. The daughters to the first complainant had just finished to do their school home work when some people broke the door to their house and two people stormed into the house. The people were flashing very bright torches. They smashed the lantern lamp that was on in the house but

before doing so the first complainant, the mother to the children, had recognized one of them as the appellant. The appellant demanded for money and mobile phone from the first complainant. She said that she did not have any. The complainants were shepherded into the bedroom. The appellant then took the 2nd and 3rd complainants out of the house in turns and defiled them. The 3rd complainant was defiled two times. The people stayed in the house upto around 1.30 am when they left and went away. During the ordeal the three complainants had recognized the appellant who was a person well known to them. In the morning the complainants reported to the area assistant chief. They went for treatment at Bukura Health Centre. They reported at Butere police station and gave the name of the appellant to the police. On the 23rd February 2006, the appellant was arrested by an administration policeman, PW2. He was taken to Butere police station. The case was investigated. The complainants were issued with P3 forms. They were completed at Butere District Hospital by one Dr. Asava. The complainants handed over to the police their torn pants that they were wearing at the time of the assault. Those of the 2nd and 3rd complainants were also blood stained. They also handed over to the police the school uniforms that the 2nd and the 3rd complainants were wearing at the time of the ordeal. After investigating the appellant was charged with the offences. He denied the charges. During the hearing the P3 forms and the above stated clothes were produced in court as exhibits.

Case for the defence:

5. The appellant gave an unsworn statement in court and stated that he was arrested on the 23rd October 2016 while he was in his house. That he was taken to Butere police station where he stayed until when he was charged in court. He denied that he committed the offences.

Trial court's judgment:

6. The trial court found that the complainants identified the appellant by aid of light from the lantern lamp before it was put off and also by aid of the torches that the invaders were flashing in the house. That the first complainant also identified the appellant by voice recognition. That the witnesses knew the appellant very well and there was no mistaken identity. That the assailants stayed with the complainants from 11 pm to 1.30 am. Therefore that the witnesses recognized the appellant as one of the assailants.

Submissions:

7. The appellant filed written submissions. He took issue with the fact that the alleged crime was committed within the jurisdiction of Butere Law Courts but the same was tried at Mumias Law Courts.

8. The appellant submitted that the doctor who testified in court, Dr. Gachari, is not the one who completed the P3 form. That the said doctor did not tell the court whether he was conversant with the handwriting of the doctor who completed the P3 forms.

9. The appellant further submitted that there was no DNA conducted to verify whether it is him who raped and defiled the complainants. He said that the witnesses in the case were from the same family. Further that the trial court failed to consider his defence.

10. On its part the State submitted that the appellant was recognized by the witnesses since they knew him before and there was a lamp light inside the house. That the appellant stayed in the house for about 3 hours. That the evidence was supported by medical evidence. The State urged the court to dismiss the appeal.

Duty of first appellate court:

11. This is a first appeal. It is the duty of the first appellate court to re-evaluate and analyse the evidence on record and come up with its own conclusions bearing in mind that it never heard or saw the witnesses testify during the trial – see ***Pandya vs Republic*** (1959) IEA 363 and ***Okeru vs Republic*** (1972) EA 32.

DETERMINATION:

12. The grounds of appeal can be combined into 5, that

- (1) The appellant was convicted on evidence that was unreliable and unsafe to convict on as circumstances were not favourable for positive identification.
- (2) That the conviction was based on hearsay evidence of a doctor who did not testify.
- (3) That there was no medical evidence to support that he is the one who committed the offence.
- (4) That the charge was defective.

13. The Magistrates' Courts Act No.26 of 2015 at **section 6** provides that the Resident Magistrate's Court shall have and exercise jurisdiction and powers of a criminal nature as may be conferred on it by the Criminal Procedure Code or any other written law. **Section 7(1)(b)** of the Criminal Procedure Code provides that a resident magistrate may pass any sentence authorized by law for an offence under the Sexual Offences Act, 2006. The magistrate who tried the appellant at Mumias was a resident magistrate. The magistrate had the requisite jurisdiction to hear the case.

14. The P3 forms for the three complainants were produced in court by Dr Gachari, PW on behalf of Dr Asava who had completed them. At the time that the P3 forms were produced in court Dr. Asava was said to be attending a three year course in Nairobi and was unavailable to come to court to produce the documents. **Section 77** of the Evidence Act (Cap 80 Laws of Kenya) allows reports of experts to be produced

in court as evidence without the maker producing the document himself.

15. That notwithstanding, the person producing the documents must be familiar with the signature of the maker. This was the holding of the Court of Appeal in *Sibo Makovo vs Republic, Nakuru Criminal Appeal No. 39 of 1996* (1997) eKLR that held:-

“... No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (cap 80 Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrate to be careful in admitting P3 forms when the maker is not called.”

16. Though Dr Gachari stated that he had known Dr Asava since form I, he never stated that he was conversant with his handwriting or signature. Of course handwritings and signatures change over time. It is then apparent that Dr Gahari did not identify the documents to have been made by Dr Asava. The P3 forms were not properly produced as evidence in court.

17. The appellant complained that there was no DNA test conducted to prove that he is the one who committed the offences. However there is no necessity of proving a charge of rape or defilement through a DNA test. In *Amil vs Republic* (2012) eKLR, the Court of Appeal stated that:-

“The fact of rape or defilement is not proved by a DNA test but by way of evidence.”

18. In *Geoffrey Kioji vs Republic, Nyeri Criminal Appeal No.270 of 2010* cited in *Dennis Osoro Obiri vs Republic* (2014) eKLR, the Court of Appeal stated that:-

“Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person ... Under proviso to section 124 of the Evidence Act (Cap 80) Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim if the court believes the victim and records the reasons for the belief.”

19. This applies in cases of defilement. The argument that there was a requirement to conduct a DNA test to link the appellant with the offences of defilement does not hold water.

20. The appellant further submitted that the charge was defective. The appellant was initially charged with rape contrary to **section 140** of the Penal Code and defilement of girls under the age of 16 years contrary **section 145(1)** of the Penal Code. While the case was going the new Sexual Offences Act, Act No.3 of 2006, came into effect in July 2006. The charges were submitted to rape contrary to **section 3(b)** as read with **section 3(3)** of the said Act and defilement contrary to **section 8(1)** as read with **section 8(3)** of the Sexual Offences Act. However when the trial magistrate came to writing his judgment he went by the initial charges that were under the Penal Code. The appellant was convicted of the offences under the Penal Code and sentenced to 20 years imprisonment on each count with an order that the sentence was to run concurrently. The trial magistrate was thereby in error to convict and pass sentence on charges that had been submitted.

21. The conviction of the appellant hinged on recognition. The first complainant, PW1, stated that she had known the appellant for over 4 years. That the appellant was related to her husband. That on that day they were in their house when the door was hit. She asked who it was. She recognized the voice as that of the appellant. That the people who were knocking the door broke it open and two people stormed into the house. They were flashing sharp torch lights. She saw a figure come towards them. She identified the person as the appellant. She did not identify the other person. The appellant was armed with a panga and a sword. The people smashed the lantern lamp that was on in the house. The appellant demanded for money and mobile phone. She told them she did not have them. They led her girls into the bedroom. The girls were the led out of the house and raped in turns. The appellant eventually raped her underneath her bed. The people left at around 1.30 am. She said that the appellant had a scurf on the head that he was wearing like a Marvin cap. She said that the people had smashed the lantern lamp immediately upon entering into the house. That the people continued flashing torches. That it is when they were flashing torches that she identified the appellant and clearly saw his face.

22. The second complainant, PW4, stated that she had known the appellant since birth. That he was a bicycle repairer at Bukura market. That upon the people entering into the house she identified one of them as the appellant. That she saw his face before the people put off the lantern lamp. His colleague was also holding a panga and a torch. The appellant was not wearing anything on the face. The appellant then took her and her sister out of the house and defiled them in turns. She further said that she also clearly saw them from the light from the torches.

23. The 3rd complainant, PW5, stated she used to see the appellant at Bukura market at the bicycle repair area. That on that day they were in their house when some people broke the door to their house and entered into the house. She recognized one of the two of the people who had entered as the appellant. She did not identify the other one as he had covered his face. The appellant was not wearing anything over his face. The appellant demanded for money and mobile phone. Their mother told them that she did not have them. The appellant then took her outside the house and defiled her. He defiled her twice. The witness said that the people had put off the lantern lamp when they entered into the house. That it was the voice which made her recognize the appellant. That the appellant had a gap over his upper teeth. That she saw the gap when he opened his mouth.

24. The trial magistrate in his judgment did recognize the danger of relying on evidence of recognition where circumstances are difficult for positive identification. Such danger of convicting on evidence based on identification has been recognized in many cases. In *Wamunga vs*

Republic (1989) KLR, the Court of Appeal had the following to say on the evidence of identification of an accused person:

“It is trite law that where the only evidence against a defendant is evidence of identity of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

25. In this case it is clear that the assailants smashed the lantern lamp when they immediately entered into the house. They were flashing very bright torches on the complainants. In those circumstances, how could the witnesses have seen the face of the appellant before the lantern lamp was smashed? The flash lights must have blinded the witnesses such that they could not recognize the people who were entering into the house. In fact, the first complainant stated that she saw a figure of a person moving towards them. How then did she recognize the figure as that of the appellant? The third complainant on the other hand stated that she did not see the face of the appellant as the people entered but that it is the voice she recognized as that of the appellant. The evidence of the 3rd complainant was the more convincing that the circumstances were not favourable for positive identification. I do not think that the witnesses had the time to see and identify the appellant in the circumstances stated.

26. The first complainant and the third complainant stated that they recognized the voice of the appellant. They stated that they had known him for long. However they did not state whether or not they were familiar with his voice. Before evidence of voice recognition is made the basis of a conviction, there must be evidence that the identifying witness was acquainted with the voice of the accused. The evidence that the witnesses had known the appellant for long did not by itself mean that they were familiar with his voice. May be they only used to know him by seeing him at the market. In ***Karani v Republic [1985] KLR 290*** the Court of Appeal held that:

“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 favouring safe identification.” – Also see *Choge vs Republic (1985) KLR 1.*

In this case there was no basis laid out that the witnesses were familiar with the voice of the appellant. The evidence on voice identification was insufficient to be the basis of a conviction.

27. The witnesses further stated that they saw the appellant when the people were flashing torches in the house. However the witnesses only gave general evidence that the people were flashing torches in the house without giving details and instances when they did so. The witnesses should have given details as to what the people were doing in the house that led them to see the appellant. Such generalized evidence is not convincing.

28. In the foregoing the evidence on identification was not free from the possibility of error. The conviction by the trial court is quashed, the sentence set aside and the appellant is set at liberty unless lawfully held.

Delivered, dated and signed at Kakamega this 19th day of October, 2017.

J. NJAGI

JUDGE

In the presence of:

Jamsumba For respondent

George Court assistant

Appellant Present

14 days right of appeal