



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 411 of 2010

BONIFACE KILONZO MAKAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 3720 of 2009 delivered by Hon. Karanja, SRM delivered on 16th June, 2010).

JUDGMENT

Background.

Boniface Kilonzo Makau, Appellant herein was charged with three counts. In the count I he was charged with the offence of attempted rape contrary to **Section 4 of the Sexual Offences Act**. The particulars of the offence were that on 10th May, 2009 in Kajiado district within Rift Valley province unlawfully and intentionally attempted to commit an act which caused penetration with female genital organ (vagina) of JNN with his male genital organ (penis) without her consent (sic). He was charged in the alternative with an indecent act with an adult contrary to **Section 11(6) of the Sexual Offences Act** in that he committed an indecent act by touching the female genital organs namely vagina, buttocks and breasts of JNN with his hands.

In Count II he was charged with assault causing bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on 10th May, 2009 in Kajiado District within Rift Valley Province unlawfully assaulted JNN thereby occasioning her actual bodily harm.

In Count III he was charged with stealing from a person contrary to **Section 279(a) of the Penal Code**. The particulars of the offence were that on 10th May, 2009 at Oloiren area Kiserian in Kajiado district within the Rift Valley Province, stole Kshs. 700/- the property of JNN from the person of the said JNN.

The Appellant was found guilty in all the counts. He was sentenced to 20 years, 4 years and 10 years imprisonment respectively. The sentences were to run concurrently. He was dissatisfied with both the conviction and sentence against which he preferred the present appeal. His grounds of appeal (hand written) filed on 26th September 2017. In summary, they were that he the prosecution case was riddled with inconsistencies and contradictions, that he was not informed of amendments to the charge sheet, that the evidence adduced was not independent and that the case was not proved beyond a reasonable doubt.

Submissions

The appeal was canvassed before me on 27th September, 2017. In addition to the grounds of appeal, the Appellant made oral submissions that there were material contradictions in the evidence. The first related to the date of his arrest which he contends that some witnesses put as it at 25th August, 2009 and others at 29th August, 2009. Further, that the date of the incident was also contradicted by the fact that one of the witnesses testified that the Appellant went to hospital on the date of the incident while she testified that she went to hospital on 11th May, 2009. He submitted that the complainant was his wife and they had a misunderstanding. He submitted that he was arrested on 23rd August, 2009 and charged on 14th October, 2009 which meant he was incarcerated in custody for a period longer than is provided in the law. Finally, he submitted the sentence was harsh and excessive in light of the fact that he was a first offender.

Learned State Counsel, Ms. Atina, for the Respondent opposed the appeal. She submitted that the prosecution presented a water tight case against the Appellant. She was of the view that the evidence of PW1 was corroborated by that of PW3 and PW4 on what transpired on the fateful day. There was also no doubt that the Appellant assaulted PW1 as evidenced by PW2, the doctor who examined her and produced her P3 Form.

On the Appellant's submission that there were contradictions with regard to the occurrence book entry that was indicated on the charge sheet and the date of the report, she submitted that this was occasioned by the fact that there were two occurrence book entries; one relating to the initial report and a second one relating to the Appellant's arrest. She submitted that this did not affect the evidence and was therefore curable under the Criminal Procedure Code.

With regard to the amendment of the charge sheet she submitted that under Section 214 of the Criminal Procedure Code the prosecution can amend the charge sheet before the close of their case. The court thereafter complied with the law by calling on the Appellant to plead afresh.

She submitted that although some witnesses testified that the Appellant was trying to rape a school girl, it was true that the complainant was 21 years old and that certain women of that age may appear young.

On sentence, counsel submitted that the same was legal with respect to counts I and II but that the sentence in count 3 was harsh. However, given that the sentences were to run concurrently the term the Appellant will serve is the 20 years. She urged the court to uphold the conviction but to exercise its discretion in meting out a reasonable sentence.

In reply, the Appellant submitted that none of the prosecution witnesses was independent as they all came from the same household. As such, their evidence could not be relied upon. He also submitted that he only took plea for two counts only which rendered the trial a nullity.

Evidence

The prosecution called a total of six witnesses. The complainant, JNN testified as PW1 setting the background to the prosecution case which was as follows. On 10th May, 2009, she was selling second hand clothes at Kiserian Market. The Appellant approached her looking for trousers to buy. He opened up a conversation between the two telling PW1 that he worked for a white man called Brown in Naromoru area. He told her that the white man wanted a house help. PW1 indicated that she had a sister who would be pleased to work for the white man but asked him to get a confirmation after one hour. The Appellant returned after one hour and after PW1 confirmed that her sister would accept the job, she agreed on the request of the Appellant to accompany the Appellant to Mr. Brown's home to go and see where her sister would be working. It was about 4.00 p.m. by then and they took the route by foot. They were then nearing a forest. They met one **Mr. Munyiri** who testified as **PW6**. **PW6** who knew the Appellant warned him that if anything happen to PW1, he would be held accountable. In his testimony, PW6 was apprehensive that the Appellant was walking with a young woman at a forest when it was nearing nightfall. He also knew that Mr. Browns home was far and his instincts told him that the Appellant was up to no good. He also knew that the forest they were walking through was dangerous. It was days later that PW6 met PW1 who told her that the Appellant had assaulted her and tried to rape her after they separated.

As the Appellant and PW1 walked, the Appellant turned to PW1 and told her that he had always desired her. PW1 knew that things were not working well and she screamed for help. The Appellant then started punching and strangling her. He warned that he would kill her if she continued to scream. By then darkness had started falling as it was around 7.00 p.m. She had to comply with what the Appellant demanded from her. He then led her to a small room which had a bed and a chair. He removed a panga and a knife from under the mattress and demanded that she undresses. She wore a skirt and she removed her biker and pant. The Appellant then lay on her and started fondling her body. He then lowered his trousers ready to rape her. Unfortunately, his penis did not erect.

While inside the house, PW1 had screamed to alert for help and some young men had come and surrounded the Appellant's house. They broke into the house and PW1 was able to run outside. The Appellant told the young man that PW1 was his prostitute and had refused to accept his demands after taking money from him. The young men then demanded that he and PW1 accompanies them to the village elders. As they walked to the village elder, the Appellant who was then carrying a panga excused himself to return to his house to drop off the panga and pick up a metal rod instead. That is when he fled and was never to be seen again. The men then together with the elders went back to the Appellant's house where they picked up PW1's pant, a cream colored biker and black sandals which were exhibited in court. Unfortunately, her mobile phone and cash Kshs. 700/= which were in a pass were not found. The Appellant was arrested three months later.

Amongst the people who rescued PW1 were **PW3, Simon Ngugi Mayo** and **PW4, Hannah Wanjohi Mambo**. PW4 neighbored the Appellant's house. While she was with her husband at about 7.30 p.m., she heard screams coming from the Appellant's house. As they walked towards the house, they came across a group of young men who had rescued PW1 in the company of PW1. She noticed that PW1 had an injured face and neck and was bleeding. She recognized PW1 with whom she went to the same church. PW1 told her that the Appellant had attempted to rape her. She accompanied her to the village elders alongside the young men. She was also present when PW1's clothes were recovered from the Appellant's house.

On the other hand, PW3 was escorting some friends at about 7.00 p.m. He heard screams from two women. According to PW1, the two women were coming from the direction of the Appellant's house and had heard screams inside the Appellant's house. They turned back with PW3 and pointed to them the house from which the screams were coming. PW3 was in the company of three other men. They demanded from the Appellant to open the house but he refused. They were forced to break into the house. Inside the house they found PW1 who was dressed in a blouse and a skirt. She had no shoes. She ran outside calling out for help as the Appellant followed her with a panga shouting that she had taken his money. PW1 told the ladies and the young men that the Appellant intended to rape her. That is when they requested the Appellant and PW1 to accompany them to the village elders.

PW1 was treated at Ngong District Hospital and on 15th May, 2009, she was reexamined by **PW2, Dr. Zephaniah Kamau** of Police Surgery who filled her medical examination form (P3). The doctor noted that she had scratches at the anterior aspect of the neck and a small wound on the linear aspect of the upper lip. She also had a swelling below the right lower eyelid. He assessed the probable cause of the injury as a blunt object and the decree of the injury as harm.

The case was investigated by **PW5, PC Olobe** then of Kiserian Police Station. He testified that the incident was reported at the police station on 11th May, 2009 at 8.00 am. He summed up the evidence of the prosecution witnesses. In addition he recorded the witness

statements and produced PW1's clothes that were recovered from the house of the Appellant. They included a pant, biker and sandals. He also visited the Appellant's house which he confirmed was one roomed which had a bed, a chair and jiko. He also confirmed from his neighbors that he worked in a farm around where he lived. He confirmed that the Appellant was arrested on 25th August, 2009 after PW1 saw him in the market and raised alarm, after which members of the public apprehended him. He preferred the charges against the Appellant.

In his unsworn defence, the Appellant stated that he was a farm boy and that PW1 was his wife and that they had lived together for five months. He had put up a business for her at Kiserian Market. On 10th of May, 2009 when he went back home, he found that PW1 had left the house with all the belongings in it. He went looking for her in the market but did not find her. Later in the day, he saw her in the market. When he called out her name, she started shouting that he was a thief. He was then arrested by members of the public and escorted to Kiserian Police station where he was charged accordingly. He stated that he was charged on 26th August, 2009.

Determination

It is now the duty of this court to determine whether the case was proved beyond a reasonable doubt and whether the Appellant's right to a fair trial was violated. I have no doubt in my mind that the Appellant lured PW1 to his house on the fateful day of 10th May, 2009. This is corroborated by the evidence of PW3 and 4 whose testimony was that they found PW1 in the Appellant's house. From the testimony of the witnesses, it is clear that after the Appellant's house was broken into, PW1 ran out of the house screaming for help. At the time, she did not wear any shoes and she neither had her pants nor the biker on. She also informed the witnesses that the Appellant had attempted to rape her. In addition, she sustained injuries on the lip, eyelid and neck as she tried to free herself from the Appellant. This was not conduct consistent with behavior of a wife. More so, PW6 testified he knew the Appellant was up to no good when he met him with PW1 as a result of which he warned him that if anything happened to her he would be held accountable. At that point, the Appellant had an opportunity to tell PW6 that PW1 was either his wife or girlfriend. He did not do this which leads the court to conclude that what PW1 told the court was the truth.

All these circumstances point to thing; that PW1 had not consented to having sex with the Appellant or that she that had gone to the Appellant's house for purposes of sex. The Appellant's contention in this appeal that PW1 was his prostitute was baseless. Had this been the case, PW1 would not have run out of the house screaming that the Appellant wanted to rape her. She also would not have resisted accompanying him when he told her that he had always desired her. He had also not demonstrated that he had given her any money as alleged. Furthermore, as the Appellant was being escorted to the village elders, he escaped from the hands of those who had apprehended him, instead of going to explain his case that PW1 was his prostitute. His defence at the trial was that PW1 was his wife which assertion was ousted by the prosecution evidence. The Appellant lured PW1 into his house in the pretext that he was going to show her the house where her sister would be working as a house help. Unfortunately, he turned a beast by attempting to rape her. Thankfully, he failed to erect.

The Appellant submitted that the prosecution's evidence was contradictory that it could not form a basis for his conviction. He first cited the fact that according to PW6, he was walking towards the forest with a school girl which assertion was discounted by other witnesses including PW1 herself that she as an adult. As rightly submitted by learned counsel for the Respondent Ms. Atina, at that time, PW1 was only aged 21 years which made her look young and small. The fact of her age was not rebutted.

The other contradiction raised was with respect to the date of the arrest and the date the Appellant took plea in court. I agree that there was a contradiction between the evidence of PW1 and 5 with respect to the date the Appellant was arrested. PW1 testified that he was arrested on 29th August, 2009 whereas PW5 testified that he was arrested on 25th August, 2009. It is important to note that the Appellant took plea twice; first, on the 26th August, 2009 and again 14th October, 2009 after substitution of the charge sheet. Thus, if the first plea was taken on 26th August, 2009, then, the Appellant could not have been arrested on 29th August, 2009. I add that the typed proceedings failed to capture the proceedings of 26th August, 2009 when the first plea was taken. But this date is clearly borne in the original record. In my view then, the fact that PW1 stated that the Appellant was arrested on 29th August, 2009 does not lessen the fact that he committed the offences. It is also clear that the first charge sheet was presented in court on 26th August, 2009 which is the date on which he took the plea. The second charge sheet which was substituted was duly received in court on 14th October, 2009. This is the date on which he took plea a second time after the substitution of the charges. There is therefore no confusion as to the dates he was charged or arrested.

The Appellant further contended that he never took plea for three counts but two. This is not true. The first charge sheet only had two counts one of the attempted rape and a second one of stealing from a person and he duly took plea for the two counts. The second charge sheet introduced a second count of assault and an alternative charge to count I. The proceedings duly captured that the Appellant took plea for all the three counts. His submission in this regard fails.

The Appellant also cited contradiction in respect to two OB extracts namely number 34 of 10th May, 2009 and another OB cited in the charge sheet number 18 of 23rd August, 2009. The Appellant called for OB 34/10/5/09 which as rightly submitted by Miss Atina related to the initial report made after the incident at 11.15 pm. The second OB extract was in relation to the Appellant's arrest. Although it indicates the date as 23rd August, 2009, what is clear from the evidence adduced is that he was arrested before 26.08.2006, the date he took the first plea. PW4 did add weight to this date by testifying that the Appellant was arrested on 23rd August, 2009.

As I have rightly stated, the Appellant was identified by PW1, 3, 4 and 6. Suffice it to state, PW1 also sufficiently discharged the burden in demonstrating that the Appellant intended to rape her safe for the intervention of members of the public and the Appellant's erectile dysfunction. More so, when the witnesses went to his house they recovered her inner wear which was indicative of the intention to rape her. However, PW1's mobile phone and money were not recovered, an indication that they were stolen by the Appellant.

Finally, the Appellant contended that his right to a fair trial was violated because he was incarcerated in police custody for a period longer than is allowed by the law. Of course, having been arrested on 23rd August, 2009 and having been brought to court on 26th August, 2009 meant that he was in police custody for three days. The old Constitution then provided that he should have been charged within 24 hours and therefore he was kept in custody against the law. However, this did not render the trial a nullity and the best that the Appellant can do is to seek redress of compensation from the person he thinks was responsible for incarcerating him in custody for a period longer than was

stipulated in the Constitution.

In sum, I find that the prosecution proved their case beyond a reasonable doubt and that the Appellant's defence lacked merit. I dismiss the appeal accordingly. I find that the Appellant's conviction was based on merit.

On sentence I agree with the learned State Counsel, Miss Atina that the same was harsh as it did not take into account that the Appellant was a first offender. **Section 4 of the Sexual Offences Act No. 3 of 2006** provides for a minimum sentence of five years imprisonment but which may be enhanced to life imprisonment. Given the circumstances of the case, it is my view that a penalty of ten years imprisonment is reasonable. In count II, Section 251 of the Penal code provides for a penalty of up to five years imprisonment. It is my opinion that the four years jail term imposed was harsh as it bordered on about the maximum penalty. Besides, the injuries PW1 sustained were not of such grave magnitude as to warrant the penalty imposed. It is my opinion that a sentence of one year imprisonment sufficed. I count III, **Section 279 of the Penal Code** provides for a maximum penalty of fourteen years imprisonment. Once again, having regard to the value of the goods stolen, I think that the ten years jail term was excessive. A penalty of five years would suffice.

In the result, the appeal partially success with respect to the sentence which I substitute to ten years, one year and five years respectively. The sentences shall run concurrently. The period of nine months twenty days that the Appellant was in custody before he was sentenced shall be deducted from the sentence. It is so ordered.

DATED AND DELIVERED THIS 30TH DAY OF NOVEMBER, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1 . Appellant in person.
- .2. Miss Sigei for the Respondent.