



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 11 OF 2017

RIGHA MWAMINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 60 of 2014

in the Senior Resident Magistrate's Court at Wundanyi delivered

by Hon G.M. Gitonga (RM) on 21st August 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Righa Mwamino was charged with the offence of rape contrary to Section 3(1) as read with Section 3(2) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on 13th February 2012 at Maktau location within Taita Taveta County, he intentionally and unlawfully caused his penis to penetrate the vagina of N M (hereinafter referred to as "PW 2") without her consent.

2. He had also been charged with the alternative offence of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act. The particulars of this charge were that on the aforesaid date, time and place, he intentionally touched PW 2's vagina with his penis against her will.

3. Interestingly, the Learned Trial Magistrate Hon G.M. Gitonga, Resident Magistrate, acquitted him under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya) but at the same time sentenced him to ten (10) years imprisonment. Being dissatisfied with the said judgment, on 14th February 2017, the Appellant filed a Notice of Motion application seeking leave to file his Appeal out of time which application was allowed and the Petition of Appeal was deemed to have been duly filed and served.

LEGAL ANALYSIS

4. On first appeal, the high court is called upon to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

5. His Grounds of Appeal appeared to have been mitigation in nature. He sought to have his sentence of ten (10) years imprisonment substituted with a non-custodial sentence on account of his advanced age. He was currently seventy (70) years of age.

6. Having said so, this court deemed it fit to look closer at the court record as it was difficult to decipher what the conclusion of the Learned Trial Magistrate was. The typed notes and the typed proceedings were on all fours unless of course there were pages missing in the handwritten records. The last word on the second last page and the first word on the handwritten notes were “124” and “Accused” respectively. The last sentence of the judgment read as follows:-

“My considered view is that even if the court were to disregard the evidence of PW 1, section 124. Accused is therefore acquitted under section 215 of the CPC.”

7. The proceedings continued as follows:-

“Prosecutor: Accused may be treated as a first offender.

Court: Accused is sentenced to 10 years.

Right of appeal explained 14 days.”

8. An anomaly such as this one can be cured by way of re-trial. In this regard, the State referred this court to the case of Otieno & Another (1991) KLR 493 where the Court of Appeal rendered itself as follows:-

“This case would appear to be an authority for the proposition that where the record of the trial court is indecipherable, which is the exact position in the appeal before us, a retrial ought to be ordered, of course bearing in mind whether the appellant has served a substantial part of the sentence and whether in all circumstances, a retrial would be fair.”

9. However, it was emphatic that a re-trial is not to be ordered as a matter of course but only if an appellate court is of the opinion that on a proper consideration of the admissible evidence a conviction might result. It argued that Christine Wawuda (hereinafter referred to as “PW 1”) identified the Appellant as the perpetrator who raped PW 2 as he caught him in the act outside her house whereafter he ran away.

10. A perusal of the proceeding showed that the trial herein was a re-trial. On 30th April 2014, the Prosecutor informed the Trial Court that he was not comfortable prosecuting the case afresh. Right at the outset, this was a ground that would dissuade this court from ordering a fresh trial to cure the irregularity that arose out of a mistake by the Learned Trial Magistrate. This is because re-trying a case that was concluded in 2014 where PW 2 was said to have been mentally unstable would greatly prejudice the Appellant herein as there was a possibility that she may not recall the facts with clarity.

11. In this regard, this court fully associated itself with the holdings in the cases of Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481 and re-stated in Fatehaji Manji vs Republic [1966] E.A. 343 that Mutende and Thuraniira Jaden JJ cited in the case of Jackson Mutunga Matheka vs Republic [2015] eKLR where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on

particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”

12. Going further, this court found that the facts that were presented before the Trial Court did not prove that rape occurred. The ingredient of force was not demonstrated in the case herein. According to PW 2, the Appellant, who was her mother’s brother, came into her uncle’s compound, held her hand and dragged her towards another aunt’s house past PW 1’s homestead into a bush. He removed her pant and he lowered his boxers and trousers to knee level and inserted his penis in her vagina. She said that she felt a lot of pain and that PW 1 found them having sex.

13. In her Cross-examination, she stated that she did not make noise because she was mentally unstable. If she was indeed mentally unstable as she and her mother H K (hereinafter referred to as “PW 3”) had contended and as was evidenced in the P3 Form, then Learned Trial Magistrate erred in law when he failed to conduct a *voire dire* examination to satisfy himself that she (PW 2) understood the meaning of taking an oath before he administered one on her.

14. Further, if PW 2 was mentally unstable as had been contended, the onus was on the Prosecution to have adduced evidence to demonstrate that she could not have consented to having sex with the Appellant herein, if at all due to her mental status. Appreciably, PW 2 was aged twenty six (26) years and had reached the age of giving consent in sexual relations.

15. She did not scream as she was being dragged from her uncle’s home to the bush and even when PW 1 found her, she told the Trial Court that she and the Appellant were having sex. Her evidence and that of PW 1 were devoid of the time of the alleged incident occurred. This would have assisted this court in understanding why no independent witness saw the Appellant dragging PW 2 to the bush.

16. It was expected that there could have been other passersby if the incident occurred in the day, which this court assumes to have been the case because PW 1 would not have seen PW 2 and the Appellant having sex in the bush if it was at dark or at night. If as PW 2 said that the Appellant had dragged her in a bush beyond PW 1’s house, PW 1 did not explain exactly where she found them.

17. The fact that the Clinical Officer, William Mwadime Mwanyika (hereinafter referred to as “PW 4”) testified that PW 2’s hymen was broken and that there was presence of spermatozoa was not proof that the Appellant raped her because the ingredient of force was not demonstrated. A consideration of the offence of incest could not be sustained because PW 3 did not allude to the Appellant being her brother as had been contended by PW 2.

18. Further, there was also no evidence that PW 2 was mentally unstable. In the case of **HCCRA No 61 of 2015 Kennedy Sheveka Mwakio vs Republic** at High Court of Kenya Voi, the State conceded to the appeal therein on the ground that the prosecution did not adduce evidence to prove that the complainant therein was mentally challenged.

19. It was not any different from this case where the Prosecution failed to provide evidence to demonstrate that PW 2 was mentally unstable which could have led to the Appellant forcing her to have sex with her, it at all.

20. Accordingly, having considered the Grounds of Appeal, the Written Submissions of both the Appellant and the State, this court was not persuaded that the Prosecution proved its case to the required standard, which is, proof beyond reasonable doubt so as to uphold the Appeal herein. The evidence by the Prosecution witnesses was too sketchy and fell way below the standard of evidence that should be adduced to sustain a conviction of a serious offence such as rape.

21. In addition to the confusion as to whether the Learned Trial Magistrate acquitted or convicted the Appellant herein, this court found and held that he erred in law when he failed to give him an opportunity to say something in mitigation before he sentenced him.

22. Bearing in mind the aforesaid, this court came to the firm conclusion that ordering a re-trial herein would not be in the best interests of justice herein. The length of time it had taken for the Appellant to go through the court process since the incident occurred in 2012 was too long and would prejudice him if a re-trial was ordered herein. It was the considered view of this court that if the case herein were to be re-tried based on the exact same facts that were adduced, no conviction could be sustained.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 14th February 2017 was merited and the same is hereby allowed.

24. It would therefore be unsafe to allow his conviction to stand. The same is hereby quashed. Consequently, the sentence is also hereby set aside. This court hereby orders that he be set free forthwith unless he be held or detained for any other lawful reason.

25. It is so ordered.

DATED and DELIVERED at VOI this 30th day of November 2017

J. KAMAU

JUDGE

In the presence of:-

Righa Mwamino-Appellant

Miss Anyumba for State

Susan Sarikoki- Court Clerk