



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HIGH COURT CRIMINAL APPEAL NO.28 OF 2015
(FORMERLY MERU HC CR A NO.94 OF 2013)

PETER MUTIRIA MITAMBO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

*(An appeal from the Judgment of Hon.P.M. KIAMA - PM made on 9th October, 2010 in Marimanti
Principal Magistrate's Court Criminal Case No.258 of 2011)*

JUDGMENT

1. Peter Muteria Mitambo, the Appellant, faced a charge of rape contrary to Section 3(1) (a) and (b) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006 before the Principal Magistrate's Court, Marimanti. The particulars of the offence were that, on 3rd April, 2012 at around 19.00 hrs in Tharaka North District within Eastern Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of L M, a female aged 28 years without her consent. The Appellant also faced an alternative charge of indecent act with an adult contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.
2. After trial, the Appellant was found guilty of the offence of rape, was convicted and sentenced to 10 years imprisonment. Aggrieved by that decision, the Appellant has now appealed to this court on both the conviction and sentence. He has raised five (5) grounds of appeal in his Petition of Appeal which may be summarized as follows:-
 - a. that the trial court erred in not considering that the Appellant was not medically examined nor any D.N.A test undertaken to verify whose spermatozoa were found in the complainants private parts;
 - b. that the trial court failed to consider that the allegation of rape was planted upon the Appellant after he had taken away his phone from the complainant; and
 - c. that the evidence of the complainant was not sufficient to convict the Appellant as the evidence of the sub area only amounted to hearsay.
3. This being a first appeal, this court is enjoined to evaluate afresh the evidence adduced at the trial and come up with its own independent findings and conclusions but bearing in mind that it did not have the advantage of seeing the witnesses when they testified. See **Okeno - VS - Republic [1973] EA.**
4. The evidence before the trial court was that on the material day at about 7pm, the complainant (PW1) was coming from Kathangacini market on her way home when she met the Appellant on

the road. They shook hands and the Appellant held PW1's bag and told her he wanted to have sex with her. When she declined, he held her neck, pulled her to the side of the road, tore up her pants and had sex with her by force. During the struggle, the complainant's red pant got torn. She screamed and people who were near a tea kiosk rushed to the scene. On seeing the people, the Appellant fled but the people pursued him and arrested him. They took the Appellant to the sub-area, then to the AP Camp and later to Gatunga Police Station. The complainant was then sent to Kathangacini Health Centre the following day but was referred to Marimanti District Hospital where she was treated on the same day. A P3 form was filled on 19.4.12. The complainant had known the Appellant for a long time.

5. On cross-examination, PW1 denied that they were with the Appellant on the material day taking beer. She stated that she managed to scream after the Appellant had finished raping her. That she heard the Appellant complain at the AP Camp that those who arrested him had stolen his phone.
6. Dr Felix Oindi (PW2) was a Medical Officer from Tharaka District Hospital Marimanti. He told the Court that the P3 form was filled on 19.4.12. That the inner clothing was torn. The history was an allegation of rape on 3.4.12 at 7pm. That there was penetration of vaginal intercourse without a condom while strangling the victim. On examination the external genitalia of the victim was normal but a white discharge was noted on the vaginal. He produced the P3 form as PExh 3 which had been filled by a Dr Karanja.
7. Julius Muniara (PW3) was the sub area. He told the court that on the material day at about 7.30pm, the Appellant was brought to him under arrest by members of the community policing. Amongst them were Cyrus Muteria, Benjamin Mwikamba, Mwiti and Priscilla Kaburi. It was reported that the Appellant had raped PW1 and also stolen Kshs.6,000/= from her. He took the accused to the Kathangacini AP Camp. PW4 PC Peter Lemonjong investigated the case. On 4.4.12 at about 5pm, he received PW1 and the Appellant who was under arrest by police officers from Kathangacini AP Camp. He recorded PW1's statement and took her to Marimanti District Hospital where she was examined and a P3 form filled. He had followed up on the Appellant's complaint about the loss of his phone and established that those who arrested the Appellant had taken the phone to the AP Camp but when the same was brought to Gatunga Police Station, it is not known to which police officer it was handed to. On cross examination, he confirmed that he did not take the Appellant to hospital for examination.
8. In his defence, the Appellant told the court that on the material day, he went to a drinking den at Kamanguna village at about 5.50pm where he found PW1. That he and PW1 had been friends before. That he had previously given her his phone. That they took the brew up to about 10 pm when he took from her his phone which infuriated PW1. That PW1 left the place and went away. After 30 minutes, Cyrus Muteria, Mwiti, Gachungu and David Mwikamba came and alleged that the Appellant had taken Kshs.300/= from PW1. Those present disputed that fact. The Appellant was thereupon arrested and taken to PW3. Pw3 together with the arresting party and the Appellant then went to PW1's house who demanded from the Appellant the phone or Kshs.300/=. On declining to give either of the two, the Appellant was taken to Gathangacini AP Camp. That it is at the camp that PW1 for the first time stated that she had been raped. That it is for this reason that those who had arrested the Appellant, namely Cyrus Muteria and David Mwikamba had not attended court to testify. According to the Appellant, the charge was a fabrication because of his phone which he had taken from PW1.
9. At the hearing of the appeal, the Appellant relied on his written submissions. He submitted that the evidence of PW3 was pure hearsay and could not find a conviction. That the evidence of PW1 was not corroborated by any medical evidence; that the P3 form, PExh 2, clearly showed that PW1's genitalia was normal; that there was no spermatozoa seen on examination and that the offence of rape was therefore not proved. That he was not medically examined to prove his guilty in terms of section 36 (1) of the Sexual Offences Act and that his defence had not been considered.

10. Mr Ongige, Learned Counsel for the state opposed the Appeal. He submitted that it was not the evidence of PW3 alone that was relied on to convict the Appellant. That there was no necessity to corroborate the evidence of PW1; that the Appellant's defence had been properly considered and rejected and that on the issue of the phone, the same had not been raised at the initial stages of the trial. Counsel urged that the Appeal be dismissed.
11. The Appellant's first complaint is that he was not medically examined or any D.N.A. tests undertaken to prove that he was guilty of the offence. Section 36(1) of the Sexual Offences Act which the Appellant relied on provides:-

“36(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

12. The above provision is only permissive in that, it allows the court to direct that medical examination be undertaken as a process of gathering evidence. In my view, the fact that a court does not direct such a course of action to be undertaken and is satisfied with the evidence already collected or presented before by the prosecution, it cannot be a basis to fault the court's decision. In this regard, I do not see of what use and at what point in this case the court should have directed for the alleged medical examination. Accordingly, ground Nos. 1 and 5 of the petition of appeal are without merit and are rejected.
13. Ground Nos. 2, 3 and 4 are to the effect that the evidence of PW1 was not sufficient to prove the case of rape against the Appellant in that, the evidence of PW3 was mere hearsay and the medical evidence was inconclusive and that the Appellant's defence was not properly considered. Under section 124 of the Evidence Act, Chapter 80 of the Laws of Kenya, it is not necessary for the evidence of a victim in sexual offences to be corroborated. That however, is when the available evidence is only that of the victim. That section provides:-

“124 Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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 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”.

14. It is clear from the proviso that when corroboration is not a requirement in sexual offences is when the only available evidence is that of the alleged victim. In my view, the use of the words **“the only evidence is that of the victim.....”** means that, if there is other evidence that is available, such evidence must be tendered to corroborate the evidence of the victim of a sexual offence just like in all other criminal cases. In any event, even when convicting on such uncorroborated evidence, the trial court must record its reasons for being satisfied that the victim is telling the truth.
15. Before the trial court, the evidence of PW3 was clear. He was at home at night when the members of the community policing whom he named brought the Appellant under arrest on allegations of having raped the complainant and stolen Kshs.6,000/= from her. He was not at the scene and he could not therefore vouch on the reasons or the circumstances under which the Appellant was

arrested. His evidence to that extent remains hearsay and totally useless as far as the charge of rape is concerned. As regards the P3 form (PEXh. 2), the same was filled on 19th April, 2012, over two weeks from the date of the alleged incident. The same shows that when PW1 was examined, her external genitalia was normal but had a whitish discharge; the urinalysis was normal and there was no spermatozoa seen after High Vaginal swab was undertaken. The testimony of PW1 and PW4 was that the examination was undertaken on 4.4.12 which was under 24 hours from the occurrence of the alleged offence. Doctor Karanja who filled the P3 form did not make any remarks to confirm whether or not there had been sexual intercourse or any vaginal penetration of PW1. He crossed over that portion and left the court to make its own conclusions based on his findings ie that PW1'S external genitalia was normal, that she had a whitish discharge but without any spermatozoa being seen.

16.Despite the foregoing, the trial court made a finding that; the evidence of PW3 corroborated that of PW1; and that the evidence of PW2 was to the effect that the vagina of PW1 had been forcefully penetrated and that the evidence of PW1's genitalia oozing a whitish discharge was evidence that PW1 had been sexually and forcefully penetrated. This court has examined the evidence of PW2 and the P3 form carefully. The foregoing conclusions of the trial court are completely at variance with both the evidence of PW2 and the P3 form. What PW2 stated was the history given to the examining doctor of '**penetration of vaginal intercourse without condom.**' This is to be found in section A (2) of part II of the P3 form. These are usually not findings of the doctor but the complainants presented by the victim to the examining officer. A trial court must always have in mind that the medical observations and conclusions are usually recorded in sections B and C of the P3 form. That is what should constitute the findings after examination. In this case, the examining doctor did not find any injuries No PW1's genitalia nor any spermatozoa in her vagina. To that extent, the trial court was clearly wrong in its conclusions that the evidence of PW1 was corroborated by that of PW3 and PW2.

17.That leaves the evidence of PW1 to be weighed vis a vis the Appellant's defence. This court notes that the vital evidence of those who arrested the Appellant at the alleged scene was not tendered. In my view, the so called members of the community policing who arrested the Appellant were very crucial witnesses as far as the charge which was laid before the trial court was concerned. I say so for the following reasons' firstly it is alleged that it is the said persons who responded to the screams of PW1; that it is when they reached the scene that the Appellant fled; that they gave chase and caught up with him whereby they arrested him and took him to PW3. Secondly, the Appellant alleged in his defence that the members of the community policing arrested him from a drinking den where PW1 had left him; that they arrested him because of an alleged theft of Kshs.300/=. Thirdly, throughout the trial, the Appellant complained about his phone that had been taken away by those who arrested him; he claimed in his defence that it is that phone that was the source of his problems; that it is after he recovered it from PW1 that out of annoyance, PW1decided to frame him with the allegation of theft and later rape. The Appellant had told the court that he was given the choice between giving that phone or Kshs.300/= to PW1 by PW3; that when he declined he was taken to Kathangacini AP Camp where the issue of rape was raised for the first time. It will later on transpired from the evidence of PW4 that as a matter of fact, a phone was recovered from the Appellant when he was arrested; that the phone was surrendered to the Kathangacini AP Camp by those effecting the arrest, that phone then disappeared in the hands of some police officer at Gatunga Police Station.

18.From the foregoing, two questions call for an answer; was it not crucial for any of the four (4) named members of the community policing to testify and tell the court the reason they arrested the Appellant in view of the two versions before the court, ie that of PW1 and the Appellant? Why was the Appellant's phone recovered from him by those arresting him and then surrendered to the police officers at Kathangacini AP Camp if it did not have anything to do with his quarrels with PW1 or PW1's complaints against the Appellant? Is it plausible that those arresting the Appellant would take his phone from him and surrender to the police just because they found him raping PW1?.

19. To my mind, the foregoing questions remained unanswered throughout the trial. They cast doubt in the mind of the court as to the commission of the alleged offence. There remained doubt as to the reason why or the circumstances under which the Appellant was arrested. That doubt in my view should have been resolved in favour of the Appellant. I note that the trial court did not properly evaluate and consider the Appellant's defence.
20. Further, the court made a finding that the Appellant had not called any witness to corroborate his alibi. Firstly, the record shows that ever since the Appellant was arrested, he had remained in custody throughout his trial; secondly, he had informed the court on being put on his defence that he was to call two witnesses if he got fare for them. Lastly, on 2nd August, 2013 he decided to close his case because he had sent for his witnesses but they could not attend. It may be safe to conclude that the said witnesses may not have attended because of lack of the fare that had been alluded to earlier on by the Appellant. The trial court seems to have been in a hurry to close the defence without addressing that issue which had been clearly raised by the Appellant. To turn around and hold that fact against the Appellant, in my view, was clearly wrong.
21. Accordingly, I find the appeal to be meritorious. I quash the conviction and set aside the sentence. The Appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Chuka this 22nd day of January, 2016.

A.MABEYA

JUDGE