



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 28 OF 2015

(CORAM: J. A. MAKAU – J.)

PATRICK AJODE OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the sentence

in Criminal Case No. 1021 of 2009 in Siaya Law Court

before Hon. M. S. Kimani – R.M.)

JUDGMENT

1. **Patrick Ajode Ochieng**, was charged with an **offence of Rape, Contrary to Section 3 of the Sexual Offences Act, No. 3 of 2006**. The particulars of the offence are that on the 8th July, 2009 at Karapul sub-location in Siaya District within Nyanza Province, intentionally and unlawfully caused his penis to penetrate into vagina of E A K without her consent with the alternative charge of **Indecent Act, contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**, particulars whereof are that on the 28th day of July 2009 at Karapul sub-location in Siaya District within Nyanza Province did commit an **Indecent Act with E A aged 19 years by touching her breast**.

2. The complainant E O K testified that she was 20 years old. That on 8th July 2009 at around 12:30 p.m. she had been send to town by her mother to buy household items. That while passing ACK Church, she remembered she had taken a phone and charger for repair to the appellant. That the Samsung belonged to her mother. She met the appellant who told her the charger was at his house asking her to accompany him to his house at Rabango. They arrived at the the resident place whereby the appellant asked the complainant to enter the house after, the appellant opened the door. Appellant took complainant to sitting room and after some time the appellant returned with tea as the complainant insisted she be given the charge but the appellant was hesitant and stated touching the complainant by her breasts, thigh and mouth as she protested asking him to leave her alone but instead, pulled her to the bedroom, removed her trouser and pulled her pants. He did not unzipped the trouser. The complainant tried to scream but no voice came out. He removed his penis and inserted his penis to the complainants vagina. She felt pain. She screamed and appellant moved. The complainant took her purse, phone and left. That before she left he told her to take emergency pills. The complainant passed through the appellants place of work and then went back and informed her mother who took her to the hospital. She identified treatment notes for O.P. No. 15796/09 MFI-P1. She reported to Siaya Police Station and was issued with P.3. form identified

as MFI-P2. She recorded statement with Police. She also identified a copy of her birth certificate as MFI – P3. She identified the appellant in the dock and stated she had known him before.

3. During cross-examination PW1 testified that she is 19 years old and stated she had known the appellant for over 2 months as they are neighbours and he used to pass through complainant's homestead to greet them as he used to visit the complainant's family and she used to see him near ACK operating a computer. She testified she took the phone at his place of work and she went to pick it after 2 months. That they went to Appellant's house through the back door and was not pushed as they did so, she testified at the time she was being caressed she did not shout. That her purse and phone were left in the sitting room. She testified she attempted to shout and no one came for help as she shouted for between 5 to 10 minutes. She informed the police so in her statement and testified she did not want to get pregnant. The complainant testified she went to pick some money in his place of work. She testified the purse was not in court as the complainant surrendered it to the police. She said from P3 form it is not indicated sperms were found. She stated the incident took place between 1.30 p.m. to 3.30 p.m. and that the sex took place for about 30 minutes and she testified that she bled a little from the vagina.

She stated she did not know whether the Appellant released sperms but said there was a colourless discharge on re-examination. PW1 stated the clothes were released to her.

4. PW2 M O, mother to PW1, testified PW1 is her 4th born child who was born in August 1990. That on 28.7.2009 she testified PW1 had gone to do some shopping and returned in the evening when she told her that Patrick had harassed her and told her he had raped her. PW2 suggested, they go to the hospital and called Appellant's mother and father. That PW2 took PW1 to the hospital with her grandmother. They found Appellant's mother in hospital. That they then proceeded to Siaya Police Station from the hospital, made a report and recorded their statement. PW2 testified that she knows Patrick, the accused as a neighbour. During cross-examination PW2 stated that they are family friends and neighbours and that appellant used to visit them adding she did not witness the incident.

5. PW3 Simon Nyamwamba a clinical officer from Siaya testified that he had a P.3. form for one E A O aged 19 years, which P.3. was filled by Howard Okeyo, a clinical officer, who was previously working at Siaya District Hospital and since then transferred to Ugunja Ambira sub-district hospital. That he had worked with him for 2 years hence he was familiar with his handwriting and signature. He confirmed the P.3. form was filled by Howard Okeyo. He testified PW1 was issued with outpatient M. 15796/09 on 28.7.2009 after she reported to the hospital on allegation of having been raped by person known to her the same day around 2.30 – 3.00 p.m. He testified that PW1 on arrival at the hospital at 6.00 p.m. she was calm and had a white foul smelling inner pant which was not torn. On examination there was tenderness on the neck part, bilateral underwear tenderness and tenderness in the pubic region, upper arms especially the shoulders, tenderness of the cuff muscles which PW3 termed as three hours post trauma. He termed the degree of injury as harm. He stated that the vagina walls were normal, hymen was not there, no laceration but tender walls. That there was fresh blood in the vaginal walls. That laboratory and high vaginal swab done showed red blood cells. That spermatozoa, pregnancy and H.I.V. Tests were negative. He testified there was evidence of penetration and likely a maiden one. He produced P.3. form as exhibit 2 and medical treatment book as exhibit 1. 6. The appellant on being put on his defence opted to give sworn defence.

He stated he did not commit the offence facing him. He testified that on 28.7.2009 he was coming from ACK Church, Siaya where he was operating a cyber cafe. That at around 1300 hrs, he heard someone calling him from behind and noticed it was his former girlfriend E O O. She told him he should give her a phone she had lent him. He told her he had left it at his house where he used to stay with his mother. That as PW1 was busy to come for her phone later on, on another day they went for it at the appellant's house together and arrived at the home, entering through the back door. The appellant took her to the sitting room as he went to pick the phone. That they started talking about their relationship and then from there after which they proceeded to the bedroom. That she removed her clothes and inner pant and appellant removed his, put on a condom and they had protected sex at PW1's wish. That at around 4.00 p.m. PW1 told the appellant she was late going home and stated she wanted some money without stating its purpose. He told her to pass by his office which she did not do. That at around 5.30 p.m. the appellant

was called by his mother who told him he had raped. He was thereafter called by Cpl David, who arrested him, booked him, charged him and arraigned him in Court. He testified that before the sex encounter with PW1 she had complained of strange abdominal pains and suspected to have had her period.

7. The trial magistrate evaluated the prosecution's evidence and the appellant's defence, convicted the appellant for the offence of rape and sentenced him to ten (10) years imprisonment.

8. Aggrieved by the conviction and sentence the appellant lodged this appeal based on the following appeal:-

“1. The trial court erred in law and facts by allowing the evidence of the complainer PW1 that was not credible and consistent.

2. The trial court erred in law and facts by allowing the evidence of the medical practitioner who did not examine the complainant and without giving any reason as to the whereabouts of the doctor who did the examination.

3. The trial court erred in law by failing to observe article 50(2)(c) of the Kenyan Constitution which resulted to unfair trial thus made him confused in his defence.

4. The trial court erred in law and fact by convicting and sentencing in the same case which was not investigated and more so the investigating officer was deliberately not called to witness.

5. That he could not recall all that traversed during the trial and humbly prayed to be supplied with the proceedings to adduce more grounds.”

9. At the hearing of the appeal, the Appellant appeared in person while Mr. Ombati learned Prosecution Counsel appeared for the state.

10. This is the first appeal and as first appellate court, I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so I cannot comment on their demeanor. I am guided by the Court of Appeal decision of **Kiilu and Another V. 2 (2005) 1 KLR 174 where the Court of Appeal** held thus:-

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

11. The Appellant at the hearing of the appeal relied on the written submissions and sought to be heard orally as well. He started by amending his grounds of appeal to be as per his written submission, thus the conviction was against the weight of evidence adduced by the two prosecution witness and that his defence was not totally considered, that is to say that sexual act was by consent. He referred to **Section 42 of the Sexual Offences Act.**

The Appellant did not say that he was positively identified nor did he deny that there was penetration but insisted he did not commit any offence as the Sexual Act between himself and the complainant was consented by both.

12. Mr. Ombati learned State Counsel opposed the appeal urging that the appeal had no merits as there

is no dispute as regards identification as it is clear that PW1 and the appellant knew each other and the offence occurred during day time. That the appellant has no objection to the penetration and having sexual intercourse with PW1. He urged P.3. form, prosecution exhibit P2 confirmed there was penetration. He also relied on evidence of PW1 who testified that the Appellant pulled her to the bedroom, removed her trouser and pulled her pants, unzipped his trouser, removed his penis and entered her vagina. The PW3 testified the penetration was a maiden one. On the said lack of consent the learned state counsel relied on evidence of PW1 and PW3 to persuade this court that there was no consent at all.

13. In a case of rape, for successful prosecution the prosecution is required to prove the following ingredients of the offence of rape:-

(a) Identification of the offender.

(b) Penetration.

(c) Lack of consent.

14. In the instant case PW1 and the appellant knew each other for considerable time as neighbours. The offence took place during day time. PW1 was also a customer of the appellant for a period of over 2 months. Appellant used to visit the complainant's family. The Appellant testified he knew the complainant as his girlfriend and at the time of the offence they walked to appellant's home a distance of about 1 kilometre. He stated they had sex at his bed. I therefore find that identification of the appellant is not an issue for determination for both PW1 and the appellant knew each other. On issue of penetration PW1 testified that the appellant pulled his penis and entered it in her vagina and she felt pain. PW3 testified that PW1's vagina walls were normal, hymen was not there and there was fresh blood in the vaginal walls. He testified there was evidence of penetration and produced P.3 form as exhibit P 2. The appellant in his defence testified that they had protected sex with PW1. In view of the above penetration was proved to the required standard.

15. The only point for consideration is whether PW1 consented to have sex with the Appellant.

Section 42 of the Sexual offences Act defines consent as follows

“for the purposes of this act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice”

16. PW1 agreed to accompany the appellant to his house for sole purpose of collecting her phone and charger but not for sex. On arrival the appellant used delaying tactics to keep PW1 for longer time as she insisted that he should give her, the charger but instead started touching her breasts, thighs and mouth. That when PW1 told the appellant to leave her alone he pulled her to the bedroom, removed her trouser and pulled her pant down, the Appellant did not remove his trouser but only unzipped his trouser. PW1 tried to scream but no voice came out. Appellant removed his penis and inserted it in PW1's vagina. She screamed and he moved. She took her purse and left.

That she went and informed her mother and was taken to the hospital and later reported to the police station at Siaya. The acts of PW1 negated the Appellant's assertion that she consented to sexual act. She did not take part in the sex by choice but was forced and overpowered by the Appellant, that is why PW3 noted she had tenderness on the neck part, bilateral underwear, pubic region, shoulders and lower limbs of cuff muscles. That is why she told her mother immediately she went home followed by going to the hospital and reporting to the Police. A sexual consenting partner is never injured nor does she go about informing her mother, or going to the hospital and reporting to police. I do not find truth in the Appellant's allegation that PW1 consented to have sex. That if that was the case the appellant would not have pulled her to his bedroom, removed her trouser and pant, and opened his trouser's zip to insert his penis in PW1's vagina. This is not the way consenting sexual partners play sex. The complainant's sustained injuries on her body and private parts which does not happen to consenting partner. The appellant testified that even her mother called him and told him that PW1 was complaining he had raped

her. I find and hold the complainant herein did not consent or agree by choice to have sex with the Appellant nor did she have freedom to make that choice but she was raped.

17 On the appellant's defence, the trial court analyzed and evaluated the same. The trial Court which had the opportunity of seeing and hearing the testimony of the complainant believed her, thus she was forced to have sex with the Appellant on the material day without her consent.

I have now carefully considered the defence and note that the Appellant did not raise the defence of consent early enough nor build a defence of consent through cross-examination of the complainant on the issue of consenting to the sex. Her response and her evidence was consistent and unchallenged. I find the defence is nothing but an after thought. I reject the same.

18. The Appellant averred that he was not challenging the sentence. I have considered the sentence and I have found that the same is lawful. I shall therefore not interfere with the same.

20. The upshot is that the appeal is without merits and the same is dismissed.

DATED AT SIAYA THIS 24TH DAY OF MARCH, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

In the presence of:

Mr. Ombati for State

Appellant in person.

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akidae

J. A. MAKAU

JUDGE