REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 56 OF 2015

JOHN MWANGANGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

From original conviction and sentence in Criminal case No. 363 of 2014 of

the Senior Resident Magistrate's court at Kyuso- B.M. MARARO- (PM)

JUDGMENT

The appellant was charged in the subordinate court at Kyuso with two counts. Count one was for rape Contrary to Section 3(1)(a)(b) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 10th August 2014 at [Particulars Withheld] within Kitui County intentionally and unlawfully caused his penis to penetrate the vagina of A K K without her consent. Count two was for stealing from person contrary to section 279(a) of the Penal Code. The particulars of the offence were that on the same day and place stole a mobile phone make Nokia 1110 valued at Kshs 2,000/- the property of A K K from the said A K K.

He denied both offences. After a full trial he was convicted and sentenced to serve 10 years imprisonment on count one and one year imprisonment on count two, the two sentences to run concurrently.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal on the following grounds:-

1. The learned trial magistrate erred both in law and facts when he admitted prosecution evidence which was totally incorroborative.

2. The trial magistrate erred while convicting and sentencing him very severely without considering that the prosecuting relied on second person evidence as there were no other witnesses to confirm the crime.

3. The learned trial magistrate erred in convicting and sentencing him very severely without considering that the arresters gave statements of stealing in the occurrence book and later a case of rape was framed.

4. The trial magistrate erred when convicting and sentencing him without considering that the

prosecution never presented any of the members of public who gave the arresters the information to come and confirm the said information before the court.

5. The learned trial magistrate erred both in law and fact when he convicted and sentenced him without considering that his case was a frame up due to a broken relationship with the complainant as indicated in his defence which brought great enemity between the two.

6. The learned trial magistrate erred in convicting and sentencing him without considering that he was a first offender and without giving leniency in concluding the matter.

7. The learned trial magistrate erred when he concluded this case and handed down a harsh sentence without considering his defence which was not displaced at all.

8. The learned magistrate erred in law and fact by convicting and sentencing him very severely without considering that he was a young person who would be useful in future nation building.

During the trial, the prosecution called 4 witnesses. PWI was the complainant K K who testified that she was a house wife. That on 10th of August 2014 as she was going towards [Particulars Withheld] market at

5.00 Pm she met the appellant John, who told her that he had pursued her severally without success and on that day he would have sex with her. He then hit her and carried her upstream to the basin of a nearby river, removed her pants and raped her. He then took her bag and mobile phone. Later she saw him being thrown from a bar and told her story to the police and the appellant was arrested and her phone recovered. (At this point she was stood down in order to avail the P3 form.)

She was recalled on another date when she identified a Nokia telephone 1110 white in colour and a P3 form as well as treatment notes.

In cross examination, she stated that she used to see the appellant at the market but did not know his name. She denied having any business with the appellant and also denied that the appellant was a neighbour. She stated that she had heard that the appellant was not a good person. She denied saying that the culprit was one Musili. She stated that the appellant carried her for a distance of about 50 metres and that they didn't meet anybody in that process. She stated that the market was about 500 metres away from the scene and that people at the market could not hear her screams. She denied ever being the appellant's friend and emphasized that he had raped her. She admitted that both of them were taken to hospital the next day. She stated that she spent the night at the police station.

In reexamination, she stated that many people were called by the name Musili but maintained that it was the appellant who had raped her.

PW2 was Sergeant Ellias Munyi Joshua. It was his evidence that on 10th August 2014 while at [Particulars Withheld] market, they found the appellant being beaten by the public. They were told that he had stolen a mobile phone a white Nokia 1110. He stated that they recovered the phone and took it to Katse Police Station. The complainant claimed that she had been raped.

In cross examination he stated that they found the appellant having been beaten by a crowd and was about to be killed before they intervened. He stated that the complainant screamed. He further stated that the complainant identified her mobile phone and that they did not photograph the appellant as it was not necessary.

In reexamination he maintained that they recovered the complainants phone from the appellant. He said that the appellant was a habitual thief.

PW3 was Police Constable Michael Juma of Katse Police Station. It was his evidence that on 10th August 2014 while on patrol at [Particulars Withheld] market, he heard noise. Together with PW2 they

proceeded to the noisy place and found the appellant being beaten and people claimed that he had stolen. They recovered a white Nokia 1110 and took the appellant to Katse Police Station. The complainant then came and recoded her statement, and claimed that she had also been raped by the appellant.

In cross examination, he said that they were at the market at about 5.00 Pm and that the rape should have occurred at about 4.00 Pm. He stated that the complainant did not claim to have told anyone about the rape. He stated that the phone was recovered from the appellant's trouser pocket and that no photograph of the same was taken.

PW4 was Francis Saku a Clinical Officer from Kyuso Sub District Hospital. He produced a P3 form for the complainant K K filled by David Mbiti a colleague who was attending a seminar. From the entries in the P3 form, there was nothing un usual on the head and neck, chest and stomach, arms and legs of the complainant who was aged 45 years. Her genitalia was also normal but she had a foul smelling discharge and a lot of epithelial cells in her urine. There was thus diagnosed urinary infection but which was not necessarily from a sexually transmitted disease. He produced the P3 form and the treatment notes as exhibit for the complainant. That was the end of the prosecution evidence.

When put on his defence, the appellant gave sworn testimony. He said that he was a car washer at Katse. That on 8th of August 2014 he left home, went to work when K K the complainant came to where he was. He used to live with her and asked him for Kshs 2,000/= to enable her go to where her daughter was married but he did not have the money. He told her to find somewhere to borrow the same and she got annoyed.

He continued working and later went home. The next day he called her to tell her that he had got some money but she did not pick his call. He did his work and waited for his boss who did not come that day. He went home and the next Sunday he was paid by his boss and went and took some alcohol. When he got drunk he heard the voice of Ellias Munyi and a Police Officer Juma Michael. He disagreed with a customer and he was removed from the bar by the police and met the complainant PWI who claimed that he beat her. At the police station, she claimed that he raped her which was a lie.

According to him, the complainant claimed that she was beaten but could not state his name. She also said that she was defiled by Musili and later changed that name to John. He complained that none of the members of public who pushed him out of the bar, was called to testify and that the doctor did not find any evidence of rape. He stated that the charge was malicious.

In cross examination, he maintained that the complainant said that she was raped by Musili. He agreed that police officers said that his street name was Musili, and agreed that people had nicknames.

From the above evidence the learned magistrate found that the prosecution had proved their case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced the appellant.

This is a first appeal. As a first appellate court I have to start by reminding myself that I am duty bound to evaluate the evidence on record and come to my own conclusion and inferences see the case of ***Okeno -vs- Republic (1972) EA 32***.

I have reevaluated the evidence on record. The appellant was convicted of two counts. He was convicted of rape. He was also convicted of stealing from a person.

The burden is always on the prosecution to prove a criminal case against an accused person beyond reasonable doubt. The accused does not have a burden to prove his innocence. He can only raise doubts in the prosecution evidence. See the case of ***WOOLMINGTON –VS- DPP (1932)AC 462***. Once the court is satisfied that the prosecution has not proved the case beyond any reasonable doubt, it has an obligation to acquit an accused person.

With regard to the offence of rape, the court found that the appellant and PWI knew each other well. The appellant infact claimed that they previously lived together with the complainant for sometime as lovers

and then disagreed. He further stated that the complainant asked for money from him, ie Kshs 2,000/- and his failure to give her that money made her frame him with the offence. The complainant on the other hand stated that she used to see the appellant at the [Particulars Withheld] market but that she had no relationship with him, nor did she know his actual names and what he did. The totality of the evidence of the complainant and that of the appellant in my view, is that physically the two knew each other, whether or not they had an intimate relationship.

The rape incidence is said to have occurred in broad daylight around 4.00 Pm or slight thereafter. Since it was during the day, visibility must have been clear, thus there was no possibility of mistaken identity. The offence of rape is a serious offence. The complainant does not seem to have reported the rape incidence to anybody before she arrived at the police station. The medical examination was said, even by the complainant herself, to have been carried out on both herself and the appellant. However the medical evidence produced only touched on the complainant. No DNA was taken to confirm that indeed there was sexual intercourse between the appellant and the complainant though the appellant was said to have been arrested just about an hour after the incident. In my view the prosecution created a gap in the prosecution evidence with regard to the proof of rape. There is a doubt in my mind as to whether indeed the appellant raped the complainant. The benefit of that doubt has to be given to the appellant and I do so. In effect the conviction for rape cannot be sustained.

With respect to the conviction for the offence of theft from a person, there is also a doubt in my mind. First of all there is no evidence that the complainant reported the incident and that the public beat up the appellant were doing so because of a complaint from the complainant. Infact, according to her own evidence, the complainant merely saw the appellant being evicted from a bar, which tallies with the evidence of the defence. The police did not mention of a bar in the vicinity. They merely talked about the [Particulars Withheld] market.

The Nokia telephone was not recovered by the police from the appellant. It was the members of the public who are said to have recovered the Nokia telephone. Curiously none of the members of the public were called to testify and explain why they arrested the appellant and were about to kill him, and how they recovered the Nokia telephone from where. No explanation was given as to why none of these crucial witnesses was called to testify. This default by the prosecution, in my view created a gap with respect to the proof of the offence of theft of mobile phone from a person. As was said in the case of ***Bukenya -vs- Uganda,(1972)EA 549*** where evidence of crucial witnesses is not called by the prosecution and the prosecution case is weak, the court is entitled to make an adverse inference regarding the proof of the prosecution case.

In my view though the ownership of the mobile phone is not in dispute, it was crucial for the prosecution to establish that it was indeed found in possession of the appellant a short while after the alleged theft incident. Such possession of the phone by the appellant would only be established through the evidence of at least one of the members of the public who arrested him. The failure of the prosecution to call any of these witnesses to testify in court resulted in their failure to prove the charge of theft from person it was not established that the mobile phone was found on him. The conviction of the appellant on theft from person cannot thus stand. The conviction has thus to be quashed.

The success of this appeal has largely come about due to poor investigations and poor prosecution of the case. However as the burden in a criminal case is on the prosecution to prove their case against an accused person beyond any reasonable doubt, I have a legal duty to find the accused innocent if the prosecution fails to discharge it burden. The sentences will also have to be set aside as a consequence of the convictions being quashed.

In the result, I allow the appeal quash the convictions and set aside the respective sentences imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 22nd April 2016.

GEORGE DULU

JUDGE