REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

H.C.CRIMINAL APPEAL NO.68 OF 2012

WILLINGTONE MUHANJI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case No.1181 of 2009 in the Chief Magistrate's Court at Kakamega (R. Nyakundi CM))

JUDGMENT

1. The appellant, **Willingtone Muhanji** was charged before the Chief Magistrate's Court at Kakamega with the offence of rape contrary to **section 3(1)(a)** of the Sexual Offences Act, (No.3), of 2006, particulars being that on the 19th day of September, 2009, in Kakamega South District within Western Province unlawfully and intentionally inserted his genital organ namely penis into the female organ namely vagina of **J.A**. without her consent.

2. The appellant faced an alternative charge of indecent act with an adult contrary to section 11(A) of the same Act, with particulars stating that on the 19th day of September, 2009 in the same area the appellant unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of JA, a woman aged 24 years.

3. The appellant pleaded not guilty both to the main count and the alternative and upon a full trial in which 4 prosecution witnesses testified as well as the appellant in his defence, the trial court returned a guilty verdict and sentenced the appellant to ten (10) years imprisonment.

4. Being aggrieved, the appellant lodged an appeal to this Court against both conviction and sentence and raised 3 grounds of appeal which can be summarised as follows:-

1) That the learned trial magistrate erred in law by failing to evaluate the entire evidence and find that the same was not watertight for lack of proper supporting medical evidence on samples from both the complainant PW1 and the appellant,

2) That the learned trial magistrate erred in law and fact in placing reliance on evidence of recognition; and

3) That the learned trial magistrate erred in convicting the appellant against the weight of evidence and sentencing him to ten (10) years imprisonment.

And sought to have his appeal allowed, conviction quashed and sentence set aside

5. During the hearing of the appeal the appellant was unrepresented while Mr Oroni appeared for the State. The appellant relied on his written submissions in disposing of his appeal. The appellant submitted in those written submissions as far as can be gleaned, that PW1, the complainant, had testified that she did not scream and the appellant felt that there were no sufficient grounds for failing to raise an alarm. He also submitted that the complainant did not prove that the slippers left behind belonged to him. He further took issue with the prosecution for failing to adduce evidence to show that the alleged sexually transmitted infection was caused by him. He referred the Court to contradictions in the evidence of PW1 where she had testified that she was treated at Kakamega Provincial General Hospital as opposed to the testimony of PW3, the clinical officer, who told the court that PW1 was attended at Shikulu hospital. He also pointed out that whereas PW1 said the offence was committed at 10 pm, PW2 said it was at 10 am.

6. The appellant further took issue with PW1's evidence on the identity of the appellant, saying it was doubtful and raised questions on why PW2 did not raise an alarm if PW1, the complainant, had been prevented to do so by her attackers. The appellant again blamed the prosecution for failure to carry out analysis on the appellant's blood samples and specimen found on the complaint's genital organ to ascertain the identity of her attacker.

7. Mr Oroni opposed the appeal and submitted that the complainant, PW1, saw the appellant and so did PW2 and both recognised him. According to Mr Oroni, PW1 and PW2 testified that the appellant was well known to them, a person who had worked with PW1's husband for long. He submitted that the issue of identification could not arise because they knew the appellant and he is the person who committed the offence. In the learned counsel's view, the evidence of PW1 was corroborated by that of PW3 the clinical officer, who testified that the complainant was examined and it was confirmed that indeed she had been raped. He concluded by saying that the evidence of prosecution witnesses had not been shaken during cross examination and urged the court to dismiss the appeal, uphold conviction and affirm the sentence.

8. This being a first appeal, this Court has a duty to look at the evidence afresh, evaluate and analyse it and draw its own conclusion on whether the conviction was proper, but bear in mind that it neither saw nor heard the witnesses who testified before the trial court and give due allowance for that. (see **Okeno v Republic** [1972] EA 32.). This duty was well stated in the case of **Isaac Ng'ng'a Kahiga & Another v Republic** [2006] eKLR, where the Court of Appeal stated:-

"A court hearing a first appeal (i.e. a first appellate court) also has to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour so the first appellate court would give allowance of the same."

9. What then was the evidence before the trial court? **PW1, J.A.** testified that on 19th September, 2009 at about 10.00 pm she was resting in her house when robbers entered the house and called her husband's name but who was not in the house. They had pushed and broken the door to gain access into the house. She had lit a lamp in the house and was able to see and recognise the appellant, who wore a long trouser, a person who used to work with her husband and used to come to her house. She raised an alarm but nobody came to her rescue because of heavy rain. The appellant got hold of her neck to stop her from screaming and demanded money from her, which she did not have. He pushed her onto the bed, tone her underwear, unzipped his trousers and pushed his penis into her vagina. The other members of the gang watched over as the appellant raped her. When the appellant was done, they left, leaving behind the appellant's slippers.

10. PW1 went to report the incident to the Administration Police Officers who referred her to Mukumu Hospital and on being examined, she was found to have contracted a sexually transmitted infection. She was at Kakamega General Hospital for treatment. She said she knew the appellant well, a person who used to work with her husband. In cross-examination, PW1

maintained that it was the appellant who entered the house first, put out the lamp and raped her.

11. **PW2, P.L.,** a minor of 14 years, testified that on 19th September, 2009 at about 10.00 a.m, he had just finished doing his homework when the door was opened and people entered into the house. He saw the appellant, a person known to him enter the house, moved to where the lamp was and put it off. The appellant was known to him because he used to work with his uncle. He got hold of PW1 and directed the other men to push PW2 to a corner. The appellant pushed PW1 on to a bed and raped her and when he was through, they left. In cross examination the witness said he saw the appellant hold PW1 and demanded money. He also told the court that the incident happened at night and the appellant removed children from the bed before raping PW1.

12. The next witness was PW3, **Duncan Mugo**, a clinical officer based at Shikulu General Hospital, Kakamega. He produced a P3 form which had been filled by his colleague **Wasike** who had seen the complainant who had been sexually assaulted. PW1 was found to have spermatozoa in her genitalia, and also had epithelia cells. The P3 form was signed on 29th September, 2009 and was produced as PEx4, while post rape form signed on 21st September, 2009 was produced as PEx5. When cross examined the witness told the court that vaginal swap done on PW1 showed the presence of **epithelia cells** which was a sign of penetration.

13. The last witness, PW4 No.67411 CPC **Thomas Obonyo,** told the court that the complainant made a report of rape and was referred for medical examination. She said the suspect was known to her. They recorded statements from witnesses and gathered exhibits in the form of an underwear and slippers. He produced the innerwear and slippers as PEx 1 and 2 respectively. In cross examination the witness told the court that investigations showed that the slippers belonged to the appellant.

14. Put on his defence, the appellant gave unsworn statement, and said that on 15th September, 2009, he was working with the complainant's husband and sought a one week leave, and went to collect his personal cloths. John, husband to the complainant was present as well as his mother. His cloths were in that home. He explained his purpose of going there to the complainant but some of his cloths had been taken by the complainant's husband. However his sweater was with the complainant. In the evening he saw the complainant with her husband, and that is when he learnt from PW1's husband that some people wanted to rape his wife. He denied committing the offence and said that the report against him was false. He maintained that he was arrested over a crime he did not commit. Following that evidence, the learned trial magistrate convicted the appellant on the main count of rape and sentenced him to 10 years imprisonment provoking this appeal.

15. I will first dispose of the appellants submissions on contradictions in the evidence before the trial court. The appellant has taken issue with the prosecution's case that the complainant failed to scream, and if she could not, PW2 should have screamed. PW1 told the court that she screamed but the appellant held her by the neck to prevent her from screaming. PW2 also told the court that he saw the appellant hold PW1 by the neck. It should also be appreciated that the attackers were more than one and they threatened both PW1 and PW2. To my mind, that does not help the appellant. PW1 said she screamed but was held by the neck to stop her, and PW2 confirmed it.

16. The appellant has also attacked witness testimonies saying that they were contradictory. He pointed out the evidence of PW1 who told the court that the attack took place at 10 pm, while PW2 said it was at 10 am. I note however that PW2 said that he had just finished doing his home work using a lamp when the attackers struck. He also told the court, just as PW1 did, that the appellant walked to where the lamp was and put it off. With all respect, this could not have been at 10 am, but must have been at night. In any case in cross examination PW2 said it was at night.

17. In trials, there will occasionally be contradictions or discrepancies in evidence and unless they are significant or fundamental as to affect the evidential value, caused prejudice or led to a

miscarriage of justice, such contradictions or discrepancies may safely be ignored. In the case of **Joseph Maina Mwangi v Republic** [2000] eKLR, the Court of Appeal had the following to say on that point:-

> **"In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by *section 382* of the Criminal Procedure Code *viz* whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."**

18. In my view, the contradictions alluded to by the appellant, including where the complainant was treated or examined, are not major. She said she went for treatment at Kakamega and PW3 said the P3 form was filled at Shikulu. If that be a discrepancy, it did not affect the fact of sexual attack and therefore is not a fundamental discrepancy which could have caused prejudice to the appellant or affected his conviction.

19. I will next deal with the second ground of appeal, which I think, is critical in this appeal. The appellant has faulted the learned trial magistrate for placing reliance on the evidence of recognition saying he was not properly identified. PW1 testified that she was able to recognise the appellant by means of light from a lamp, when he and other members of his gang entered the house. She told the court that it was the appellant who held her and that he was well known to her being a person who used to work with her husband and frequently visited their home. PW2 also testified that he saw the appellant enter the house and recognised him, a person who was also known to him. He told the court that he had just finished doing his homework and that a lamp was burning. He also told the court that it was the appellant who put out the lamp. The appellant in his defence confirmed that he used to go to PW1's home and he had even left his cloths there. He therefore did not deny that both PW1 and PW2 knew him to the point of recognising him.

20. It is possible for a person who has been frequenting a place and is well known there to be recognised even in situations that may be difficult but in cases involving identification by recognition, a court must pay special attention to the inherent dangers that there is a possibility of error, and ensure that according to the evidence, there was no such error. On this issue, the Court of Appeal stated in the case of **Cleophas Otieno Wamunga v Republic Criminal** [1989] KLR 424:-

> **"Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance of the correctness of the identification."**

That point was again addressed, in the case of **Karanja & another v Republic** [2004] 2 KLR where the Court of Appeal, after quoting **Wamunga's** case (supra) said:-

> **"Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognise someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made."**

21. The legal position arising from the above decisions is that although identification by recognition is more safer, Courts should approach the evidence of identification by recognition with caution because even in situations where a witness may purport to identify an accused person known to him for long, there is still a likelihood of mistakes and take that into account before convicting the accused.

22. The evidence of PW1 and PW2 was that they knew the appellant and recognised him that night through light from a lamp. The appellant held PW1 and according to the two witnesses, had sex with PW1 while directing members of his group. In his defence the appellant although vague

on the dates, said that he took seven days leave on 15th September, 2009 and went to collect his cloths, which he had left at PW1's home. This confirms the fact that he went to that home frequently and therefore was a person well known to both PW1 and PW2. The appellant also left behind his slippers. There is credible evidence that the appellant went to where the lamp was and put it out which created an opportunity for PW1 and PW2 to see and identify him through recognition, I am satisfied, as the learned trial magistrate was, that the appellant was properly identified by recognition, being a person well know to the witnesses prior to the attack. On this I find support in the decision by the Court of Appeal in the case of **Reuben Taabu Anjononi & 2 others v Republic** [1980] eKLR that:-

"Recognition of an assailant is more satisfactory more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

23. The other point of complaint raised by the appellant was that the trial court did not evaluate the evidence and conclude that it was not water tight for lack of medical evidence on samples from both the complainant (PW1) and the appellant. The appellant's argument, as I understand it, is that there should have been a medical examination on his blood samples against the spermatozoa found on PW1. The appellant was charged with rape an offence under the Sexual Offences Act. For the offence of rape to be proved under that Act, the prosecution is required to establish the following elements:-

a) The intentional and unlawful penetration of the genital organ of a person by genital organ of another.

b) The absence of consent or

c) Where consent is obtained by means of threat or intimidation of any kind.

24. There was credible evidence before the trial court that PW1 was sexually assaulted by the appellant who forced his genital organ (penis) into her genital organ (vagina). PW1 made a report, and when examined, she was found to have been raped. From the evidence of PW3 the clinical officer, after a swap was done on PW1, there was the presence of EIPITHELEAL CELLS. The presence of spermatozoa was detected and this witness told the court that the presence of spermatozoa was evidence of penetration of the vagina. The P3 form was produced as PEx4 and post rape care form was also produced as PEx5. The conclusion arrived at by the clinical officer, was that indeed there was rape because there was penetration.

25. The prosecution was also required to establish that there was no consent. PW1 told the court that the appellant held her by the neck, pushed her on the bed, tore her underwear, unzipped his trousers and inserted his penis into her vagina. The act of holding PW1 by the neck, tearing her under wear and pinning her on the bed to achieve penetration cannot be acts achieved by consent. The torn underwear was produced in court as an exhibit. PW2 also told the court that he witnessed these violent acts by the appellant against PW1. With the above evidence, the prosecution established that indeed there was no consent.

26. I have perused the record and the judgment by the learned trial magistrate and I am satisfied that he evaluated the evidence of both the prosecution and the defence and rightly concluded as he did, that the appellant had committed the offence of rape.

27. The appellant raised the issue of lack of medical examination on the spermatozoa found on PW1 and his blood samples to confirm whether he was the sexual attacker. PW1 testified that she saw her attack and recognised him. PW2 also witnessed the attack on PW1, and the medical evidence tendered in court confirmed that indeed PW1 had been sexually assaulted. In my view, I do not think medical examination on the appellant was necessary. The offence of rape had been proved and the attacker identified. On this point, courts have held that rape is proved by evidence

and nothing else, and in the case of **Kassim Ali v Republic** [2006] eKLR the Court stated as follows:-

"[The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim by circumstantial evidence."

A similar position was taken in the case of **AML v Republic [**2012] eKLR where the court stated:-

> **"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**

28. That issue arose again for consideration in the case of **Fappyton Mutuku Ngui v Republic** [2014] eKLR where it was argued that there was no tangible medical evidence, in the form of a DNA examination, to connect the appellant with the offence of defilement. The Court of Appeal stated that such evidence was not necessary, and in any event, the trial court had found that there was sufficient **medical evidence in support of the complainant's testimony which was trustworthy as to the person who had defiled her.**

29. Going by the evidence tendered by the prosecution before the trial court, it was not necessary to subject the spermatozoa found on PW1's vagina and samples from the appellant to a medical examination. The evidence of PW1, PW2 and the medical evidence by PW3 was sufficient to prove the fact of rape, and the appellant was identified as the attacker. I do not therefore find merit in the appellant's argument that he should have been subjected to a medical examination.

30. I have carefully perused the record of the trial court and evaluated the evidence myself to draw my own conclusion on it. I have also not found any evidence of violation of the appellant's rights under **Articles 49** and **50** of the Constitution as alleged in ground 3 of the appeal. The appellant did not make any submissions either to support those allegations. Regarding sentence, this being a charge of rape, the minimum sentence prescribed by law is ten years, and the learned trial magistrate meted the legally permitted sentence.

30. For the foregoing reasons I find that this appeal has no merit and it is hereby dismissed.

Dated and delivered at Kakamega this 21st day of April 2016.

E.C. MWITA

JUDGE