REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 323 OF 2013

JOSHUA MUSYIMI KAVEMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is an appeal from the decision of the trial court in criminal case no. 150 of 2012 at Principal Magistrate Court, Kilungu (Hon. H. Nyakweba, PM) by which the appellant was on 6th December 2012 convicted of rape contrary to section 3 (1) (a) as read with subsection (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for ten (10) years. The appellant was charged that he had on 28th October 2012 in Kilungu District within Makueni County unlawfully and intentionally caused his penis to penetrate the vagina of E K M without her consent.

The prosecution case

2. The prosecution case is best summed in the testimony of the complainant as follows:

> *"**PW1: (FEMALE ADULT SWORN (through intermediary) STATES IN KIKAMBA***
>
> *I am E. I do not know any other name. I attend school at [particulars withheld] in std.1. I know the accused person in the dock. His name is Kaselu. I was sent by Sam's mother to go across to the shamba and scare away monkeys. She also told me that if I felt hungry, I get food from the kitchen. I went to the shamba and sat under an avocado shade. Then somebody touched me from the back. I turned and saw it was the accused person in the dock. He told me to accompany him somewhere but I refused. He grabbed my hand and dragged me near a guava tree. He then removed his pair of long trousers then removed his underpant. He then wrestled me down. He then removed my underpants and inserted his genital organ into mine and penetrated. I screamed and attracted Carol and Kioko who rushed to the scene. I felt pain when he inserted his genital organ into mine and I bled therefrom. I was later taken to hospital and treated. I told Mumo, Kioko, Carol and those who came."*

The defence

3. When put on his defence the defendant chose to remain silent.

Submissions

For the Appellant

4. The appellant's counsel M/S P. M. Mutuku & Company Advocates filed written submissions dated 20th November 2015 urging two broad cluster grounds based on Amended Petition of Appeal dated 20th January 2015 as follows:

> *a. That the learned magistrate erred in law and fact when he convicted the accused on a defective charge and conducted the trial in a manner that amounted to a mistrial (Grounds 2, 2A and 3);*
>
> *b. That the learned magistrate erred in law and fact when he relied on irrelevant and non [persuasive] evidence of the prosecution witnesses; and*
>
> *c. The learned magistrate erred in law and fact when he meted an illegal sentence against the appellant.*

5. On the first ground, the appellant complained that the record at plea taking on 5/11/2012 only showed interpretation 'English/Swa/Kamba' without indicating the language to which the charge was put to the appellant and whether the contents of the charge were explained to the accused person. It was urged that the plea taking in the trial court contravened the provisions of Article 50 (2) (b) and (3) of the Constitution on the right to be informed of a charge in a language that the person understands and section 207 of the Criminal Procedure Code on procedure for plea taking, citing ***Adan v. R*** (1973) EA 445. Pointing out that the appellant was a Mkamba and that the proceedings on the evidence of PW4, PW5 and PW6 were taken in Kiswahili, the appellant's counsel pose a question whether the appellant understood Kiswahili language and relied on section 198(1) of the Criminal Procedure Code on the right of interpretation in case of evidence given in a language that an accused does not understand. Finally it was contended that the provisions of section 211 of the Criminal Procedure Code on the different modes of presenting his defence were not explained to the appellant 'to ensure that he understood what was required of him.'

6. As regards the evidence of prosecution witnesses, the appellant's counsel submission in its entirety was as follows:

> *"**Ground 3. The learned Magistrate erred in law and fact when he over relied on the irreverent and non pursuance (sic) evidence of the prosecution witnesses.***
>
> *Your ladyship, the evidence adduced by PW1 and PW3 raises controversy as to the correct particulars of the accused person. PW1 in her evidence referred to the accused person as "Kaselu". Thereafter PW3 referred to the accused as "Spo", stating that Spo is Timothy Wambua. These names were alluded to refer to one and the same person, the accused herein. However, no evidence was adduced to prove this allegation. The trial magistrate did not enquire further to ascertain the truth and determine this allegation."*

7. On the sentence, the appellant contended that a sentence of imprisonment for ten years was excessive for a first offender.

For the Respondent

8. For the DPP, Mr. Cliff Machogu filed written submissions dated 4th February 2016. In response to the ground of appeal on the language of the proceedings, the learned Prosecution Counsel it contended that the appellant understood and took actively participated the proceedings at the trial by cross-examining witnesses and responding to various application, and Counsel relied on the court of Appeal decision in ***Moses Mohamed Fadhili v. R*** (2014) eKLR which held that-

> ***"For the court to nullify proceedings on account of lack of language used during trial, it should***

be clear from the record that the accused did not at all understand what went on during his trial."

9. As regards proof of the charge to the required standard of beyond reasonable doubt, the DPP urged that the incident occurred during the day with sufficient light and the complainant (PW1) had recognized her assailant as the appellant who was well known to her being a neighbor as 'Kaselu' and that her evidence of recognition (citing ***John Mbuvi Kimweli v R*** 2014) eKLR) was more reliable than mere identification of a stranger and was corroborated by the evidence of PW3, a neighbor and PW5, the clinical officer who examined the complainant and found evidence of laceration on vagina wall.

10. On the sentence, the DPP submitted that the imprisonment for ten (10) years was lawful minimum sentence for rape under section 3 (3) of the Sexual Offences Act.

Determination

Plea taking

11. The Court of Appeal for Eastern Africa in ***Adan v. R*** (1973) EA 445 set out the procedure for plea taking where it held as follows:

"**Held:**

i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

iv. If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

v. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

12. In ***Rodgers Kipruto Kiplagat v. R*** (2015) eKLR where Kimondo, J. applied ***Adan v. R*** in considering the procedure for plea taking in a case of plea of guilty where there was multiplicity of languages used, and held:

"The multiplicity of languages used in the present case; the claims by the appellant that he never understood the proceedings; and the failure to recognize his qualified plea all cast a long shadow of doubt on the plea of guilt. I find in the end that the plea was unequivocal. It follows as a corollary that the conviction was unsafe. I would accordingly set aside the conviction and sentence."

13. Unlike in ***Rodgers Kipruto Kiplagat v. R.***, supra, the accused (appellant) herein pleaded not guilty to the charged and had a full trial of his case conducted to conviction. It would appear that in brief the court complied with section 207 of the CPC and the decision in ***Adan v. R*** as it records that ***'the substance of the charge and every element thereof has been stated by the court to the accused person, in the language that he understands who being asked whether he admits or denies the truth of charge replies: Not true.***' The authority of ***Adan v. R*** is clearly not applicable in this case, although the record of the trial indicates compliance therewith. No prejudice was shown to have been suffered by the appellant in the manner of plea taking recorded merely for failure to state the language that the charge was put to the accused.

Language of the Proceedings

14. The issue of the language of the proceedings and the question whether the accused understood the language is now governed by authority of the Court of Appeal as observed by the Court in ***Moses Mohamed Fadhili v. R,*** supra. The court said:

"[T]he law [as to the language of proceedings and the ability of the accused to understand the proceedings] is this:-

> ***'For the Court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not understand what went on during the trial.'*** See *George Mbugua Thiongo v. R,* Criminal No. 302 of 2007.

Again in the case of *David Njuguna Wairimu v. R,* (2010) eKLR Criminal Appeal No. 28 of 2009 it was stated, dealing with issue of language,

> ***'The record clearly reflects that the appellant fully participated in the proceedings, asked questions in cross-examination, himself gave evidence in his defence.'"***

15. It was noted that the PW1, PW2 and PW3 testified in Kikamba language, which the appellant's counsel concedes is the appellant's language and PW4, PW5 and PW6 testified in Kiswahili language. Upon considering the record of the trial court in this matter, I am not convinced that the appellant was in way inhibited by the use of the Kiswahili language from understanding the proceedings on his trial. Indeed, the record shows that the appellant fully participated in the trial and cross-examined the prosecution witnesses as shown in the proceedings on the cross-examination on all the witnesses as follows:

> "**PW1**
>
> **Cross- examination by accused** – You came alone and found me alone. I saw you clearly.
>
> **PW2**
>
> **Cross-examination by accused** – I did not see you at the scene. I was told by E that you are the one who raped her. I did not raise any alarm.
>
> **PW3**
>
> **Cross-examination by accused** – E did not raise an alarm when you defiled her. E is epileptic and is incoherent in her speech. I did not see you commit the offence because I was in church. You were seen by Grace Mumo Mutuku committing this offence. You came when I sent for you. You acknowledged knowing E. The under pant that E was wearing is not an exhibit. I did not surrender it to the police. I however took it to the hospital where E was examined. The officer who examined E observed this under pant. I observed E's under pant which was blood soaked. I observed her body but did not see anywhere where the blood on the under pant might have oozed from.
>
> **PW4**
>
> **Cross –examination by accused** – I re-arrested you after being brought to the post by members of the public. You were then escorted to Kilome police station.
>
> **PW5**
>
> **Cross – examination by accused** – You were not brought to my facility. I examined E K and saw a whitish discharge from her genital organ. I found bruises on her vaginal area. According to the history, she was defiled by a known person.

PW6

Cross – examination by accused – You were brought to the station on 29.10.2012. I observed E when she was first brought to the station. I visited the scene of crime and found it was in the bush and growing grass. There was no shamba around."

16. It was clear that the Court was meticulous in setting out to the appellant with interpretation being shown as English/Swahili/Kikamba the options for presenting his defence in accordance with section 211 of the CPC and the accused chose to remain silent, as he was entitled under the Constitution and the law.

*"**Cr. Case No. 150 of 2012 (Principal Magistrate's Court at Kilungu)***

Proceedings by Hon. H. Nyakweba - PM

3/10/2013

Before Hon. H. Nyakweba (Mr)P.M

Prosecutor – P/P Muasya

Court Clerk – Makumi

Inter: Eng/Swa/Kamba

Accused – Present

***COURT** – Upon carefully going through the evidence adduced, I am of the opinion that the prosecution has established a case sufficiently to require the accused person being put on his defence.*

H.NYAKWEBA

P.M.

***COURT** – The accused person is charged with the offence of rape contrary to Section 3(1) (a) (3) of the Sexual Offences Act 2006.*

The particulars are that on 28/10/2012 in Kilungu District of Makueni County unlawfully and intentionally caused his penis to penetrate the vagina of E K M without her consent.

There are three options on how the accused person may elect to defend himself under Section 211 CPC.

i. ***He can offer evidence on oath from the witness box and be cross-examined;***

ii. ***He can make a statement not on oath from the dock and will not be cross-examined;***

iii. ***He can remain silent and wait for the judgment of the court.***

In all the three options he can call witnesses.

H. NYAKWEBA

P.M.

***ACCUSED** – I will remain silent and wait for the judgment of the court. I will not call any witness.*

H. NYAKWEBA

P.M.

COURT – *Judgment on 1/11/2013.*

H. NYAKWEBA

P.M.

6/11/2013"

Proof beyond reasonable doubt

17. There was evidence that the complaint PW1, PW2 and PW3 knew the appellant as a neighbour in the village and there can never be any question of identification. Apart from referring to the appellant by name Kaselu, the complainant also testified that she knew him 'the accused in the dock' and that he was the assailant, and on cross-examination she maintained that 'you came alone and found me alone. I saw you clearly.' PW2 confirmed that she saw the complainant coming from the shamba crying and the complainant told her that 'the accused person in the dock had dragged her into the bush under a guava tree, undressed her and lied on her and inserted his organ into hers.' PW3, the grandmother of the complainant, testified that the complainant had told her that the accused, whom she called 'Spo' had defiled her. All the three witnesses identified the appellant as the person the complainant saw and said had defiled her under the guava tree. There was no question despite use of different names as to the person whom the complainant saw defiling her and there was no question of wanting circumstances of identification and recognition of the appellant. PW5 confirmed that there was no penetration although there were lacerations on the vaginal wall. Without penetration, the offence of rape is not proved but there is proved an offence of attempted rape.

CONCLUSION

18. There was evidence of attempted rape and I agree with the trial court as to its application of section 184 of the CPC, and consequently find no merit in the appeal which is hereby dismissed.

ORDERS

19. Accordingly, for the reasons set out above, the appellant's Amended Petition of Appeal herein dated 20th November 2015 is dismissed.

DATED AND DELIVERED THIS 26TH DAY OF MAY 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of**: -**

Miss Mbuvi for the Appellant

Ms. Saoli for the Respondent

Mr. Moruri - Court Assistant.