REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL 213 OF 2014

ERASTUS WAKI KIBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. L. Simiyu SRM

in Criminal Case No. 83 of 2013 delivered on 7th June 2013

at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was charged with the offence of rape contrary to section 3(1) as read together with subsection 3(3) of the Sexual Offences Act. The particulars of the offence were that on the 25th day of October 2012, at Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M K.

In the alternative the Appellant was charged with the offence of committing an indecent Act with an adult contrary to section 11(b) of the Sexual Offences Act. The particulars of the offence were that on the 25th day of October 2012, at Machakos County, the Appellant unlawfully and indecently touched the private parts (vagina) of M K using his penis.

The Appellant was first arraigned in court on 22nd January 2013 and he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced to ten (10) years imprisonment for the main charge.

The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The main grounds in his Petition of Appeal dated 13th November 2014 as amended on 25th March 2015 and filed in Court on 31st March 2015. The grounds are that the trial magistrate erred in law and fact by relying on uncorroborated evidence of the complainant; by finding that the evidence adduced by the prosecution was sufficient to convict the Appellant; by failing to appreciate that there was contradictory evidence by PW1 and PW3 on whether the complainant had taken a bath before going to hospital; by giving weight to medical examination that did not link the Appellant to the crime as no samples in evidence were taken from the Appellant as required by Section 36 (1) of the Sexual Offences Act; and by failing to consider the defence by the Appellant.

The Appellant's learned counsel, J.M. Mutua Advocates filed written submissions dated 26th February 2016 upon direction by the Court. It was argued therein that the testimonies of PW3 and PW1 were full of inconsistencies, and that the trial Court should not have taken the evidence of the complainant as the truth. It was stated that PW4 examined the complainant 4 hours after the incident and there were no injuries found on her to indicate an attack. It was also argued that her testimony that the Appellant had ejaculated on her thigh was a cover up, since the examination by the clinical officers indicated that no spermatozoa was found on her. The learned counsel submitted that there was thus no proof of penetration and reliance was placed on the decision in **Abduba Galan Wako vs Republic, (2013) eKLR** in this regard.

The Appellant also questioned why one Nico was never brought in as a witness. Finally it was stated that the lack of corroboration on vital facts confirmed that the offence was not committed by the Appellant, and that the offence was not proven beyond reasonable doubt. The decisions in **Edwin Nyandieka Omweri vs Republic, (2015) eKLR** and **Edwin Otieno Onyango vs Republic, (2012) eKLR**. were cited in this regard.

Rita Rono, the learned prosecution counsel, filed submissions dated 21st March 2016 in opposition to the appeal. It was submitted therein that the charge against the Appellant was proved beyond reasonable doubt. It was stated that the complainant knew the Appellant very well since they had attended the same school. Further, that the Appellant was armed with a panga when he accosted her, and that the testimony of PW1 was enough to convict the Appellant without the need of corroboration.

It was submitted further that PW3 could not ascertain whether the complainant had been raped since she was not a virgin, and the Appellant had ejaculated on her thighs. Reliance was placed on the decision in **Daudi Hassan Molu vs Republic, Criminal Appeal No. 166 of 2011** where the court held that whether rape has been committed is a question of fact not merely that of scientific proof. On the issue of arrest it was submitted that according to the testimony of PW4, he confirmed to have received the report of rape on 25th October and first saw the Appellant on 21st January after he had been arrested by an AP from Yuthui.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The prosecution called four witnesses. The complainant, M K M (PW1), testified that she knew the Appellant as they were school mates and he was a class ahead of her. She narrated the events of 25th October 2012 when the offence of rape against her was committed by the Appellant. PW2 was AMK, who stated that she was a domestic worker at the complainant's uncle's home, and testified as to the report she received from the complainant of the alleged offence committed against her.

PW3 was Alice Mane, a clinical officer at Wamunyu Health Centre, who examined the complainant after the alleged rape and produced a filled P3 form as an exhibit. The last witness was P.C Robert Mwangi (PW4), who was stationed at Wamunyu Police station and testified as to the report of the rape from the complainant and the arrest of the Appellant.

The trial court found that the prosecution had established a *prima facie* case to warrant the Appellant to be put on his defence. The Appellant gave sworn testimony and did not call any witnesses. He stated that he did not commit the offence and the court should consider that he was a first time offender.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise one main issue of whether the Appellant's conviction for the offence of rape was based on consistent and sufficient evidence.

Section 3(1) of the Sexual Offences Act in this regard provides for the elements of the offence of rape as follows:

"A person commits the offence termed rape if-

a. **He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;**

b. **The other person does not consent to the penetration; or**

c. **The consent is obtained by force or by means of threats or intimidation of any kind."**

The Court of Appeal in its decision in **Republic vs Oyier (1985) KLR 353** elaborated on these elements as follows:-

1. **The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.**

2. **To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.**

3. **Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.**

In the present appeal, the evidence of PW1 as regards the alleged offence was as follows:

"On 26/10/2012 I was going to water livestock and as I returned I found accused closing the path we usually used. I removed the branches that barricaded the path and passed and after taking some few steps I heard footsteps behind me and I looked behind and asked him where he was going and he said he was pursuing me. Suddenly he blocked my way, held me with his right hand and pressed onto my neck and threw me down. He lifted up my skirt, removed my panty and also removed his pants as he lay on top of me. He inserted his penis into my vagina while holding onto me. I did not scream. After a short while he moved away from me dressed up and picked a panga he had dropped and left. I also dressed up pursued the cow and reported to a worker at my uncle's home and asked her to call my uncle."

PW1's testimony in this regard was specific as to the act of penetration, and from her testimony it is also evident that the Appellant did use some element of force in the sexual act. What is not evident is whether there was lack of consent to the sexual act. There appears to have been no physical resistance and/or struggle on the part of the complainant to the sexual act. Given the use of force it may be argued that the complainant yielded through duress, but this doubt has to be construed in favour of the Appellant.

It has also been argued by the Appellant that the medical evidence was not conclusive as to the act of penetration. PW3 in this respect testified that upon examination of the complainant, there were no tears on the complainant's vagina, the lab test did not detect pus cells in her urine, and that she tested negative for syphilis tests, HIV and pregnancy. It was PW3's conclusion that she did not know whether there was penetration.

Medical evidence only serves to corroborate primary evidence that shows that all the elements of rape were met, and that also identifies the person who committed the rape. In addition, the proviso to section 124 of the Evidence Act provides that no corroboration is required in cases involving sexual offences, where the Court believes that the complainant is telling the truth. The testimony by PW1 as to what transpired during her ordeal was however in this respect inconsistent. PW3 testified that PW1 informed her that the Appellant ejaculated on her thigh, and she had a bath before the medical examination. This evidence contradicts that of PW1 who testified that she did not bathe after the ordeal, and who did not allude to ejaculation in her testimony. The credibility of PW1's testimony is therefore in doubt.

Arising from the foregoing reasons, I accordingly quash the conviction of the Appellant for the charge of rape contrary to section 3(1) as read together with subsection 3(3) of the Sexual Offences Act. I also set aside the sentence imposed upon the Appellant for this conviction and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE