



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 32 OF 2015**

**PETER OMONDI MUSUMBA ----- APPELLANT**

**VERSUS**

**REPUBLIC-----RESPONDENT**

*(Appeal against Conviction and Sentence by Chief Magistrate's Court Busia in Criminal Case no. 50 of 2015 at Busia by Miss Hannah Ndungu Chief Magistrate)*

**JUDGMENT**

1. The conviction of Peter Omondi Musumba (The Appellant) on the Offence of Rape contrary to Section 3(1)(a) of the Sexual Offences Act (No. 3 of 2006) was substantially based on the evidence of the victim J R A T(PW1).

2. The Victim gave unsworn evidence after the Trial Magistrate carried out a Voir Dire and remarked,

**“Due to mental retardation and inability to understand the nature of an oath, the witness will give unsworn evidence.”**

In receiving this Evidence, the Learned Trial Magistrate was acting within the confines of Section 125 of The Evidence and in particular subsection (2) thereof. Section 125 provides:-

**(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.**

**(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.**

3. The allegations that the Appellant faced was that:-

**On the 12<sup>th</sup> day of March 2015 at about .100p.m. at *particulars withheld* within Busia County, Peter Omondi Musumba intentionally and unlawfully caused his penis to penetrate the vagina of JR A T without her consent.**

4. The Complainant extracts rocks for making building concrete. She was going about her usual business when she was called by the Appellant who she referred to as “Boss.” Her testimony was that the Appellant took the hammer that she was using to work the rocks and hit the stool she was sitting on. He

then asked her to lie down. He pulled her clothe down, he then removed his penis from his trouser and,

**“He inserted his penis into my vagina.”**

The evidence of the Complainant is that the Appellant had sexual intercourse with her.

5. The Complainant informed her mother, P A A (PW2) about the incident. PW2 saw the skirt (P Exhibit1) that her daughter wore on that day. It had blood stains. The mother took her daughter to hospital on the following day. It was her further testimony that her daughter was epileptic and suffered mental retardation.

6. Dr. Edwin Oseno (PW4) is the Medical Officer who attended to the Complainant at Port Victoria Sub District Hospital. This was on 13<sup>th</sup> March 2015. The history of the patient is that she had been raped by a person known to her. His findings were that the victim had normal external genitalia. No tears or bruising on vagina mucosa. She had a torn hymen. Although a HVS( High Vaginal Swab) was done on the Victim, no sperms were seen or abnormality detected.

7. PC Anne Wangui (PW3) was at the material time attached to Bunyala Police station a Port Victoria. On 13<sup>th</sup> March 2015, at about 3.00 p.m. PW1 alongside PW2 visited the Police Station. The two complained about rape to PW1. PW3 issued the Complainant with a P3 form that was duly filled at Port Victoria Hospital. After carrying out investigations, the Officer preferred charges against the Appellant.

8. In Defence, the Appellant gave sworn evidence. His testimony was that on 12<sup>th</sup> March 2015, the Complainant demanded to be paid a debt of Kshs. 500/-. But he did not have the money and so she grabbed him and violently demanded for the money. The situation degenerated into a fight. That he later received information that she had reported him to the police at Port Victoria Police Station. He denied the charges.

9. In his Petition of Appeal, the Appellant raises 6 Grounds which can be paraphrased and reduced to the following,

- i) The learned trial Magistrate erred by relying on contradictory evidence
- ii) The Learned trial magistrate erred by accepting the testimony of a mentally retarded witness.
- iii) The Learned trial Magistrate erred by disregarding primary evidence and in particular the Doctor’s Report.
- iv) The Learned Trial Magistrate erred in disregarding the Defence
- v) The Trial was conducted in Gross violation of the Appellant’s Constitutional Rights.

10. This being a first Appeal, the Court has a duty to re-evaluate the evidence and draw its own conclusions bearing in mind that it did not have the advantage of testing the demeanor of the witnesses during the Trial [**Okeno vs Republic (1972] EA 32].**

11. Let me begin with the Constitutionality of the Proceedings. In his written submissions, the Appellant complains that his Right to a Fair Trial was violated as he was not provided in advance with Witness Statements and Documents to be relied on by the Prosecution. Under Article 50(2)(j) of The Constitution, 2010, The Right to a Fair Trial includes the Right of an Accused Person to be informed, in advance, of the evidence the Prosecution intends to rely on, and to have reasonable access to it.

12. The Trial Court record shows that on 11<sup>th</sup> May 2015, the Appellant informed Court that he had not received witness Statements, whereupon The Trial Magistrate ordered that they be supplied to him. This does not seem to have happened because on 9<sup>th</sup> June 2015, the Appellant raised the same complaint. The

Trial Magistrate, again, made a similar order. Hearing commenced on 12<sup>th</sup> June 2015. On that day and on subsequent hearings the Appellant never complained about not receiving Witness Statements. It can only be assumed, going by the record, that the witness statements were furnished to him as ordered by Court. The Court Record, I am afraid does not support the Appellants argument. That ground lacks merit.

13. Section 125 of the Evidence Act is on competence, generally, of witnesses. Section 125(2) provides:-

**A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.**

After carrying out a *Voire Dire* examination, the Trial Magistrate concluded that the Complainant could give unsworn evidence. The testimony of the witness shows that she was capable of understanding questions put to her and that she gave rational answers. It is however good practice that upon carrying out a *Voire Dire*, the Trial Court expressly indicates, on record, whether or not it is satisfied that the mental disorder of the potential witness does not prevent him/her from understanding questions put to him/her and giving rational answers to them. That said, nothing in the testimony of PW1 suggests that her condition prevented her from testifying. The criticism that the Trial Court erred by accepting the testimony of this witness is therefore without merit and that ground cannot succeed.

14. The backbone to this Appeal, it would seem, is the grievance that The Trial Magistrate returned a conviction on the basis of contradictory evidence. In his written submissions, The Appellant highlighted the following;

- i) The time when it is alleged that the victim told her mother about the sexual assault.
- ii) The place where her mother was at the time of the incident.
- iii) How, if at all, the police came to be in possession of the clothes allegedly worn by the victim at the time of the incident.

15. The victim gave a detailed account of the unfortunate encounter. She stated,

**“I recall sometimes back I was doing rock extraction Boss (*points to the accused person*) called me. He took the hammer I was hitting the rocks with. He started hitting the 3 legged stool I was sitting on with it. He then asked me to lie down. The accused then slid my clothes down (*witness demonstrates the sliding down of the clothes*). I had been hitting the concrete rocks outside the house. We went to the house and that is where he told me to lie down. I lay down. He slid my clothes down. Then he removed his penis (*demonstrates opening of the trouser fly*). He inserted his penis into my vagina. He then had sexual intercourse of me (*she says this in Samia language “husoda” which means to have sex.*). He finished having sexual intercourse of me.”**

This account was not shaken at all in the short cross-examination.

16. It is however true that the witness told Court that she informed her mother (PW2) about the incident at about 4.00p.m. on the 12<sup>th</sup> March 2015 while her mother told Court that she received that information on that day but after 6.15 p.m.

17. It is further true that PW1 stated that PW2 had gone to the shamba when the assault happened while PW2 herself stated that she had gone to the Port to buy Omena(type of fish).

18. Whether the above contradictions, taken together or in isolation, destroys the credibility of the evidence of PW1 and PW2 would depend on whether they are grave and/or material. In my view the contradictions are not material as they are not in respect to the issue that was at the heart of the proceedings, that is, the rape incident. And a contradiction as to when the rape offence was committed

may be significant but a difference as to when it was reported may not be as significant. Secondly whether or not PW2 was at the shamba or at the Port may not be as significant as none of the witnesses had alleged that she was at the locus of the crime. Given that the account of PW1 was clear and not shaken in cross-examination and given that it was corroborated by that of PW1, I hold that the two contradictions were not material. I would not fault the Trial Learned Magistrate for finding the evidence of PW1 and PW2 believable.

19. As to how the police came to be in possession of the victim's skirt, I find nothing contradictory in the evidence. The evidence of PW1 and PW2 was that the victim visited the Hospital and the Police Station a day after the incident. The Medical Officer (PW4) who attended to her stated that the victim **"had changed clothing"** when he saw her. That is, was she wearing other clothes other than the skirt she wore at the time of rape. The evidence of the Police Officer (PW3) who investigated the complaint was that while at the scene,

**"... the Complainant showed me the skirt she had worn that day with blood stains"**

The Officer did not say that the victim was wearing the blood stained skirt when she visited the police station. There is no contradiction.

20. Did the Trial Court disregard the Defence of the Appellant? In analyzing the Defence case, the Learned Trial Magistrate stated,

**"it is worthy of note that during cross-examination of PW2 he did not raise issue of debts. His Defence is therefore clearly an afterthought and after considering it I dismiss it as such."**

The Court record supports the conclusion by the Trial Magistrate and it cannot be faulted.

21. The Judgment of the Lower Court shows that the Learned Trial Magistrate warned herself on the danger of convicting on the basis of a sole witness. The Judgment also shows that the Trial Magistrate was acutely alive to the statutory position that in criminal cases involving a sexual offence a conviction can be returned on the basis of the sole evidence of the Victim of the offence where it is the only evidence. The Learned Trial Magistrate gave the reasons why she believed the testimony of the Victim to be truthful and honest and concluded-

**After she was raped she reported the matter to her mother and on being taken to hospital sure enough she had been raped. The identity of the Accused is not in doubt at all. He was a known person. Offence was committed in broad daylight.**

The only finding of the Trial Court that is unable to identify with is that the Medical Evidence confirmed the Sexual assault. I say more on this shortly.

22. This Court concludes that the Learned Trial Magistrate was entitled to return a conviction even in the absence of evidence that:-

- i) The blood stains on the skirt were that of the victim.
- ii) The Vaginal swab of the victim did not reveal the presence spermatozoa.

The absence of abnormality in the vagina swab is theorized by the Doctor as follows;

**"There was a delay in the presentation hence some crucial evidence could have been lost"** (see remarks of the Doctor at the end of the P3 Form).

It is however my finding that the absence of Medical evidence does not take away the strength of the evidence of PW1 and PW2. That alone was sufficient to found a safe conviction.

23. Turning to the Sentence, the minimum Sentence for an Offence under Section 3 of the Sexual Offences Act is imprisonment for not less than 10 years. The Learned Magistrate, in sentencing the Appellant to a term of 10 years, imposed the most lenient sentence available. How can she be faulted for that leniency?

24. The entire Appeal is without merit and is hereby dismissed.

Dated and signed at Busia this 27<sup>th</sup> day of May 2016.

F. TUIYOTT

**J U D G E**

Delivered at Busia this 20<sup>th</sup> day of June 2016.

W. KORIR

**J U D G E**

In the Presence of :-

Orwasa -C/Assistant

Appellant in person

Obiri - for the State