



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 30 OF 2015

BENSON OKUMU----- APPELLANT

VERSUS

REPUBLIC-----RESPONDENT

(Appeal against conviction and sentence by Hon. C.I. Agutu Resident Magistrate delivered on 28th July 2015 in CM Criminal Case No. 2232 of 2013)

JUDGMENT

1. Benson Okumu (The Appellant) and Dickson Maloba (Dickson) were together arraigned before The Chief Magistrates Court at Busia where they faced the Offence of Gang Rape Contrary to Section 10 of the Sexual Offences Act (Cap No. 3 of 2006). The Two faced an Alternative Charge of Indecent Act Contrary to Section 11(a) of The Sexual Offences Act as read with Miscellaneous Amendment Act No. 6 of 2009.

2. The two were convicted on the main charge and the Appellant was sentenced to serve a prison term of 15 years. This Appeal is against both conviction and sentence.

3. The particulars on the main charge are that:-

On the 20th December 2013 at [Particulars withheld] Sub location of Butula District within Busia County Dickson Maloba and Benson Okumu while in the company of each other intentionally and unlawfully penetrated the vagina of D A without her consent.

4. D A (The Complainant) is a farmer. On 20th December 2013, she had visited a neighbour to buy some vegetables. On her way back home, at about 7.00 p.m. she was confronted by two people. She says that it was not yet dark and there was still light. She knew Dickson. Dickson pushed her and the Appellant held her hand. They forcefully led her to a forested area. Dickson tore her inner pants and raped her while the Appellant held her. The ordeal is said to have taken some 30 minutes. She screamed in distress. She told Court that her Daughter in Law reacted to the distress call and came to the scene.

5. From the record it is not clear whether R N (PW2) is the Daughter in Law who reached to the Scene of crime by the complainant. Anyhow, the evidence of PW2 is that she did not visit the scene but she was informed by the Complainant about the incident. That the Complainant spoke to her at about 7.30 p.m. on that very day. It was her evidence that the Complainant was crying, certainly in distress. That the Complainant mentioned the 1st Accused by name and described the Appellant.

6. The Complainant reported the incident to Bumala Patrol Base on 21st December 2013 where Sgt.

Edward Ndaru (PW5) received the report. He booked the complainant and issued the Complainant with a P3 form.

7. Moses Khaemba (PW3) examined the victim on 21st December 2013. She had tenderness around her neck and in the cervix. He found the presence of spermatozoa on doing a vaginal swab.

8. Acting on an arrest order allegedly given to him by the Complainant, David Shem Mula arrested both Accused persons on 21st December 2013.

9. The Appellant made a short unsworn statement in Defence. He denied the offence and was surprised at the charges. He gave an alibi Defence. That at the time of the alleged offence he was helping his sick mother to cook some omema fish.

10. Although the Appeal raises some 7 Grounds, I would agree with the Appellant that it should succeed because of insufficiency of evidence.

11. The only direct evidence tendered was that of the Complainant. She described how she was confronted by two people and pushed into a forest by both of them. One tore her pant and raped her, while the other helped the rapist by holding her hand. She was clear that she knew the person who raped her and gave her name as Dickson. This is what she said,

“I have known Dickson all his life. I saw him being born.”

It was her evidence that there was still light and she was able to see her two assailants. So in respect to Dickson the evidence would be of recognition.

12. What about the Appellant? The Complainant does not say whether or not she knew the Appellant prior to the incident. What she says about the Appellant is as follows;-

“I have forgotten the name of second Accused.”

At what point she knew of the name of the second Accused is unclear. Was it before or after the incident? No interrogation was made by the Prosecution, Defence or Court on this aspect and the evidence on record is wholly unhelpful.

13. What is clearer is that she did not have the name of the Appellant when she spoke to PW2 a very short while after the incident. PW2 testified,

“PW1 mentioned the name of 1st Accused... She described 2nd Accused and I knew it was 2nd Accused.”

The 2nd Accused is the Appellant. The evidence of PW2 falls short of distinguishing whether the Complainant was giving a description of someone known to her or a description of an unknown person who attacked her.

14. In the end this Court reaches a Decision that, from the evidence, it is not clear whether the evidence against the Appellant was that of recognition or that of identification. If it was of recognition, no effort was made to establish how the Complainant recognized the Appellant. If it was of identification, an Identification Parade was necessary as the Appellant was arrested some 7 days later. Either way the evidence is unsatisfactory.

15. This Court must come to the conclusion that the Conviction of the Appellant was unsafe. Save for the unsatisfactory evidence of PW1, there is no other evidence that incriminates him.

16. The Appeal on conviction and sentence succeeds. The conviction is quashed and sentence set aside.

The Appellant shall be set free forthwith unless held for some other lawful reason.

Dated and signed this 27th day of May 2016.

F. TUIYOTT

J U D G E

Delivered on this 14th day of June.2016.

W. KORIR

J U D G E

In the presence of:-

Orwasa - C/Assistant

Appellant in person

Obiri- for the Respondent