



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO 16 OF 2014

(Appeal from original Conviction and Sentence in Thika CM Criminal Case No 2042 of 2008 – J W Onchuru, Ag PM)

STANLEY WAINAINA MWAURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant in this appeal, **Stanley Wainaina Mwaura** (1st accused in the trial court) was convicted after trial of **gang rape** contrary to **section 10** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of the charge that on 01/06/2008 in Murang'a South District within Central Province, jointly with his co-accused **Patrick Njuguna Kamau** (who was acquitted), and in association with another person who was not before the court, he intentionally and unlawfully committed an act which caused penetration with one **FWM**. He was on 13/02/2014 sentenced to fifteen (15) years imprisonment. He has appealed against both conviction and sentence.

2. The grounds of appeal set out in the petition of appeal dated 26/02/2014 may be rephrased as follows –

(i) The Appellant was not positively identified.

(ii) All the material elements of the offence charged were not proved beyond reasonable doubt.

(iii) The trial court erred in law in admitting into evidence exhibits that had been un-procedurally recovered.

(iv) The evidence tendered by the prosecution was inconsistent and contradictory, and raised doubts that ought to have been resolved in favour of the Appellant.

(v) The Appellant's defence of alibi was wrongly rejected by the trial court.

(vi) The trial court failed to properly analyze the Appellant's defence, including what came out in cross-examination of the prosecution witnesses.

3. The Republic has opposed the appeal.

4. I have considered the submissions of the learned counsel for the Appellant, Mr. Njoroge, and those of the learned prosecution counsel, Miss Keya. As the first appellate court it is my duty to evaluate the

evidence placed before the trial court and arrive at my own conclusions regarding the same. I must however give allowance for the fact that I neither saw nor heard the witnesses.

5. The Appellant was originally tried alone before C. W. Meoli, CM who took the evidence of five prosecution witnesses. His case was then consolidated with that of his co-accused. The Chief Magistrate then directed that the case be heard afresh before another magistrate, and the Appellant and his co-accused were then tried by L. W. Gicheha, SRM. Upon close of the prosecution case the trial went to yet another magistrate, J. W. Onchuru, Ag PM who took the defences of the Appellant and his co-accused and also prepared and delivered judgment.

6. The complainant (PW1) was attacked at about mid-day in broad daylight. But she was attacked from behind by three men who used the T-shirt she was wearing to cover her face (and eyes) such that she could not see. As she struggled with her attackers her trouser and panty were removed and then one of her attackers raped her. In the meantime the other two attackers left, apparently as she was being raped by the third man.

7. After the rapist finished he got off of her and made his escape. As he did so she noted the Sahara shoes, navy blue jeans, short-sleeved flowered shirt and bluish cap that he was wearing. When she subsequently described this clothing to her brother, **E I M**, he told her that he knew the young man who was wearing those clothes.

8. This **E I M** testified as PW 2. His testimony was that when he received from the complainant the description of the clothing her rapist was wearing, he went out and walked about the village. He met the Appellant (whom he knew as his friend) and that upon observing him he noted that he was wearing clothes similar to those described by the complainant.

9. It will be noted that when the complainant first testified before Meoli, CM on 13/11/2008 she never stated that she was able to identify the rapist or any of the other two men who attacked her. What she was able to observe were the shoes and clothing the rapist was wearing. But when she subsequently testified before Gicheha, SRM on 19/05/2009 she now testified that she saw the faces of all 3 attackers and was able to identify all of them.

10. This was a major contradiction. The fact that trial started afresh before another magistrate did not mean that the previous testimony of the witnesses before the first magistrate had to be ignored and could not be used to test the veracity of the fresh testimony. The previous testimony was still part of the record of the court!

11. Upon my own valuation of the testimony of the complainant, she was not able to identify any of her attackers at the time of the attack. All she was able to do was to give a description of the shoes and clothing of the man who raped her. Her brother used that description to connect the Appellant to the crime committed against his sister.

12. The clothing which the prosecution used to tie the Appellant to the offence was recovered from the Appellant's house in his absence when he was already in custody. The recovery was made through the assistance of the Appellant's brother who was himself a suspect in the case and under arrest. He was never charged and he was never called to testify. Although the Appellant admitted in his defence that the shirt and jeans recovered were his, can the possibility be excluded that his brother may have worn them and committed the offence?

13. The Appellant was arrested upon the complainant's brother connecting him to the shoes and clothing described by the complainant to him. There was no evidence that members of the identification parade conducted by PW6 at which the complainant purported to identify the Appellant were dressed in clothing similar to that described by the complainant. The identification parade could thus not have been of much evidential value as the complainant had not given a description of the face of her rapist, beyond his dark complexion, sufficient for her to identify him should she see him again.

14. There is also the issue of the Appellant's defence of alibi. This alibi was that at the time of the alleged offence he was a long distance away at his place of work at **Blue Post Hotel** in Thika Town. He gave a sworn statement in his defence and was cross-examined. He testified that on the day and time of the alleged offence he was at work, and produced a copy of the Master Roll which verified his claim. He also called the general manager of the hotel (DW3) whose testimony corroborated the alibi or at the very least lent credence to it.

15. It is trite that an accused is under no obligation to prove his alibi. He only need put it forward, and it becomes the duty of the prosecution to disprove the alibi.

16. In the present case a record kept in the ordinary course of business (the Master Roll) was produced in evidence; it tended to show that the Appellant was at his place of work on the date and at the time of the alleged offence. The testimony of the general manager of the hotel where he worked also tended to corroborate his alibi. Clearly, the trial court ought to have found that the alibi was probably true; a reasonable doubt would thus have been raised as to whether the Appellant could have been one of the men who attacked the complainant.

17. Having evaluated the evidence placed before the trial court, I am not satisfied that the Appellant was positively identified as the person who raped the complainant in association with others. I am also not satisfied that the Appellant's alibi which could well have been true, was disproved by the prosecution as required by law. The charge against the Appellant was not proved beyond reasonable doubt, and his conviction is entirely unsafe.

18. In the event I will allow this appeal. The Appellant's conviction is hereby quashed and sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A ON THIS 9TH DAY OF JUNE 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 10TH DAY OF JUNE 2016