REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 173 OF 2013

KILONZO KITHANGAU ……..……..……
APPELLANT

VERSUS

REPUBLIC……...……RESPONDENT

(An appeal arising out of the judgment and sentence of A.Odawo RM in Criminal Case No. 52 of 2013 delivered on 21st May 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 10th day of January 2013 in Yatta District, within Machakos County, the Appellant intentionally and unlawfully caused his penis, to penetrate the vagina of JMM.

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 10th day of January 2013, in Yatta District, within Machakos County, the Appellant intentionally and unlawfully indecently assaulted JMM by touching her vagina with his penis.

The Appellant was first arraigned in court on 14th January 2013 and he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced to forty (40) 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 filed in Court on 10th June 2013, and supplementary grounds of appeal he availed the Court, are that the trial magistrate erred in basing the conviction on unsatisfactory medical evidence and as he was not medically examined; the prosecution did not prove the case beyond reasonable doubt; his fundamental rights of fair and impartial trial was violated as provisions of section 211 of the Criminal Procedure Code were not complied with; and that the sentence was too harsh and excessive.

The Appellant also availed two sets of submissions wherein he urged that it was irregular and un-procedural for the complainant to have been examined by a doctor prior to reporting the incidence to the police. He faulted the stamping of the P3 form 55 days after it was signed. He questioned why the police had not sought a link between the whitish discharge found on the complainant after the medical examination and himself. He also submitted that the identification by PW1 should have been corroborated given that the complainant had given contradicting evidence as to the identity of her alleged rapist by

testifying that he was unknown to her, and yet she told the doctor that her attacker was known to her.

Rita Rono, the learned prosecution counsel, filed submissions dated 7th March 2016 in opposition to the appeal. It was submitted therein that the prosecution had proved its case beyond reasonable doubt. In particular, that the medical evidence adduced in court and the testimony of PW4 found that PW1 had blunt injuries and her hymen had been freshly broken and was tender. In addition that there was evidence of penetration which proved that there was rape. It was submitted that the whitish discharge was consistent with vaginal candidiasis which was a yeast infection common among adult females, and was therefore not as a result of the rape.

Lastly, it was submitted that the record showed that section 211 was explained to the accused in a language which he understood being Kikamba, and the accused elected to keep quiet and made a request to the court to make a determination.

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 five witnesses. The complainant, JMM (PW1), testified as to the happenings of 10th January 2013 when she had been left at her aunt's home in Kyua to herd cattle and when the offence of rape against her was committed by the Appellant.

SM (PW2) who was the complainant's mother; PC Stephen Cheplawony (PW3), a police officer attached at Katangi D.C Office; and PC Joseph Geturo a police officer at Katangi Patrol base (PW5) and who visited the scene of the crime, all testified as to the reports they received from the complainant of the alleged offence committed against her, and on the arrest of the Appellant. The last witness was Dr. Emmanuel Loiposha (PW4), a doctor at Machakos Level 5 Hospital, who testified that he examined PW1 and signed a P3 form for her on 14.2.13 which was stamped on 7.3.13 over allegations of rape.

The trial court found that the prosecution had established a *prima facie* case to warrant the appellant to be put on his defence. Section 211 of the Criminal Procedure Code was also explained to the accused in Kamba Language. The accused elected to keep quiet and stated that the court should make a determination.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise two issues. These are firstly, whether there was proper identification of the Appellant; and secondly, whether the Appellant's conviction for the offence of rape was based on consistent and sufficient evidence.

On the issue of identification, **the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness in ***Maitanyi vs Republic*** **, *(1986) KLR 196*** as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

I have also reminded myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for**

seeing who was doing what is alleged, the position from the accused and the quality of light".

In the present appeal, the offence that the Appellant is convicted of took place during the day time. PW1 testified that on 10th January 2013 at around 10.30 am, she had been left at her aunt's farm in Kyua. As she was tethering the cows, a man who was unknown to her came and put her down and raped her. She said that she screamed but no one came to her rescue. She stated that she managed to escape and reported to Kyua AP camp and she went with the officers to arrest Appellant at the farm. PW1 was also taken to Katangi health centre and later Machakos General Hospital for treatment.

It I notable that PW1 stated that she did not know her assailant, and she reiterated this fact during her cross-examination by the Appellant. PW3 also stated that when making the report of the rape, PW1 stated that she had been raped by a man she did not know at a farm in Kyua. He went on to testify that he then went with other villagers to the farm, where they found the Appellant and arrested him.

It is therefore not evident how the Appellant was identified, as this was not a case of recognition. No evidence of an identification parade was brought by the prosecution, and the Appellant not having known her assailant before, did not give any evidence as to how she was able to tell that it was the Appellant who raped her, and what circumstances aided her in this respect. The conviction of the Appellant to this extent was therefore not safe.

On the issue of whether there was sufficient evidence to convict the Appellant for the offence of rape, section 3(1) of the Sexual Offences Act provides the elements of the said offence 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, there was no attempt to bring out any evidence on the elements that constitute rape. The evidence of PW1 as regards the alleged offence was as follows:

> **"My aunt left me… she instructed me to tether the cows. As I was doing so, a man unknown to me came and put me down and raped me. I screamed and nobody came"**

PW1's testimony in this regard was not specific as to the act of penetration, and a finding that there was penetration cannot be made in the absence of further evidence and details as to what actually happened in the act of the said rape. The specificity of this category of evidence while quite traumatic, is necessary, as a victim's testimony is the best way to establish the elements of rape in most cases.

I would like in this regard like to comment on the utility and probative value of the evidence by PW4 in these circumstances. The evidence by PW4 was that upon vaginal examination, he found that PW1's hymen was freshly broken and tender, and whitish discharge consistent with vaginal candidiasis and the approximate age was 4 days. This evidence showed that there was penetration, however such medical evidence can only corroborate primary evidence that shows that all the elements of rape were met, and that also identifies the person who committed the rape. Medical evidence on its own is not sufficient to prove all these elements of rape.

This finding also addresses the submission by the Appellant that he was not subjected to medical examination. Such medical examination of a female victim in rape cases only serves to corroborate evidence of penetration, and no value will be added by examining a male accused person as it is not possible by such examination to establish if there was penetration or not.

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 9TH DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE