



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 82 OF 2015

PIUS NYABABWI NCHAGWA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal arising from the judgment, conviction and sentence by Hon. C. M. Kamau, Resident Magistrate in Kehancha Principal Magistrate's Criminal Case No. 429 of 2014 delivered on 11/11/2015 by Hon. G. Sagero, Senior Resident Magistrate)

JUDGMENT

Introduction:

1. The Appellant herein, **PIUS NYABABWI NCHAGWA**, was arraigned before the trial court on 23/06/2014 and was charged with the offence of '**Rape**' contrary to **Section 3[1][a][c]** as read with **Section 3[3]** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 17/06/2014 in Kuria West District within Migori County, intentionally and unlawfully caused his penis to penetrate the anus of *D.M.N.* by use of force.
2. The appellant was also charged with an alternative count of committing an indecent act with an adult contrary to **Section 11(A)** of the Sexual Offences Act No. 3 of 2006. He denied both counts.
3. The prosecution called five witnesses in a bid to prove the charges against the appellant. *D.M.N.* was the complainant who testified as **PW1**. He took the court through his ordeal in the hands of the assailant. **PW2** was PW1's brother while **PW3** was PW1's stepmother and the guardian to PW1 since PW1 was mentally-challenged. **PW4** was the Clinical Officer whereas the Investigating Officer testified as **PW5**.
4. At the close of the prosecution's case the trial court placed the appellant on his defence. The appellant opted to give sworn defence without calling any witnesses and thereafter the court rendered its judgment on 11/11/2015. The judgment was however written by the trial court but delivered by another Magistrate since the trial Magistrate had been transferred. The appellant was found guilty as charged on the main count and was sentenced to the minimum 10 years imprisonment.

The Appeal:

5. Visibly dissatisfied with the conviction and sentence, the appellant preferred an appeal by filing the undated Petition of Appeal on 20/11/2015. He raised the following grounds of appeal:

- a. **THAT** I pleaded no guilty to the charge
 - b. **THAT** the trial magistrate erred in both law and facts by shifting the burden of proof to the appellant herein.
 - c. **THAT** the trial magistrate erred in both law and facts by failing to consider the mitigation circumstances and other options while sentencing I the appellant.
 - d. **THAT** the trial magistrate erred in both law and facts by meeting out a sentence which was excessive in the circumstances.
6. At the hearing of the appeal the appellant appeared in person and relied on the written submissions he filed on 14/04/2016 in urging the Court to allow the appeal and set him at liberty. The appeal was opposed by the State hence this judgment.

Analysis and Determinations:

7. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
8. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of rape, or alternatively those of the offence of committing an indecent act with an adult, were proved and as so required in law; beyond any reasonable doubt. However before I venture into the analysis of the ingredients of the offence I will first deal with a preliminary issue which the appellant raised in his submissions and which if successful can give the matter a totally different dimension altogether.
9. The appellant contended in his submissions that:

'4. The judgment was wrote (sic) by a different magistrate and I was not consulted this was a total injustice on my side may justice prevail.'

I have carefully perused the judgment of the trial court. The same was written and signed by the trial Magistrate one Hon. C. M. Kamau. It was however delivered by Hon. G. Sagero on 11/11/2015. It is therefore not true that the judgment was written by a different Magistrate. The delivery of judgment by another Magistrate other than the one who recorded the evidence and subsequently wrote the judgment is so provided under **Section 200(1)(a)** of the **Criminal Procedure Code, Chapter 75** of the Laws of Kenya (**the CPC**) as follows:

'200.(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

Subsection (3) thereof provides as follows:

'Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

In this case the above subsection (3) does not apply and as aforesaid the matter was rightly handled under the law. The appellant's contention therefore fails.

10. Turning to the issue of the ingredients of the offence of rape, the starting point is how the offence of rape is described in law. **Section 3** of the Sexual Offences Act (**the Act**) defines '**rape**' as follows:

'3(1) A person commits the offence termed rape if-

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

11. It can therefore be safely said that the ingredients of the offence of rape include proof of the age of the complainant, proof of penetration, proof that the appellant was the perpetrator of the act and proof that the consent was obtained by force or by threats or intimidation of any kind. In other words there has to be evidence that the consent was not freely given. On looking at those aspects in this judgment, this Court shall consider each of them singly.

(a) On the age of PW1:

12. The appellant strenuously contended that the age of PW1 was not settled and as such the trial court did not have any legal basis to either convict and/or sentence him.

13. From the record, PW1 did not state his age. It is however to be noted that PW1 was mentally-challenged and the court made that observation. PW3 who was PW1's guardian stated that PW1 was an adult but since he had mental challenges he behaved like a young minor. PW3 likewise did not however state the age of PW1. PW3 was staying with both PW1 and PW2 who were orphans.

14. When the trial court was taking the evidence of PW1 it recorded as follows:

'PW1 Male Adult Christian sworn state in Kiswahili.'

The trial court therefore noted that PW1 was an adult. It was indeed satisfied that he was of age and proceeded to take his evidence on oath. There are also two documents which touched on the age of PW1. They are the treatment notes from Kehancha District hospital and the P3 Form. The treatment notes is dated 18/06/2014 under No. [particulars withheld]/014 and the P3 Form was issued on 19/06/2014 and filled on 20/06/2014. Both the treatment notes and the P3 Form were produced as exhibits and they indicate the age of PW1 as 22 years. Infact the P3 Form on page 3 indicates as follows:

'Estimated age of person examined: 22years.'

15. Under **Rule 4 of the Sexual Offences Act, (Rules of Court) 2014** which came into force on 11/07/2014 vide Legal Notice No. 101, a victim's age can be determined by way of a Birth Certificate, any School documents, a Baptismal Card or ***'any other similar document'***. Since in this case there was no Birth Certificate, any school documents or a baptismal card in proof of PW1's age and that PW1's age was not assessed, then the two other documents which dealt with the age of PW1 fell within the category of such documents described as ***'any other similar document'***. They were the P3 Form and the Treatment notes.

16. To that end, the trial court was right in treating PW1 as an adult, I so find.

(b) On the issue of penetration:

17. **Section 2** of the Sexual Offences Act defines 'penetration' and 'genital organs' as follows:

'penetration' the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

'genital organs' includes the whole or part of male or female genital organs and for purposes of the Act includes the anus'.

This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus:

'...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....' (emphasis added).

18. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

19. In demonstrating this ingredient, PW1 stated as follows:-

"...On 17/06/2014 at around 12pm.....He told me grab hold of a tree while bending backwards (demonstrated that he held a tree andbend him over)....He removed my clothes. I started cryingHe started doing bad things to me. I even defecated on myself. He was wearing trousers and a shirt. He opened the zip of his trousers. He removed the organ used for urinating. He put it into my behind, into the place I use to defecate, my anus (demonstrates). I felt pain....."

20. When PW1 was taken to the Kehancha District Hospital by the police, he was examined by PW4, a Clinical Officer. That was on 18/06/2014. PW1 complained of pain when passing stool and had history of having been sodomized. PW4 examined him around the anus and noted some lacerations at the anal orifice although there was no bleeding. A swab analysis did not reveal the presence of any spermatozoa. PW4 then concluded and gave a professional opinion that PW1 had been sodomized. PW4 then filled in the P3 Form and produced it together with the treatment notes as exhibits.

21. The appellant challenged the way the P3 Form was filed in that it did not indicate the 'weapon' which might have caused the injury since Part 'B' thereof was not filed. I have carefully perused the P3 Form in light of the appellant's contention. I however do not take that as a serious submission since PW4 was very clear that PW1 was sodomized. In sodomy the 'weapon' used is obviously the male penile organ; a fact which this Court takes judicial notice of. Further, it was

PW4 who first saw PW1 when he visited the hospital on 18/06/2014.

22. Going by the definitions of 'rape', 'penetration' and 'genital organs' in the Act coupled with the evidence of PW1 and PW4 as well as the contents of the treatment notes and the P3 Form, this Court is satisfied that indeed penetration was proved in the circumstances of this case.

c) On whether the appellant was the perpetrator:

23. The appellant vehemently denied any involvement in the alleged offence and wondered why he was charged. To him, he was framed due to a longstanding grudge between himself and the family of PW1.

24. I have carefully gone through the prosecution's evidence on what exactly happened. It can be easily gathered that on the material day, 17/06/2014, at around midday PW1 went to take a bath at the neighbouring river. As PW1 so went to the river PW3 had also asked him to fetch some water using a jerrican. When PW1 was on his way from the river, he came across the appellant who beckoned him and led him into a maize farm, forced him to get hold of a tree, undressed him and had anal sex with him. PW1 stated so clearly what happened and how. Although PW1 raised alarm before he was firmly held on the neck, there was no help that came by and when the appellant was through with him, he released PW1 who went back home and immediately informed PW3 what had happened and that it was the appellant who did so. Indeed PW1 was clear that it was the appellant who had sexually assaulted him. PW1 also led PW3 and the police on separate occasions to the place where the ordeal took place where there was evidence of some disturbance as well as footprints. Since PW3 had no money to take PW1 to hospital, PW1 remained in pain until the following day when PW2 took him to the police and then to the Kehancha District Hospital.

25. The act took place during daytime. There is no contention that there were any circumstances which could have possibly hindered the visibility or might have rendered the identification/recognition not free from error. It is also not denied that the appellant and PW1 are neighbours and that they knew one another too well and had previous dealings. The appellant had been serving as the Chairman of the Community Policing Initiative since 2011 until his arrest on 22/06/2014. He therefore knew too well that PW1 was mentally-challenged. As a result of the appellant's position of authority in the community, PW1 had no option but to comply with the appellant's call when he was asked to follow him into the maize farm where the sexual act followed later on. The appellant obviously took advantage of PW1.

26. Before looking at the appellant's defence, I will look at some issues raised by the appellant touching *inter alia* on his possible identification/recognition. The appellant contended that PW1's evidence was that of a single witness which lacked corroboration. Whereas the evidence of PW1 remained the sole one in identifying the appellant, there was indeed corroboration by PW3 and PW4. That aside, the position in criminal cases involving sexual offences is that a court can still sustain a conviction even in instances where there is no corroboration, if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth. (See **Section 124** of the Evidence Act, Chapter 80 of the Laws of Kenya).

27. There is also the issue of how the evidence of PW2 was recorded. It was contended that since the evidence-in-chief for PW2 was not recorded then that went to the root of the conviction and the appeal ought to succeed. I have perused both the handwritten proceedings and the typed proceedings. It is true that the evidence-in-chief of PW2 was not recorded. The record only has the cross-examination and re-examination. I have noted the omission. I have equally gone through the evidence of PW2. The same only deals with how PW2 assisted PW1 to hospital for treatment and to the police station where PW1 lodged an official complaint. PW2 was not an eye-witness and indeed what PW2 alluded to was squarely covered by the evidence of PW3.

28. Whereas I find that the omission did not cause any injustice to the appellant and that the same is

curable under **Section 382** of the CPC, I hasten to say that the prosecution's case may be least affected even when the entire evidence of PW2 is disregarded.

29. The appellant also contended that the name of the assailant given by PW1 as NYARIRO was not his and as such PW1 must have been referring to another person. Towards the end of the cross-examination PW1 responded to a question as follows;

'...It was you Nyariro....'

Looking at the entire evidence of PW1, there is no doubt that PW1 was clear on who the assailant was and that it was the appellant. PW1 identified the appellant by pointing at him during the trial and physically demonstrated what the appellant did to him. PW1 also explained clearly where the appellant hailed from and confirmed that he knew the appellant since his birth more so that the appellant used to visit their home until the incident occurred. PW1 even stated that he met the appellant near the appellant mother's house; truly PW1 could not have been mistaken on whom he was referring to. The use of the name 'Nyariro' did not therefore mean that PW1 was referring to another person other than the appellant. That contention appears not to be holding any water and hereby fails.

30. It was also submitted that since the whitish dry stains which were found on the waistline of PW1's trousers were not scientifically proved to be from the appellant's then there was no nexus between the appellant and PW1. Whereas it is true that there was no scientific confirmation that the said stains belonged to the appellant given that the results of the examination of the samples collected from the appellant were never returned by the Government Chemist before the prosecution closed its case, that aspect taken in exclusion cannot make this Court absolve the Appellant from the offence. This Court has to take the entire body of evidence as a whole and to carefully analyse it before reaching a conclusion. Needless to say, the offence of rape is not only proved by conducting a D.N.A. test but also by any other evidence.

31. Be that as it may, the appellant also raised a defence in the case which is worth consideration. He gave a sworn statement without calling any witnesses. He contended that the case against him was but a set up by the PW1's family. To that end the appellant stated that as he was serving as the Chairman of the Community Policing, members of the PW1's family were implicated in stock thefts and he had compelled them to compensate those whom they stole from; decisions which were not well received by the said members. The appellant further stated that the members of PW1's family had also been in possession of illegal firearms and that he had pursued them until the firearms were surrendered to the government. As a result of his determination to ensure that the community lived in peace, the appellant stated that the members of PW1's family who were visibly against his said efforts schemed against him and planted the charges which the appellant is now facing. He also alleged that he was attacked sometimes in May 2014 by three of PW1's family members and that he reported the matter to the police. The police issued an arrest order against one of the members as the other two were killed by members of public still on theft related allegations and as a result PW1's family is blaming the appellant for the deaths of their own. The arrest order is still in force since the suspect is still at large and a copy of the arrest order was produced as an exhibit.

32. The trial court considered the defence in its judgment and found it not to be holding as it was intended to divert the court from the main matter before it. I have likewise considered the defence and do agree with the trial court's finding on the same. I say so because the appellant only made bare allegations which are not holding in law. Without being seen as shifting the burden of proof to the appellant, it is clear that the prosecution's case stood the test of the defence. I am of that position since there is no evidence that the appellant raised the issue with the police so as to offer an opportunity to the police to investigate the allegation. Raising such a serious issue at the end of the trial and having even not cross-examined any of the witnesses on it can be reasonably seen as an afterthought.

33. The trial court also saw the witnesses testify before it. That court believed the witnesses to be truthful and credible. Given that there is nothing placed before this Court to shake those observations and the findings of the trial court, I find no reason to disagree with that court.

d) The issue of the consent:

34. Sections 42, 43, 44 and 45 of the Act deals with the aspect of the consent of the victim at length. Section 42 states as follows:

‘For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice’

Sections 43, 44 and 45 of the Act goes into great detail in describing instances where one’s consent cannot be said to have been obtained.

35. From the above statutory description of the consent and going by the testimony of PW1 coupled with that of the other witnesses, it can be clearly seen that PW1 never consented to the sexual activity with the assailant. The issues of PW1 raising alarm, having been held by the neck and the mouth to stop him from raising alarm and having his hands held against a tree are some indicators that indeed PW1 was opposed to the sexual act. Infact PW1 clearly stated that he did not consent to the act.

36. Closely related to the foregone is the mental status of PW1. It is stated that PW1 was mentally-challenged. That was confirmed by PW3 who was his guardian, PW4 as well as PW5. The court also made that observation when PW1 testified before it. With that state of mental health PW1 is usually assisted by his family members but he is generally able to discharge most of the activities at home including grazing cattle, fetching water from the river among others. That being so, it cannot be said that PW1 had the freedom and capacity to make a choice of engaging in a sexual act with the appellant. It appears that the appellant took advantage of the state of PW1 and forced him into the sexual activity. I therefore find that PW1 did not consent to the sexual act and that it was so done as against his will.

14. As I come to the end of this judgment I wish to look at two more issues which were raised by the appellant. The first one was the alleged contradictions of the evidence of PW1 and PW3. Having looked at the said evidence this Court finds no merit in that contention. I did not come across any such contradictions and in the event any contradictions existed then the same must be of such a minor nature that it caused no miscarriage of justice to the appellant. To that end the provisions of Section 382 of the CPC readily come to play. I equally echo the words of my brother in the case of **R vs Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** when he stated thus:-

“...It is trite law that minor discrepancies and contradictions should not affect a conviction.”

37. The other issue was on the submission that crucial witnesses were not called including the Area Assistant Chief as well as the arresting officer. This Court draws the appellant’s attention to Section 143 of the Evidence Act, Chapter 80 of the Laws of Kenya which provides that :-

“No particular number of witnesses shall, in the absence of any provisions of law to the contrary, be required for the proof of any fact.”

38. However, if the prosecution fails to call very crucial witnesses in a trial without any justification, then the inference that had the witnesses been called their evidence was likely to have been adverse to the prosecution is usually made. (See: **Bukenya & Others -versus- Uganda (1972)EA 549 and Nguku -versus- Republic (1985)KLR 412**). In this case however I am not about to make that inference because the alleged two people dealt with the arrest of the appellant after PW1 had reported the matter to the police and the police having asked members of the

Community Policing to search for and arrest the suspect.

Disposition:

39. The upshot is that the appellant is unsuccessful in his bid to secure his freedom. He was rightly convicted and sentenced to the minimum sentence in law. Infact the appellant should remain grateful to the State that it did not persue the issue of enhanced sentence as the case had aggravated circumstances since PW1 was mentally-challenged and the appellant obviously took advantage of him. That would have called for a more stiffer penalty but since the matter was not raised on appeal, I say no more.
40. The appeal is hereby dismissed.

DELIVERED, DATED and SIGNED and at MIGORI this 20th day of July 2016

A. C. MRIMA

JUDGE