REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 25 OF 2015

SAMMY MULEWA MUKANDA……...APPELLANT

VERSUS

REPUBLIC…..…..…….....RESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal Case no. 61 of 2014 – G. W. Kirugumi SRM)

JUDGMENT

The appellant was charged in the magistrates court at Mwingi with rape contrary to section 3 (1) (a) (b) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 27th January 2014 at [particulars withheld] Sub Location in Migwani District of Kitui County intentionally and unlawfully caused his penis to penetrate the vagina of RNK without her consent. In the alternative, he was charged with committing an indecent act with an adult contrary to section 11 (a) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally touched the vagina of RNK with his penis against her will.

He denied both charges. After a full trial he was convicted of the main count of rape and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel C. K. Nzili & Co. Advocate. The grounds of appeal are as follows:-

1. The learned magistrate erred in law and in fact in taking complainants evidence without undertaking voire dire proceedings.

2. The learned trial magistrate erred in law and in fact in failing to establish the age and the charge facing the appellant.

3. The learned trial magistrate erred in law and in fact in admitting inadmissible evidence especially on identification.

4. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellant especially on the alibi defence given.

5. The learned trial magistrate erred in law and in fact in convicting the appellant against the weight of the evidence tendered.

6. The learned trial magistrate erred in law and in fact in convicting the appellant on contradicting and un corroborative evidence.

The trial magistrate erred in law and in fact in overlooking the grudge which resulted to the appellant being implicated in the case.

7. The learned trial magistrate erred in law and in fact in not finding that the whole evidence was tailor-made and coached to defeat justice.

The learned trial magistrate erred in law and in fact in failing to consider the accused's defence.

The advocate for the appellant also filed written submissions and relied on a case of ***Moses Nato Raphael Vs. Republic [2014] eKLR*** a decision of the Court of Appeal at Nairobi.

At the hearing of the appeal learned counsel for the appellant Mr. Nzili, emphasized the issue of identification of the appellant and the alibi defence. According to him, these issues were not resolved by the trial court even though the appellant was an identical twin of another brother. Counsel stated that the names which were similar could have been confused.

Counsel emphasized that one brother was called Sammy Mulewa Mukanda and the appellant Mulewa Mukanda. Counsel submitted that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit, and relied on the case of ***Woolmington Vs. DPP [1935] AC 462***.

In response, learned Prosecuting Counsel Mr. Okemwa submitted that the appellant was the person who was described in the charge sheet as Sammy Mulewa Mukanda. He did not deny the description and did not indicate that the name belonged to his brother. In counsel's view, the description of the appellant by name was clear and as such the conviction was safe.

I have considered the arguments of both sides. I have perused the charge sheet and the record.

The identity of the culprit herein was very crucial because there were two identical twin brothers having similar names. Indeed, the burden is always on the prosecution to prove a criminal case against an accused person beyond any reasonable doubt, as was clearly stated in the English case of ***Woolmington Vs. DPP*** which was cited with approval by the Court of Appeal in the case of ***Moses Nato Raphael Vs. Republic (Supra),*** relied on by counsel for the appellant.

In the same case of Moses Nato also, the definition of what amounts to proof beyond reasonable doubt was addressed by the Court of Appeal which agreed with what was stated by Lord Denning in the English case of ***Miller Vs. Ministry of Pensions [1947] 2 ALL ER 372.***

The complainant Pw1 stated in her sworn evidence that the person who raped her was Mulewa Mwikali. According to her this was the appellant. In cross examination she stated as follows –

"you are called Mulewa Mwikali. You have a twin brother Sammy Mwikali. You were all in school even with your brother."

The complainant Pw1was the only eye witness to the incident. She reported the incident to Pw2 Mwikali Mutemi but did not give her the name of the culprit. The incident occurred after 7pm at night. Information was passed to the mother of the complainant Pw3 J K. The complainant informed her mother that the culprit was Mulewa Mwikali. In cross examination the said Pw3 admitted that Mulewa Mwikali had a twin brother called Sammy Mwikali.

It is of note that the eye witness who was the victim referred all through, to Mulewa Mwikali as the culprit. The person who was charged in court however was Sammy Mulewa Mukanda, who I understand is also called Sammy Mwikali.

In his defence, the appellant stated on oath that he was Sammy Mulewa Mukanda the person who was charged. He denied that he was the culprit. No attempt was made to prove that Sammy Mulewa Mukanda was Mulewa Mwikali who was said by Pw1 and Pw3 to be the culprit. All through it was the evidence of the prosecution that two brothers were identical. In addition Dw2 Cosmos Mutui Mbuvi and Dw3 Katembo Makuthu stated that they were with the appellant on the date of the alleged incident and were training him as a mechanic.

All the above put together shows that the identity of the appellant as the culprit was not established by the prosecution beyond reasonable doubt. It is clear from the evidence on record, that Sammy Mulewa Mukanda and Mulewa Mwikali referred to by the complainant were two different identical brothers. As such, it is apparent that the wrong person was charged in court. The prosecution did not prove that the culprit was the appellant, even assuming that the rape incident did occur. On that ground this appeal will have to succeed, as the conviction is unsafe.

I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 18th day of August 2016

GEORGE DULU

JUDGE