REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 34 OF 2015

From original conviction and sentence in Criminal Case No.

427 of 2013 of the Principal Magistrate's court at

Mwingi – G. W. Kirugumi RM)

CYPRIAN WENDO ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court at Mwingi with rape contrary to Section 81(a), (b) and (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 10th April 2013 [particulars withheld] market in Mwingi East District within Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of JMK 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 buttocks, and vagina of JMK with his penis against her will.

He denied both charges. After a full trial, he was convicted of the main count of rape, and imprisoned for 10 years.

Dissatisfied with the decision of the trial court, the appellant filed an appeal on 12th November 2015 through Mulinga Mbaluka and Company Advocates. However the said Advocate withdrew from acting for him and another firm of advocates Mutuku Wambua and Associates proceeded with the appeal.

The grounds of appeal relied upon by Mutuku Wambua and Associates Advocates are three as follows:-

1. The learned magistrate erred in law and in fact in failing to note, analyze and resolve inconsistencies in the prosecution witness evidence which is material in sexual offences and in the circumstances of the case before him.
2. The learned trial magistrate erred in law and in fact in finding the appellant guilty of rape despite the fact that there was no supporting medical evidence.
3. The learned trial magistrate erred in law and fact by failing to appreciate the appellant's defence.

Counsel for the appellant also filed written submissions which I have perused and considered. Mr. Nyachae learned counsel who appeared for the appellant, also made oral submissions in court.

Counsel submitted that there were inconsistencies in the prosecution evidence with the complainant PWI saying at one point that she was sleeping in the house and at another point that she was outside the house.

According to counsel, the evidence of the complainant was contradicted by that of PW5 who said that he saw someone leave the house at 10.00 Pm.

Counsel also contended that the medical evidence from PW3 a Clinical Officer and PW10 a Doctor was that there was no forced sex though the hymen of the complainant was broken.

Counsel also submitted that the magistrate failed to consider the defence of alibi of the appellant and gave flimsy reasons for disagreeing with that defence. The magistrate also shifted the burden of proof to the appellant. Counsel emphasized that the burden of proof in criminal cases was always on the prosecution to prove an accused person guilty beyond any reasonable doubt, even if the accused raised a defence of alibi at the tail end of the criminal case. Counsel sought to rely on the case of ***Wangombe -vs- Republic [1980] KLR 14.***

Learned prosecuting counsel Mr. Okwemwa did not oppose the appeal. Counsel agreed that there existed inconsistencies in the evidence of PW1 and PW2 who were crucial witnesses with regard to the time of the occurrence of the rape incident. Counsel also faulted the magistrate in imposing her own perceptions in the judgment and proceeding to convict the appellant. Counsel emphasized that the medical evidence and the contents of the P3 form exonerated the appellant from the allegations of rape levelled against him.

Counsel also submitted that the appellant did not have the burden of proving his alibi defence.

In summary the facts of the case are that the complainant PWI was an employee of PW2 M M in Nguni area Mwingi East District. She worked in a saloon with one Mwikali. The prosecution position was that on the 10th of April 2013 at 10.00 Pm, the complainant was at the room where she shared a sleeping mattress with Mwikali but Mwikali was not present that night.

The appellant who was a boyfriend of Mwikali went to the house and asked for Mwikali. When he learnt that Mwikali was not in the house that night, he informed the complainant that he was going to do what he ordinarily did to his girlfriend Mwikali. He then pulled the complainant into the room, gagged her mouth with a piece of cloth, threatened her, and proceeded to rape her two times and then went away.

The complainant was fearful and remained in the room till the next morning and did not go to work. At around 11.00 am, her employer Monica Mwende Pw2 came and asked what the matter was and she was then given the story. Monica then called her husband PW4 David Kimwele who came and thereafter, the complainant was on 11/04/2013 taken to the Administration Police Camp where the appellant worked as an Administration Police Officer. However the Administration Police (AP) Officers did not record the entry of the report and instead said that the matter would be referred to the DO's office. Later they said it be referred to the police and then still later to Nguni Health Centre.

The complainant was seen at Nguni Health Centre on 12th April 2013 and treated. The matter was initially handled by Ukasi Police station, but was later taken over by the CID at Mwingi. After investigations the appellant was charged with the offence.

In his defence, the appellant gave a long sworn testimony. He also called two defence witnesses. He denied committing the offence and said that he was not at the scene of the incident and was infact at the Administration Police (AP) Camp that night of 10th April 2013 on standby duties. He denied knowing Mwikali, but admitted knowing the complainant

This being a first appeal, I am required to examine all the evidence on record afresh and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See the case of ***Okeno -vs- Republic [1972] EA 32***.

I have re-evaluated the evidence on record. I have also taken into account the fact that prosecuting counsel has conceded to this appeal.

The first ground of appeal relates to inconsistencies in the evidence of prosecution witnesses. I have been told that there are a lot of contradictions regarding the time when the incident is alleged to have taken place.

From the evidence on record, I do not see such glaring inconsistencies. There is no evidence that any of the prosecution witnesses was keeping specific time of the incidences as they occurred. It could not be expected therefore that the witnesses would be exact about the time the incident occurred. Suffice to say that all the witnesses agreed that the incident occurred on 10th March 2013 at night before midnight.

There is also no contradiction of a material nature on whether the complainant was inside or outside the house when the appellant arrived. The fact of the matter is that the complainant stated that the appellant went there and asked for Mwikali and when he found that Mwikali was not present, he turned on her and did what he used to do to Mwikali as a boyfriend. In my view therefore, any slight contradictions of details as to whether the complainant was outside the house or inside the house at the time the appellant arrived is not of material significance. I dismiss that ground.

I now turn to the issue of the trial magistrate not considering the alibi defence of the appellant. In my view the magistrate did consider the defence of alibi. In this regard the magistrate stated in the judgment as follows:-

> ***"The accused person alibi defence is not verified by his in-charge then and ever by APC Nguto. The complainants house was ½ Km from AP Camp and if that accused reported to his superior at 9.45 Pm he had returned to camp he did not account for the time between 9.45 and 10.00 Pm when the alleged offence occurred."***

With the above in mind, it cannot thus be said that the magistrate did not consider the alibi defence of the appellant.

On shifting the burden of proof, in my view the magistrate was merely stating that the alibi defence of the appellant left some gaps and was thus not believable. The magistrate did not state that the appellant had the burden of proving the alibi defence. The magistrate was fully entitled to believe or disbelieve the alibi defence of the appellant and give reasons for so doing. In the present case the magistrate disbelieved the alibi defence and in accordance with Section 169 of the Criminal Procedure Code, (Cap. 75) gave the reasons for so disbelieving the alibi defence of the appellant. The magistrate cannot thus be faulted.

I appreciate the authority cited by the counsel for the appellant, on proof of alibi defence, that is the case of ***WANGOMBE VS. REPUBLIC [1980]KLR 14*** but in my view it is not applicable in the circumstances of the present case.

I now turn to the proof of the offence beyond reasonable doubt. The burden is always on the prosecution to prove an accused person guilty beyond any reasonable doubt. See the case of ***LEONARD ANISETH VS. REPUBLIC [1963] EA 206***. An accused person does not have a burden to prove his innocence. He may only raise doubts in the prosecution case.

The offence of rape need not be proved on the basis of medical evidence. However in circumstances like the present where the complainant claims that such sexual activities was the first sexual experience, then there could be a reason to establish the offence through medical evidence.

The complainant stated that the rape incident was her first sexual encounter. Both the Clinical Officer at Nguni Pw3 Irene Musyimi, who examined her slightly after two days from the date of the incident, and the Medical Officer Pw10 Dr. Mutua Joseph who examined her about a month later, confirmed on oath in court that assuming that there was forced first sexual intercourse as alleged by the complainant, then the first medical examination at Nguni Health Centre would have indicated some injuries even if they were

minor. They both confirmed that no such injuries were noted. They also stated that though sexual intercourse may have occurred, if the same did occur and it was the first sexual intercourse then it must have been consensual or with the consent of the parties, as there was no trace of trauma noted.

In the face of the above expert evidence, in my view, it would be unsafe to sustain a conviction of the appellant for the offence of rape. However in my view sexual intercourse must have occurred between the appellant and the complainant. Otherwise, I would not see any reason why the complainant would have consistently in her reports both to her employer, then to the police and to the medical staff said that the appellant had sexual intercourse with her. Though I find no sufficient evidence to prove the offence of rape, in my view sexual intercourse between the two must have occurred on that night of 10th April 2013. Because however, lack of consent was not proved by the prosecution, it meant the offence of rape was not proved, and the appellant has to be acquitted.

I however add that the treatment the complainant was given by the Administration Police Officers whose names appear in the trial court proceedings herein, was far from what is expected of police officers. They refused to record the report of the complainant and her employer about the rape. They sent the complainant away. They transferred her from one station to another and appear to have been reluctant to enable her get a P3 form.

In my view this is a case where the Director of Public Prosecutions should forward a copy of the proceedings of the trial court to the National Police Service Commission for necessary action on the Administration Police Officers and Regular Police Officers involved in any misconduct on their actions.

I thus order that the Director of Public Prosecutions office will forward a copy of certified typed proceedings of the trial court and a copy of this Judgment, to the National Police Service Commission who should investigate the conduct of the police officers involved in handling the rape complaint, and the victim herein.

For the above reasons, I 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 16th day of August 2016.

GEORGE DULU

JUDGE