



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 42 OF 2013

ERIC MAKAU MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(An appeal arising out of the judgment and sentence of Hon. P.M. Mugure RM in Criminal Case
No. 736 of 2011 delivered on 8th April 2013 at the Chief Magistrate's Court at Machakos)**

JUDGMENT

Eric Makau Mutuku, the Appellant herein, has appealed his conviction and sentence of twenty (20) years' imprisonment for the offence of rape contrary to section 3(1) (a)(b) (3) of the Sexual Offences Act. The particulars of the offence were that on 5th May 2011 at Kasinga village, Mungala sub-location in Mutituni Location in Machakos District, within Eastern Province, he intentionally and unlawfully caused his penis to penetrate the anus of Musembi Kivuva without his consent.

The Appellant was also charged with an alternative offence I of 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 5th May 2011 at [particulars withheld] in Machakos District, within Eastern Province, he intentionally and unlawfully caused his penis to touch the anus of M K.

The Appellant was arraigned in the trial court on 13th May 2011 and he pleaded not guilty to the charge. He was tried, convicted of the offence of rape, and sentenced to twenty (20) years in prison.

The Appellant being aggrieved by the judgment of the trial magistrate preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in the Grounds of Appeal he filed in Court on 18th April 2013 and Amended Grounds of Appeal he availed to the Court. The grounds of appeal in summary are that the learned trial magistrate erred in law and fact by basing the Appellant's conviction on uncorroborated evidence of PW1 and PW2 and without ruling out the possibility of mistaken identity; by not awarding the Appellant his fundamental rights; by failing to observe that the Prosecution's case was not proved beyond reasonable doubt; by acting on hearsay evidence; and by not considering his defence.

The Appellant also availed two sets of written submissions wherein he argued that there was no proof of penetration that is required to prove rape by both PW1 and the medical evidence by PW3. Further, that the alleged took place at night at 10pm, and he was identified by a single witness using the light from a phone. Therefore there was the possibility of mistaken identity. The Appellant cited various judicial decisions including in Oketh Okale vs R E.A. 555, Mwaura vs R and Joseph Ngumbao Nzaro vs R

(1991) 2 KAR 212 in support of his arguments.

Mr.s Tabitha Saoli, the learned prosecution counsel, filed written submissions dated 3rd March 2016 in opposition to the appeal. It was stated therein that the penetration was proved by the testimony of PW1, and the evidence of PW3 on the findings of the medical examination of the victim. Further, that the absence of discharge or spermatozoa from the anal swab from the victim was not necessary to prove penetration, as held in **Andrew Apiyo Dunga vs R (2010) eKLR**. Lastly, that the light shorn from the torch and trouser the Appellant left behind were sufficient to identify the Appellant.

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**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called four witnesses during the trial. The victim of the offence, M K, however did not testify, and there was evidence brought by M M K (PW1) who was his brother, and Dr. Erick Munungu (PW4), a doctor from Machakos Level 5 Hospital, as to the mental illness of the victim and that he was not able to speak. PW4 in addition presented a mental assessment report signed on 17th December 2012 by Dr. Kokonga, who had been transferred, to the effect that the victim suffered from mental illness.

PW1 in addition testified as to the events of the night of 5th May 2011 when he stated that they were looking for the victim at 10pm in the night, when they found him in an incomplete house lying on his stomach without his pants and the Appellant in the Act of raping him, whereupon the Appellant fled leaving behind his trouser which was produced in Court as an exhibit.

PW2 was PC John Chebii and he testified as to the report he received o 6th May 2011 of the rape, and that he issued the victim with a P3 form and later took him to hospital for examination on 12th May 2011. The remaining witness who testified was Dr. Emmanuel Loiposha (PW3) who produced a P3 form filled by Dr Kimuyu whom he worked with, which P3 form had the results of a medical examination of the victim and was signed on 12th May 2011.

The trial court found that the prosecution had established a *prima facie* and put the Appellant on his defence. The Appellant gave unsworn testimony and did not call any witnesses. He stated that he was at work on 5th May 2011 and was arrested on 11th May 2011 and told he had committed the rape . He stated that the cloth found was not unique to the complainant, and no spermatozoa was found when the doctor examined the victim.

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 night, and I note that PW1 testified as follows as regards the identification of the Appellant:

“We went to a house approximate 700 metres from our home that was incomplete and we heard people saying “sit properly” in kamba language and we went into the house and found the complainant sleeping on his tummy without his pants on and the accused person was raping him. We used our phone lights to see the accused person who took off through the window, he left his jean trouser marked MFI”

PW1 did not testify that the Appellant was known to him before the alleged rape, nor that the voices he heard belonged to the Appellant. In addition the prosecution did not establish the length of time that the light was shorn on the assailant, and from which distance and angle, for this Court to be able to analyse if indeed the identification was positive. Lastly, as it is not stated that PW1 knew the Appellant from before, no evidence of any identification parade was also brought, and the circumstances in which PW1 therefore identified the Appellant are therefore not watertight.

In addition, no witness was called to identify the trouser that was left at the scene of the offence, and to link it or show that it belonged to the Appellant, and the said trouser cannot therefore be used as corroboration as to the identity of the Appellant.

The finding of this Court from the foregoing analysis is that there was no positive identification of the Appellant as the perpetrator of the offence, and it is therefore not prudent to proceed with an examination of the issue whether there was sufficient evidence to convict the Appellant for the offence of rape.

I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court for the offence of rape, contrary to Section 3(1)(a)(b)(3) of the Sexual Offences Act, for the reasons given in the foregoing. I also order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF NOVEMBER 2016.

P. NYAMWEYA

JUDGE