



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. 49 OF 2013

JOSEPH MUNYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***The Judgment in Mwingi SRM Criminal Case No. 99 of 2012 Delivered On 28/022012 I. W. Gichobi
RM***

JUDGMENT

The appellant was charged in the subordinate court with rape Contrary Section 3 (1) (c) as read with the section 5 of the Sexual Offences Act No. 3 2006. The particulars of offence were that on 19/02/2012 at Mwingi Town ship Mwingi District with Kitui County did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of M. M. a woman aged 45 years. In the alternative, he was charged with indecent act with an adult Contrary to Section 11 (6) of the same act. The particulars of the offence are that on the same day and place did an act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of M. M. a woman aged 45 years.

He denied both counts. After full trial, he was convicted of the main count of rape and sentenced to serve 10 years imprisonment. Aggrieved by the decision of the trial court, he filed this appeal. He filed his initial grounds of appeal 18/04/2013. He however filed an amended petition of appeal on 4/06/2014. He relied on the amended petition of appeal. He also filed written submissions.

His grounds of appeal are that the charge sheet was defective. Secondly, that he was not positively identified as the culprit. Thirdly, that the contents of the doctors report or P3 form did not support the particulars of the charge. Fourthly, that the prosecution evidence was contradictory and inconsistent. Fifthly, that his mode of arrest was improper. Sixthly, that the statement of the victim did not support the offence of rape as alleged by the prosecution. Seventhly, that the husband of the complainant was not called by the prosecution to light on the incident.

At the hearing of the appeal, the appellant relied on his written submissions. He elected not to make oral submissions.

Learned Prosecution Counsel, Mr. Orwa opposed the appeal. Counsel submitted that the Magistrate considered the evidence on record and came to the conclusion that the prosecution had proved the case against the appellant beyond reasonable doubt, and that the defence was a mere denial and an afterthought. Counsel submitted that the charge was not defective as it complied with the requirements of

Section 134 of the Criminal Procedure Code. Counsel maintained that in case there were minor defects in the charge, the same were curable under Section 382 of the Criminal Procedure Code.

On identification, counsel submitted that the appellant was arrested soon after the incident and that there was therefore no possibility of mistaken identity. Counsel submitted further that the P3 form produced by the prosecution supported the occurrence of the offence. Counsel stated also that there were no contradictions in the prosecution evidence. Counsel further submitted that there were no violations of the appellant's rights when he was arrested. On failure to call the husband of the complainant as a witness, counsel submitted that his evidence would have been a hearsay. To conclude, counsel submitted that the prosecution established a water tight case against the appellant.

In response to the Prosecuting Counsel's submissions, the appellant stated that he will rely on his written submissions.

At the trial, prosecution called 4 witnesses. The complainant started testifying as PW1 on 27/07/2012. She testified that she lived at Mwingi town with a brother who was not married called G M. That on 19/02/2012 at around 7.00p, she went to her house and then to a bar whose name she could not remember. She took beer with people she did not know and left at around 10.00pm. She then went back to her house but the accused followed her from the bar. It was her evidence that she was raped inside the house. At that point the prosecutor asked for an adjournment for the investigating Officer to take the victim for medical treatment as her testimony was contrary to what she had informed the police. The court allowed the adjournment. Thereafter, doctor Indumwa tendered his evidence as PW1 on 22/11/2012.

The complainant later tendered evidence as PW2 it was her evidence that she was a seller of traditional liquor. That on 19/02/2012 she went to a bar at 7.00pm and took beer with other people. She left at 9.00pm followed by Kilonzi Musyimi who, according to her, was the appellant. He held her hand and took her to the river and asked to have sex with her. They made love at the river but she screamed. At that time, the appellant was with two other men who did not have sexual intercourse with her. She went home and then later to hospital, where she was admitted. She then changed her story again and said on that evening she was with a man with dreadlocks. That they drank beer together in the bar but each left separately. She stated that she knew Joseph Munyoki and not Kilonzi Musili. She further stated that it was Joseph Munyoki who raped her. She was not cross examined.

PW1 was Dr. Edmond Indumwa. He produced a P3 form filled by a Mr. Njoroge. The contents of the P3 form were that the complainant had bruises on the right side of the face and below the right eye and nose. Other parts of the body were normal. However, she had an infection in the vagina HIV test was negative. In cross examination, he stated that the appellant was not examined medically. PW3 was PC Beatrice Waitera. It was her evidence that on 20/02/2012 at around 8.00am, she perused the OB report back at Mwingi police station and noted that there were rape suspects held in the cells. It was her evidence that a lady called M M had reported at night that she had been raped. She interrogated her and she said on 19/02/2012, she went with her husband to Small World bar and stayed there up to 11 pm that they left for home but as they passed Surgeons Guest House and near a river, they met two men. One had dreadlocks while the other was fat and short. Those men stopped the complainant and the dreadlocked man ordered the husband to go home. When the husband resisted he threw stones at him. The husband then left the scene screaming. Thereafter, the two men forcefully undressed the complainant and the one with dreadlocks raped her. As the husband ran away, he met policemen on patrol and he informed them about the incidence. The policemen thus went to the scene and arrested the appellant. According to this witness, the complainant was raped again thereafter by three men, but she did not know the culprits.

PW4 was Corporal Vincent Ongola of Mwingi Central DO's office. It was his evidence on 19/02/2012 at about 11.15pm while on patrol with another officer constable Joseph Mutemi, they heard noise near Santos Lodging or guest house. They rushed to the scene and found a man wearing his trousers while a woman was crying. They arrested both of them and took them to Mwingi Police Station. He stated that the person who was wearing the trousers was the appellant. That is the prosecution evidence.

When put on his defence, the appellant gave sworn testimony. He stated that on 19/02/2012 he was called by a cousin called on phone Mwaniki through a phone. He then went and met him at Happy Corner Club. He collected money from him and proceeded to 2,000 club where he met two officers, an Administration Police officer and a Kenya Police Officer. The officers arrested him and took him to Mama C's shop at down town Mwingi and left him at [particulars withheld] Lodging under the guard of one of officers. The one who left came back with a lady. When he enquired why he was being held he was informed by the officers that he should be told the reason while at the station. He was later charged with rape and did not know why.

Faced with the above evidence, the learned Magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The Learned Magistrate convicted the appellant on the main count and sentenced him to serve 10 years imprisonment. Therefrom arose the present appeal. This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – see *Okemo vs. R. (1972)EA32*.

The first complaint of the appellant is that the charge was defective. In my view, that complaint is based on good grounds. The offence of rape can only be committed when the victim has not consented to the sexual act. The particulars of charge do not state either that the act of the appellant was “unlawful” or that there was no consent from the victim. The victim was an adult and could lawfully consent to sexual intercourse. In effect, therefore the particulars of the charge did not disclose the offence of rape as known in law. Even assuming for argument sake that the appellant had pleaded and guilty to the charge as framed, he would not have pleaded guilty to the offence of rape.

The alternative charge of indecent act was also on an adult. For such an offence to be committed there would be a requirement of the absence of consent. Taking into account the facts circumstances of this case, one cannot say there was absence of consent. The touching if any was not done in the sight of the public. The incident occurred at night. According to the complainant they went all the way to the river. It is apparent that there was drunkenness on the part of both the complainant and the appellant. They took an adventure and it was just the intervention of the unexpected police officers which created the long story. Otherwise in my view, both charges do not disclose any offence. They are incurably defective. As such the appellant was wrongly convicted on a charge which did not disclose an offence known in law. The appeal will succeed on that account.

The other reason why this appeal will succeed is the contradictions in the evidence of the prosecution witnesses. The complainant initially mentioned the name of a totally different person from the appellant as the person who raped her. She gave three versions of the incident. According to her she lived with a brother in the same house. The brother paid the house rent. She went to the house that night followed by this person who raped her in the house. At that point the prosecution stood her down because she was contradicting what she had told the police. She was later to change the story and say that it is the appellant who raped her. This second version is that the appellant held her hand and led her to a river accompanied by two people. At the river, he asked her to remove her clothes which she did. The appellant then forcefully had sexual intercourse with her. This was a completely new story and the scene of crime was completely different. No explanation was given why the scene and players had changed from a house to the river bed.

The third version is the story the complainant gave to the police. The same complainant according to the Investigating Officer PC Beatrice Waithera, informed her that on the fateful day she was walking home with her husband. The husband was threatened with stones and ran away screaming. That the husband reported the incident to police officers on patrol who came to the scene and arrested the appellant. This is also another different story.

It is instructive to note that the husband was not identified by name nor was he called to testify in court nor was an explanation given for his absence.

Added to these three different versions of the complaint, the arresting officer has another story. PW4 Vincent Ogola, stated in his evidence that together with Corporal Joseph Mutemi, they heard noises near a

guest house. When they arrived, they saw a man trying to wear his trousers and arrested him. They also found a woman crying who alleged to have been raped. This woman was the complainant. The man was the appellant. Corporal Ogola neither mentioned the report from the husband of the complainant nor did he mention the presence of any other person at the scene apart from the appellant and the complainant.

In my view, with these contradicting four versions of what happened on that day, it is not possible to determine which story of the complainant was true. It is not possible to say that there was no consensual sexual intercourse on that day. The only thing that could be said with certainty is that sexual intercourse occurred. That is why the police on patrol heard screams and on approaching found the appellant pulling up his trousers after the act. The burden is always on the prosecution to prove its case against an accused person beyond reasonable doubt. Even assuming the charges were correct and proper, in my view the evidence on record does not establish that there was an offence of rape or indecent act committed by the appellant. The prosecution failed to prove beyond reasonable doubt that there was no consent of the complainant.

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 19th day of February 2015

GEORGE DULU

JUDGE

In the presence of: