REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 91 OF 2012

PETER GIKUNDA MWITI.....................................APPELLANT

V E R S U S

REPUBLIC...PROSECUTOR

JUDGMENT.

The Appellant Peter Gikunda Mwiti was charged with three counts namely: rape contrary to section 3 (1) (a) (b) as read with section 3 (3) of the Sexual offences Act No. 3 of 2006. The particulars of the charge are that on 27th June 2011 at [particulars withheld] Location, Imenti South District within Meru County, the appellant did an act which caused penetration with his genital organ of Z. K. a woman aged 82 years.

In count two, the appellant faced a charge of indecent act with a woman, contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged that he indecently assaulted Z. K. woman aged 82 years by touching her buttocks and vagina.

In count three, the appellant faced a charge of stealing contrary to section 275 of the Penal Code. It was alleged that he stole (30) Kilograms of beans, and Kshs, 500/= all of which were valued at Kshs 2300/=, the property of Z.K.

As was correctly observed by the Learned Trial Magistrate, count two ought to have been an alternative charge. Be that as it may, the Appellant was tried and at the end was convicted and sentenced to 15 years imprisonment in respect of count one. On count III he was fined Kshs 10,000/- in default 6 month's imprisonment. In respect of count two, the sentence was suspended the trial court having found that the same was an alternative charge.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In the amended memorandum of appeal which was more or less similar to the original grounds, the Appellant raised the following issues:

a. **THAT the learned trial magistrate erred both in law and facts in flouting section 197 and 198 of the Criminal Procedure Code;**

b. **THAT the learned trial magistrate erred both in law and facts by relying upon the evidence of the clinical officer who had no qualification;**

c. **THAT the learned trial magistrate erred in both law and facts in failing to find that the**

prosecution witnesses tendered uncorroborated evidence;

d. **THAT the learned trial magistrate erred both in law and fact in failing to find that there was an existing grudge between the appellant and PW6;**

e. **THAT the learned trial magistrate erred in law and fact in flouting the provisions of section 169 (1) of the penal code;**

The appellant relied on the written submissions filed in court on the hearing day. The appellant submitted that sections 197 and 198 of the CPC were flouted in that the lower court record does not show which language the court used; that he only understood Kimeru; that it is his constitutional right to an interpreter which was not availed to him. The appellant also contended that the clinical officer did not meet the requirements of Section 48(1) of the Evidence Act in that he did not state his qualifications.

The appellant also urged that the prosecution evidence was contradictory especially that of PW1 and he relied on the decision in **Dankerai Ramkishan Pandia v. Republic (1957) EACA 336**. Where the court held that if the evidence is contradictory or inconsistent, it should not be relied upon. On grounds 4 and 5 it was the appellants submission that his defence was not dislodged and that he had a dispute with PW6 emanating from his place of work.

The appeal was opposed. It was contended by Mrs. Matheka Learned State Counsel that with regard to the doctors qualifications, the appellant was given a chance to cross examine the doctor which he did not; and that he did not oppose the production of the P3 form. With regard to the language used, she contended that when the appeal came up for hearing on 11th February 2015, there was no interpreter and the Appellant addressed the court in Kiswahili. She further contended that the plea was taken in Kimeru and that PW1 and 2 proceeded in Kiswahili. Consequently she urged the court to dismiss the appeal.

This is the first appellate court and the evidence adduced before the trial court has to be subjected to a fresh evaluation and analysis for this court to draw its own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court espoused by the Court of Appeal in the decision of ***KIILU AND ANOTHER V R (2005) 1 KLR 174*** where the Court of Appeal held thus:

"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions."

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

Briefly the evidence adduced before the trial court is that Z.K., PW1, who was an elderly woman aged 82 years, was on 27th June 2011, coming from her farm when the Appellant approached her from behind as she was carrying fodder for her cows, held her from the back and pulled her into a ditch while assaulting her and told her to lie down as he wanted to have sex with her. He forced her on the ground, and removed her clothes and had sex with her by force. After the appellant finished, PW1 screamed once, calling John but the appellant covered her mouth with his hand. The appellant then asked for PW1's key and PW1 told her it was on her lesso. The appellant then took the key and told PW1 to give her the money, proceeds from the sale of a cow she had sold the previous day. They then went to PW1's house, whereupon he lit a matchbox that he had and asked PW1 to put on the lamp. PW1 then told him that she didn't have a lamp and that she uses a torch. The appellant then took PW1's purse which was in her jacket with Ksh 550/= which was in the purse and 50 kilograms of beans which was in the house in a sack and told PW1 that if she mentioned his name, he shall come and finish her and take away all her goats. After he went away, PW1 informed one Joshua Kiimba Dereva how she had been assaulted by the appellant. The said Joshua

assisted PW1 by coming to her house and he spent the night in PW1's house to protect her. The following day, PW1's son came and took her to Mitunguu where they reported to the police. She was taken to Kanyakine hospital, was treated for one day and issued with a P3 form. PW1 further testified that she knew the appellant very well and his family and that at the 1st time that he accosted her there was no darkness.

I have considered the submissions by the appellant and the State Counsel and the grounds of appeal. In addition, I have re-evaluated the evidence on record.

The complainant narrated in detail how she was accosted, from behind, and was forced into having sex with the assailant. Her evidence is corroborated by that of the clinical officer, PW5 who confirmed that there was evidence of penetration of her vagina. PW1 told the court that she was also assaulted into submission to the act. Indeed PW5 found that PW1 had tender dark parts of her shoulder on the lower region, tenderness of left wrist, dark left swelling on left thigh. Those injuries which were scattered all over the body are evidence of force used on the complainant. I am satisfied she was indeed raped. PW1 is an elderly lady of 82 years who could not withstand the strengths of a young man.

The appellant generally denied committing the offence. This incident occurred at 6.00 pm. There was still light. PW1 told the court that she stayed with the appellant till 7 pm and thereafter he took her to her house where he demanded money. PW1 told the court that she hails from the same village with the appellant. He even knew that she had sold a cow. They were in close contact during the sexual act and I am satisfied that PW1 identified the appellant as the assailant because she knew him before. They spent a long time together and also the fact that the ordeal started at daytime.

With regard to ground one, whether the trial magistrate flouted sections 197 and 198 of the Criminal Procedure Code CAP 75 of the Laws of Kenya. Section 198 of the Criminal Procedure Code inter alia provides as follows:

"whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.."

Article 50 (2) (m) of Constitution also guarantees an accused person's right to have the assistance of an interpreter without payment if he cannot understand the language of the court. It is the duty of the court to ensure that the accused understands the language of the court i.e. English or Kiswahili and if he does not, he must get an interpreter of the language he understands and the court must put that on record.

I have carefully perused the proceedings and indeed it is not clear from the record which language was used at the trial since the same was not indicated even though the Learned State Counsel intimated to court that PW1 and 2 proceeded in Kimeru. That is not ascertainable from the record. Be that as it may, the plea was taken in Kimeru, a language which as indicated on the record, the Appellant understood. The Appellant pleaded not guilty to all the three counts and even in his defence, he intimated to court that he understood the charges that he was facing. In addition, when the appeal came up for hearing on 11th February 2015, he addressed the court in Kiswahili. Consequently I am satisfied that the appellant was not in any way prejudiced by this fatal omission by the court not indicating the language that was used at the trial. He actually participated in the proceedings and therefore understood the pleadings. This can only be an afterthought. This ground fails.

With regard to ground 2, it is indeed true that the clinical officer who produced the P3 did not give her qualifications but the applicant had an opportunity to question the officer but did not do so. However on examination of PW1 there was inter alia presence of red blood cells showing errosiveness of the vaginal walls which was a sign of penetrative sex. From this evidence, it is clear PW1 had taken part in sexual act. The probable reason why there was no presence of spermatozoa was because PW1 went to hospital the next day. In any event the essential ingredient of the offence of rape is not the presence of spermatozoa but rather penetration which was proved in the instant case. There was no evidence that PW5 was not qualified. Consequently, this ground must also fail.

With regard to the allegation that there was a grudge between the appellant and PW6. PW6 denied having ever had a grudge with the appellant and further stated it was over 15 years since he stopped working at the quarry with the appellant. The appellant did not raise this issue in his defence. Even if PW6 had a grudge with the appellant, the other witnesses and in particular PW 1 had no reason to implicate him. Consequently, this ground must also fail.

With regard to the contention that the learned trial magistrate flouted the provisions of section 169 (1) of the Criminal Procedure Code, which deal the contents of a judgment, the appellant has not demonstrated how the trial magistrate flouted this section. Consequently, this ground must also fail. I have read the judgment and in my view it is a well-structured judgment containing the charge, evidence, analysis and reasons for the decision.

Having carefully analyzed the evidence of all the prosecution witnesses, I find the same to be consistent and reliable to sustain a conviction and I see no grounds upon which to fault the Learned Trial Magistrate’s finding. I have no doubt in my mind that it is actually the Appellant who raped PW1 and in the process also stole her money and beans.

In the end result, I find that evidence tendered by the prosecution was overwhelming and sufficient to found a conviction. The conviction entered against the Appellant was safe. I accordingly uphold it.

On sentence, the learned trial magistrate sentenced the appellant to 15 years imprisonment. The offence attracts a minimum of 10 years imprisonment which may be enhanced to life imprisonment depending on the circumstances. The sentence was very lenient and this court will not disturb the same.

With regard to the second count, the court suspended the sentence on the same having found it be an alternative charge, I make no finding on the same.

With regard to the last count, the appellant was fined Kshs 10,000/- in default six months imprisonment. The maximum sentence for this offence is 3 years. The sentence was therefore very lenient.

In the end result, I find the appeal to be without merit and I accordingly dismiss it.

DATED AT MERU THIS 13th DAY OF MARCH 2015.

R. P. V. WENDOH

JUDGE.