`REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 227 OF 2013

BETWEEN

ISAACK YESWA……………APPELLANT

AND

REPUBLIC…………..…………ACCUSED

(Being an appeal from the conviction and sentence of Hon. P.A. Achieng Ag, PM in Kakamega CM Cr. Case No. 2402 of 2011 delivered on 27.07.2012)

JUDGMENT

Introduction

1. The appellant was charged in the subordinate court with the offence of rape of an imbecile contrary to Section 7 of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 28th of September, 2008 at Kakamega South District within Western Province unlawfully and intentionally inserted his genital organs namely penis into genital organ namely vagina of M I R a woman with mental disability.

2. In the alternative he was charged with indecent act contrary to section 11(6) of the Sexual Offences Act No. 3 of 2006. The particulars are that on the 28th day of September, 2008 at East Kakamega District within Western Province the appellant intentionally and unlawfully conducted his genital organs namely penis into the genital organs namely vagina of M I R a woman with mental disability.

3. He denied the charges but after a full trial he was convicted and sentenced to serve 10 years imprisonment for the offence under Section 3(1) as read with Section 3(3) of Sexual Offences Act No. 3 of 2006.

The Appeal

4. Being dissatisfied with the decision of the trial court the appellant has appealed to this court on the following seven (7) grounds.

> 1. THAT:- The learned trial Magistrate erred in law and fact in failing to analyze the evidence on record which failure resulted into unwarranted conviction of the appellant.
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> 2. THAT;- The trial Magistrate completely ignored the numerous contradictions in the prosecution evidence which should have been put to the benefit of the Appellant.

3. THAT;- The learned trial Magistrate misdirected herself and convicted the appellant on a defective charge sheet that was not amended yet the offence there under had not been proved and when infact no offence under that section had been disclosed and or established and that the Magistrate's conviction was biased and against the weight of evidence adduced in court.

4. THAT;- The learned trial Magistrate fatally shifted the burden of proof failed to analyze and consider the evidence as a whole and or consider the appellants case and she erred by casually dismissing the appellants defence and further erred by indulging in speculations and inferences.

5. THAT;- The learned trial Magistrate misdirected herself and convicted the appellant yet he was not positively identified at the scene and the prosecution witness who purported to have indentified him at the scene of crime were in bad blood rather had a grudge against the appellant who was a complainant in Cr Case No. 169 of 2008 against them.

6. THAT;-The learned trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt when she had noted that some of the exhibits which were produced in the earlier case could not be traced and proceeded to convict the appellant on mere testimonies that were not corroborated.

7. THAT;- The learned Trial Magistrate erred in law and fact by admitting hearsay evidence adduced by PW5 who was not at the scene and further went on to admit the evidence adduced by PW6 the Medical Doctor who also relied on PW5 in attending to the complainant since PW6 could not communicate with PW1 because of language barrier.

The Submissions

5. Though the appellant was initially represented by Counsel, he later opted to act in person after discharging his counsel vide the letter dated 04.09.2014. He filed written submissions which he relied on fully. He raised issue with PW1's testimony that she was defiled for four (4) hours from 7.00pm which contradicts the testimonies by PW2 and PW4 who came to her (PW1) rescue. He argued that if at all the complainant she was raped for four hours then the act could have ended at 11.p.m and the rescue at 7.pm could not have been possible. The appellant weaved a theory that he was set up because as PW1 would have it she claimed that the appellant wanted to have sexual intercourse with her by force and she screamed and that is when PW2 and PW4 went to her rescue.

6. The appellant further submitted that since PW1 was insane the court should have considered the same before admitting her testimony. That PW1 should have been medically tested to verify her sanity before being sworn to testify in court.

7. The appellant has also raised issue with the case of assault he filed against PW2 and PW4 and maintained that because of that case they decided to fix him. He said that there was a grudge between him and PW2 as a result of the case he filed. He submitted that there was collusion to produce a document which was never verified for its authenticity namely the agreement PEXl which he claimed was very malicious. He submitted that if PW1 was raped then the report should have been made immediately after the incident. On the document produced namely the agreement he claimed that there was no independent witness who signed the same who was called to give evidence nor was the mother of the complainant who was adversely mentioned called to testify. He maintained that the investigating officer should have taken him for medical examination and denied entering into any agreement concerning an incident which had not happened by then.

8. Mr. Ng'etich for the state made oral submissions in response to the grounds of appeal. On ground 2, he submitted that the prosecution evidence was consistent and corroborated and that the resultant decision by the trial court was proper. Regarding the defects alleged to be on the charge sheet, he submitted that they were such that did not lead to miscarriage of justice and were curable under Section 382 of the CPC.

9. Regarding the rest of the grounds of appeal, Mr. Ng'etich maintained that the prosecution discharged

its burden and that the defence did not raise any doubt in the prosecution case when it was given a chance to do so and thereof the trial court had no option but to convict the appellant. He contended that the appellant was properly identified from the evidence of PW1 as corroborated by PW2.

10. Finally, Counsel submitted that the trial court made the decision based on the evidence of all the witnesses and not just the evidence of PW5. He urged the court to dismiss the appeal in its entirety.

Prosecution's case

11. The facts of the prosecution case are that at about 7.00 P.m. on 28/09/2008 the complainant M I R, a mentally challenged girl was sent to the applicant's shop to buy sugar. After buying the sugar, the appellant asked to go and sleep with him but she told him that she had left some food cooking [and had to go back home]. The appellant then took her by force to the nearby sugar cane plantation, removed her clothes including the petticoat and under pant. The complainant who testified as PW1 started crying as the appellant wanted to have sexual intercourse with her by force.

12. PW1 stated that when she screamed her brother by the name D L went to the scene and asked the appellant what he was doing to the complainant. She also stated that by the time her brother D arrived on the scene, the appellant had already raped her and she was still lying on her back, she also stated that one Matayo went to the scene and together with D, they told the appellant to let her go home.

13. The complainant stated further that when she went home, she told her mother about the incident where upon the mother took her to hospital at the Kakamega Provincial General Hospital. At the hospital, PW1 was seen and examined by Etiana Francis who testified as PW6. According to PW6 examined PW1 on 15/10/2008 although she had allegedly been raped on 28/09/2008. On examination, PW6 noted torn clothings being white petticoat and greenish male underwear with dry blood stains. He also stated that PW1 had sustained an injury on the left thigh. He gave Pw1 anti-biotics. He also told the court that there were bruises around PW1's labia majora and Labia minora. There was also a whitish discharge mixed with pus the same being assign of infection. PW6 thereafter filled the P3 form, signed it and produced it in court as P Exhibit 5. PW6 also produced the past rape case form which he filled on the 27.02.2012. The past tape form was produced as Pexhibit 6. The earlier treatment notes on PW1 were also produced by PW6as PExhibits 2(a) (b) and (c)

14. When PW6 was cross examined by appellants counsel he admitted that he did not examined the appellant alongside PW1. He also stated that PW1 was a psychiatric patient at their clinic and that she had been on treatment for some time. He also told the court that during examination, PW1 was not completely coherent as she forgot some things while remembering others.

The Defence case

15. At the close of the prosecution case, the appellant was found to have a case to answer and he was thus put on his defence. He elected to give sworn evidence.

16. In his defence, the appellant stated that apart from being a farmer, he was also a preacher with the African Israel Church. He denied raping PW1. He also denied committing an indecent act with PW1.

17. He stated that on 28/09/2008 which was a Sunday, he went to Church as usual and returned home at about 7.00pm. He stated that on the material day he did not meet Pw1 and that he was not at the shop either.

18. The appellant also testified that both Matayo Mwanzo PW2 and D R PW4 were well know to him, they were his neighbours and that he had case with them after assaulted him. He stated that he testified in the case against them and that the said case gave rise to bad blood between him and the said 2 witnesses. He also said that J R A PW5 was father to both PW2 and PW4. The appellant deemed executing any agreement being PExhibit 3.FDrom the record however, P Exhibit 3 is not on the record.

19. During cross examination, the appellant reiterated his evidence in chief, saying there was a grudge between him and 3 of the prosecution witnesses, namely PW2, PW3 and PW5. He denied that the shoe produced in court belonged to him. The appellant also stated that after the commission of the alleged offence, it took a long time before he was arrested. He urged the court to acquit him.

Judgment of the trial court

20. After carefully considering the evidence on record the learned trial Magistrate concluded that the prosecution had proved its case against the appellant beyond any reasonable doubt, found the appellant guilty on the main count convinced him and sentenced him to 10 years imprisonment.

Duty of this court

21. This being a first appeal, this court is under a duty to reconsider and evaluate the whole evidence afresh with a view to coming to its own conclusions in the matter, only bearing in mind the fact that it neither saw nor heard the witnesses who gave evidence before the trial court. See **Otieno – vrs – Republic (1972) E.A. 32.**

Analysis and findings

22. The court notes from the evidence and especially the evidence of PW6 the Clinical Officer that PW1 was a Psychiatric case who was undergoing treatment at PW6's health facility. It is not clear from the record whether the trial court tried to establish the state of mind of PW1 before PW1 was allowed to testify, but said the following complainant of its judgment; "though the said complainant was said to be mentally challenged, she was able to express herself in manner which could be understood by the court and her testimony was clear"

23. This court has itself looked carefully at that "clear" evidence by PW1 and finds that there are serious gaps in it. Infact according to the testimony of PW1 bothPW2 and PW4 arrived at the scene before the appellants raped her although in the same breach, she said that the two arrived after the appellant had raped her and she was lying on the ground on her back. Further, while PW1 stated that the ordeal took place for some 4 hours from around 7.00 pm on the material day. She also said that both PW2 and PW4 went to her rescue at about 7.00p.m. These contradictions go a long way in showing that PW1 may not have been on her lucid moments when she was testifying. It may be true that the appellant committed the offence, but the evidence lifting him to the incident is not water tight.

24. According to the testimony of Matayo Mwanzo PW2 he reached the scene of the alleged crime at 7.00pm and heard a voic of a woman coming from there. He said he jumped onto the appellant as he raped PW1 and tried to bribe him with kshs.500/=. He also said that soon thereafter D, PW4 arrived on the scene with a rope, but apparently the appellant managed to escape leaving his shoe behind.

25. According to D L R, he got to the scene of the alleged crime at 7.00pm and heard a woman crying. When he entered the sugar cane plantation he found PW1 therein and she said she had been raped by the appellant. He said he checked the sugar cane plantation and found the appellant who was being held by Matayo, PW2. Once the appellant agreed that he had committed the offence PW2 and PW4 at the suggestion of PW4 decided to tie the appellant with ropes o they could take him to the chief but on hearing that, the appellant ran away.

26. During cross examination PW4 stated that it was dark by the time he got to the scene. He denied that he was telling lies and said they were able to see the appellant who was a local church elder with the help of a torch which PW2 had. PW2 did not of course mention anything to do with a torch either by himself or PW4. PW4 admitted that PW2 himself and the appellant were engaged in an assault case. PW4 could not say whether the shoe that belonged to the appellant.

27. Taking all the above evidence into account, I find that the contradictions none of such a magnitude that they should have created a doubt in the mind of the trial court as they have done in //. That benefit

must go to the benefit of the appellant. It may well be true that main case was planted on the appellant because of the grudge between him on one hand and PW2 and Pw4 on the other hand.

Conclusion

For the reasons above stated, I find that this appeal has merit, the same is hereby allowed. The conviction is quashed and the sentence of 10 years imprisonment is set aside. Unless he is otherwise lawfully held the appellant is to be released from prison custody forthwith.

Judgment delivered, dated and signed in open court at Kakamega

This 31st day of July 2015

RUTH N. SITATI

JUDGE

In the presence of;-

present in person…………………..…………………..for appellant

Mr. Orwenga ………………….……………for the state/ Respondent

Mr. Okoit……………………………Court Assistants