



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 139 OF 2014

KAMULA KIMANTHI NGUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence of H.M. Ng'ang'a RM delivered on 17th July 2014 in Criminal Case No. 203 of 2013 in the Senior Resident Magistrate's Court at Tawa)

JUDGMENT

The Appellant has appealed against his conviction and sentence of 30 years' imprisonment for the offence of rape, contrary to section 3(1) and (3) of the Sexual Offences Act. The particulars of the charge of rape were that on 17th July 2013, in Mbooni East District within Makueni county, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of PN without her consent.

The Appellant was arraigned in the trial court on 6th August 2013 and charged with the said offence of rape, and an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act. He was also charged with a second offence of stealing, contrary to section 275 of the Penal Code. After conducting the trial, the trial court convicted the Appellant on the charge of rape and acquitted him on the charge of stealing.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. His grounds of appeal are stated in his Petition of Appeal dated and filed in Court on 30th July 2014. These grounds are that the trial Magistrate erred in law and in fact by not evaluating that the light used was not conducive to proper identification, and by not doubting the veracity of the evidence of recognition by the complainant. Further, that the trial magistrate erred in law and fact by convicting the Appellant on contradictory evidence, and failing to note that the case was not proved beyond reasonable doubt. Lastly, that the trial magistrate failed to consider the Appellant's alibi defence case.

The Appellant also availed to the Court amended grounds of appeal during the hearing of the appeal, which are as follows:

1. That the learned trial Magistrate erred in points of law and facts while basing the conviction on contradicted evidence which was contrary to section 163 (1) (c) of the Evidence Act.
2. That the learned trial magistrate further failed in points of law and facts while basing the conviction in reliance to the attributed evidence of a single witness (PW1) as credible and truthful, whereas the same had no evidential value in this instant case.

3. That the learned trial magistrate further failed in points of law and facts while basing conviction on the identification evidence alleged by PW 1 while the condition at the scene of crime were harsh and not conducive for proper and positive identification.
4. The learned trial magistrate also erred in points of law and facts by concluding that he found that there was overwhelming evidence sufficient to warrant the conviction in count one, while the prosecution failed to prove their case affirmatively and relied only on hearsay testimony.
5. That the learned trial court failed in points of law while accepting PW 6 to present P3 form evidence in court and failing to observe that she was not a qualified doctor to give such evidence as required under section 77 (1) (2) & (3) of the Evidence Act.
6. That the learned trial Magistrate failed in points of law by failing to consider that some of the vital and crucial witnesses were not called by the prosecution to give evidence contrary to section 144 as read with 150 of the Criminal Procedure Code.
7. That the defence evidence was not misplaced at all had the defence been duly put into consideration.

The Appellant availed to the Court written submissions wherein he argued that the point in dispute before the court was that he was the assailant who committed this offence. Further, that the gist of the prosecution case is the alleged identification by recognition made by PW 1 a single witness, and that the learned trial magistrate wrongly admitted her evidence which was contradicted.

The Appellant submitted that the only means that PW 1 informed the court she used to identify the person likened to be the Appellant was the torch light and moonlight, and that she alleged that the person was wearing a brown and Khaki jacket. However, that this evidence was contrary to the exhibit produced in court which showed a red and grey jacket recovered by the police officers. It was the Appellant's submission that the said exhibit was not relevant to this case because PW 1's identification does not match with what the police recovered.

According to the Appellant, PW 1's evidence as to the conditions at the scene of crime did not accord her any positive and reliable identification, because she informed the court that she was shocked when she saw somebody in her room at night, and that she was scared as she knew the man was coming to kill her as the man was shining the torch on her. Further, that the incident occurred very late at night when she was from a deep sleep, as she never heard the door opened or broken, but only saw a torch light shorn onto her.

The Appellant argued that PW1 screamed but was threatened to keep quiet or be killed, thus she was confused and no clear and reliable identification can be made. The Appellant submitted that it is trite law that before a court can base a conviction on the evidence of identification at night or when it is known that the conditions favouring a correct identification are difficult, such evidence must be watertight. He relied on the decisions in **Kimani vs. Republic (1985) KLR 290** and **Ndungu Kimani vs. (1979) KLR 282** in this regard.

The Appellant also argued that no cogent and reliable investigations were made describing how the assailants gained the entry into the house of PW I, and that PW 4 did not support PW 1's evidence on how the suspects gained entry into her house. Further, that there was no proof that the door of PW I was broken as alleged by PW 4 or that its lock was loose as said by PW 1.

It was the Appellant's contention that according to the evidence on record, it is unsafe to base his conviction on hearsay evidence and that what was needed was other evidence to link the Appellant to the commission of the crime. This was for the reason that the police who visited the scene did not corroborate PW 1's allegation and only contradicted it on the major issue on how the intruder gained the entry to PW 1's house.

The Appellant further submitted that the person who filled the P3 form was not a medical officer, but only a clinical officer whose qualification does not allow her to perform the task. Further, that PW 6 never told the court if she knew the person who treated PW 1, because she informed the court that she relied on the treatment card to fill the P3 form. She also never informed the court whether she knew the

handwriting on the MOH 363, and that the learned trial magistrate overlooked that PW6 was a clinical officer and was not a geologist or a pathologist to stand before the court to give evidence as required under section 77(1) (2) and (3) of the Evidence Act.

According to the Appellant, the prosecution also failed to summon some of the crucial witnesses to come to the court and give their evidence as enshrined under section 144 and 150 of the Criminal Procedure Code. In particular, that one Mang'oka who was mentioned by PW 3 who never called by the court to testify as the neighbour who first came and found PW 1, PW 2 and PW 3 outside their house. Further, that PW 1, PW2 and PW 3 were from the same family and therefore the only independent witness could have given the court a true picture on what transpired was Munyoki Mang'oka, whom PW 3 told the Court accompanied them to the house of PW1.

The Appellant also claimed that his mother was also a crucial witness who could have cleared the doubt on the jacket claimed to have been left by the person likened to him. Further, that the prosecution also failed to summon the Medical Officer of Health to give evidence. Therefore, that the failure by the prosecution to avail such witnesses left doubt in the prosecution side.

Lastly, the Appellant submitted that the trial court did not give cogent reasons why his defence was not accepted, and that had his defence been considered, he would have been acquitted.

Ms. Saoli, the learned counsel for the State on her part submitted that the prosecution availed a total of 7 witnesses. PW 1 was the complainant, aged 65 years and she testified that on 17th July 2013 as she slept at around midnight, the Appellant came to her house and raped her and told her not to make any noise. The Appellant had a torch which shone on her and that she recognized him as he was a neighbour. Her clothes which were torn as a result of the ordeal were also produced in court. PW 1 reported the incident to PW 2 and she was taken to the police station and examined at Machakos Hospital.

The learned counsel further submitted that PW2 and PW3 testified that PW 1 narrated the ordeal to them, and PW 3 accompanied PW1 to report the matter to the police. PW 4 is the one who arrested the Appellant. PW 6 was the medical doctor who testified that there was evidence of penetration. PW 7 was the investigating officer who stated that the incident was reported to him on 18th July 2013 at Mbooni Police Station, and that he accompanied PW 1 to see the doctor. That upon investigation he recovered that stick used by the Appellant to threaten PW 1, and the Appellant's phone and jacket left by the Appellant when he fled at the time of attempted arrest by the Administration Police.

The learned counsel for the State submitted that Appellant was convicted on sound evidence on the 1st count of rape and sentenced to 30 years imprisonment, and asked that the appeal be dismissed and that the court upholds the conviction and confirms the sentence.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, 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**).

Seven witnesses testified at the trial in the lower court. PW1 who was the complainant and who testified in camera stated that that on 17th July 2013 at around midnight, she saw the Appellant on the door leading to her bedroom. Further, that the Appellant had a torch which he shone on her, and later put it on a table where she was sleeping, whereupon he held her down on the bed and she screamed. PW1 said the Appellant told her to keep quiet or that he would kill her, and that he then put a stick on her neck and removed her underpants and proceeded to rape her for about half an hour in the vagina and anus. Further, that he then left leaving the main door open, and took with him 400 Kenya shillings that PW1 stated she kept in a small hand pocket on the bed.

PW1 testified that she then went to her brother-in-law's house the same night and told him what had

happened, and she went with him to Mukuku Administration Police post the morning of the next day at 4am, and reported that the Appellant had raped her. Further, that her brother-in-law and his wife took her to make a report at Mbumbuni Police Station on 17th July 2013 in the morning, and then took her to Kisau hospital for treatment from where she was referred to Machakos Hospital where she was also examined and treated.

PW1 identified the clothes she was wearing on the night she was raped, which were her underpants, petticoat and skirt, and a jacket which she stated was the one that the Appellant was wearing the night of the rape and was red in colour. She also identified the stick used by the Appellant to strangle her on the night of the rape, which she stated was one she used in her home.

PW2 who was the complainant's sister-in-law testified that on 17th July 2013 at around midnight she heard someone scream, and she woke up her husband, and when she went out of their house she found PW1 outside. Further, that PW1 told her that she had been raped by the Appellant who took her Ksh 400/=. PW2 further testified that she knew the Appellant, and that they then went to PW1'S house found nothing else had been stolen. Further, that they returned to PW2's house and stayed there with PW1 until 4 a.m. in the morning, when they went to Mukuku Administration Police Camp and reported the incident.

PW2 further testified that the police gave her a note for treatment and she took PW1 to hospital at Kisau sub-district hospital and to Machakos General hospital that morning. Further, that on 18th July 2013 they went back to Kisau sub-district hospital. She also identified the clothes PW1 was wearing on the night of the rape and the stick that was used to strangle her.

PW3 who was a brother-in-law of PW1 and the husband of PW2, confirmed that on 17th July 2013 at around 00.45 am he heard a scream, and that when he went out he found PW1 who told him and his wife that she had been raped. He stated that a neighbor by the name of Munyoki Man'goka also came to his house, and that he and the said neighbor went to PW1's house with the neighbor and locked it. PW3 atated that he then went back to his house, which is when PW1 told her that it was the Appellant who had raped her.

PW3 further testified that later in the morning at 4.45 a.m., they went to Mukuku Administration Police lines and reported the matter, and that one of the Administration Police said that he knew the Appellant and would look for him. However, that the Administration Police officers came back after 30 minutes and told them that the Appellant had escaped, but that they had recovered his phone and jacket. PW3 stated that the Administration Police then went to PW1's house and took her underpants, petticoat and skirt, and told them to take PW1 to hospital. PW3 stated that he told PW2 to take PW1 to hospital, and he identified PW1's clothes and rod she said was used to strangle her.

PW4, a police officer stationed at Mukuku Administration Police post, testified that on 17th July 2013 at around 6 a.m. while at the station, PW1 came and reported that she had been raped by a person she knew, and that she named the Appellant. Further, that he booked the report, and PW1 then took them to the place where she had been raped, where they found that the door had been broken. PW4 stated that PW1 showed them the clothes that were torn during the rape and that they took the said clothes to the station and PW1 was taken to hospital.

It was PW4's testimony that on the same day at 7.00 a.m., they went to the Appellant's house and found him there and that when he saw them he ran away, and left his jacket and slippers. PW4 stated that they took the jacket and slippers and that he found a phone inside the jacket. Further, that on 5th August 2013 they got information that the Appellant was at Mbumbuni, and went there identified and arrested him and brought him to the Administration Police camp at Mukuku, where PW1 came and identified him as the person who raped her on 17th July 2013. PW4 stated that they then booked the arrest of the Appellant band escorted him to Mbumbuni police station.

PW5 was also a police officer stationed at Mukuku Administration Police post and was the in-charge of

Nduluku location, and he confirmed that on 17th July 2013 at around 6 a.m., PW1 came and made the report about being raped by the Appellant, and that on 5th August 2013 they were informed that the Appellant was in Mbumbuni, and that he accompanied PW4 to arrest the Appellant.

PW6 was a clinical officer at Kisau District hospital, and she testified that on 27th July 2013 she filled a P3 form for PW1, and relied on treatment cards. Further, that PW1 was first treated at Kisau sub-district hospital on 17th July 2013, and on the same day she was again treated at Machakos General Hospital. PW6 testified that PW1 had injuries on her neck and pain, and pain on the left side of the chest, hands and left hip joint. Further, that there was redness in her vagina and laceration on the perinum which is the area between the vagina and anus. PW6 stated that the degree of injury was harm, and produced as exhibits the treatment cards from Kisau hospital; the treatment notes from Machakos hospital; the post rape care form (MOH 363) and the filled P3 form.

The last witness for the prosecution was PW7, a police officer stationed at Mbumbuni Police Station, and who was the investigating officer. She testified that on 18th July 2013 at about 3.30 p.m., PW1 came to the police station and reported a case of rape, and that it was the Appellant who was her neighbor who had raped her on the night of 17th July 2013 between 12 and 1 a.m. PW7 stated that she recorded the report and took PW1 to Kisau sub-district hospital for examination, and found that she had been treated the previous day at both Kisau and Machakos hospitals.

PW7 further testified that she went to the scene of the rape on 18th July 2013, and on her way there passed through Mukuku Administration Police post where the report of the rape was first made, and it is the Administration Police officers took her to PW1's house. Further, that PW1 who was present showed her the stick the Appellant used to open the door and strangle her, and the Administration police also informed her that when they first tried to arrest the Appellant he had ran away and left behind his jacket, slippers and phone, which she took together with the clothes the complainant was wearing on the day of the rape.

PW7 stated that they recorded the statement of witnesses and took the complainant to Kisau sub-district hospital on 23rd July 2013 where the P3 was filled. She also confirmed that the Appellant was arrested on 5th August 2013 and brought to Mbumbuni police station. She produced as exhibits PW1's underpants, petticoat, skirt and wooden stick; and the Appellant's jacket, slippers and phone.

After the close of the prosecution case, the Appellant was put on his defence and made a sworn statement and did not call any witnesses. He stated that he was arrested at Mbumbuni market on 5th August 2013 and the police took his items including his jacket which had not been returned to date. He further testified that he denied the offence when charged in court, and that he did not know PW1, PW2 or PW3 and that all the witnesses had lied in court.

From the foregoing submissions and evidence, I find that the issues raised in this appeal are firstly, whether there was positive identification of the Appellant, and secondly, whether the Appellant's conviction for the offence of rape was based on consistent, sufficient and satisfactory evidence.

On the first issue as to the identification of the Appellant, this Court is guided on this issue by the law on identification as stated in **Mwaura v Republic [1987] KLR 645**, where 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 addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

The law on identification is also replete with warnings on the need for caution before sustaining the conviction on the basis of identification of a single witness in difficult circumstances. This was explained in Maitanyi –Vs- Republic [1986] KLR 198 at 200 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”.

In the present appeal, PW1 testified that she was raped at night at about midnight, and she was able to identify the Appellant using the light from a torch that he shone on her face and also put on a table in the room she was in. PW1 testified that the Appellant raped her for about 30 minutes which was ample time for her to identify him after her initial shock and fear. She also stated that she was able to identify the Appellant because she had known him since his birth and knew his parents, and that he lived in her neighborhood.

Therefore, this was not simply a case of identification but also recognition. PW2 and PW3 corroborated PW1’s evidence that the Appellant was a neighbor and was known to them, and the act of the Appellant running away when PW4 first went to arrest him is additional evidence pointing to his guilt. I therefore find that the Appellant was positively identified.

On the second issue as whether the conviction of the Appellant was based on consistent, sufficient and satisfactory evidence, I will start with the argument by the Appellant that there was contradictory evidence as to whether he broke the door to PW1’S house and as to the colour of his jacket. While it is true that there was no clear evidence as to whether PW1’s door was broken and if so by whom, and as to whether the jacket recovered from the Appellant was red or red and brown, the weight of that evidence and its effect has to be evaluated in light of the elements that the prosecution needs to be prove in the commission of the offence of rape.

Under Section 3(1) of the Sexual Offences Act, a person commits the offence termed rape if-

- a. He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
- b. The other person does not consent to the penetration; or
- c. The consent is obtained by force or by means of threats or intimidation of any kind.

The elements of the offence of rape therefore include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent, or forced consent.

PW1 testified as to how and when the Appellant raped her including how she screamed, and how the Appellant threatened her forcing her to be quiet as he raped her. Medical evidence was also given by PW6 that corroborated PW1’ evidence of rape and penetration, and the Appellant was placed at the scene of the crime and positively identified as the perpetrator of the crime by PW1. The elements of the offence of rape were therefore clearly established by the prosecution, and any contradictions in the evidence of how the Appellant accessed PW1’S house and particularly whether or not he is the one who broke the door to PW1’s house, and the colour of jacket he wore were minor contradictions as *they do not affect the main substance of the prosecution’s case.*

As regards the argument by the Appellant that the prosecution evidence was based on hearsay, the critical witness was PW1 and she narrated her rape ordeal as she personally experienced it, and positively identified the Appellant as the person who raped her. PW6 also gave evidence of her examination of PW1. The other witnesses also testified as to what they saw, and even though they also testified as to what they were told by other persons, no prejudice was caused as these persons were also called as

witnesses.

In particular PW2 and PW3 testified as to what PW1 told them about being raped by the Appellant, however this fact was confirmed by PW1 in her testimony. PW1, PW2 and PW3 also testified as to what they were told by the police about the arrest of the Appellant, which was confirmed in the evidence by PW4. Therefore there was direct evidence on the facts that were the subject of the hearsay by the various witnesses, and no prejudice was caused to the Appellant in this regard.

The Appellant also raised the ground that the prosecution left out essential witnesses contrary to section 144 as read together with section 150 of the Evidence Act, and therefore its case was not proved beyond reasonable doubt. I note that section 144 of the Evidence Act deals with the admissibility of evidence of certain facts while section 150 of the Evidence Act is on the prohibition of asking leading questions during cross-examination and re-examination. The two sections therefore have no bearing on the number of witnesses required to be called to give evidence.

In addition, under **section 143 of the Evidence Act** no minimum and/or particular number of witnesses is required to prove a case. It is thus clear that in law, unless specifically stated in the relevant law, there is no need for more witnesses than enough to prove the offence. In this appeal PW1's evidence was the main evidence on what took place at the time she alleged she was raped, and she was the only direct witness as to the rape. The prosecution also called other witnesses who gave evidence as to what transpired after the rape, and also witnesses who gave medical evidence to corroborate the rape. I find that no additional value could have been added by the witnesses the Appellant alleges were not called, namely the neighbor who came to PW2 and PW3's house after PW1 was raped, and his mother, as they were not witnesses to the rape. In addition, PW6 filled the P3 form and gave the required medical evidence that a medical officer of health would have given.

Lastly, it was also argued by the Appellant that PW6 was not competent to give medical evidence for reasons that she was a clinical officer and not one of the experts envisaged by section 77 (1) to (3) of the Evidence Act. **Section 77(1)** of the Evidence Act allows a document under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist to be used in evidence. By **section 77(2)** of the Evidence Act, the court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. This Court in this respect also notes that it is upon the discretion of a Court to call the maker of a medical report in criminal proceedings under section 77(3) of the Evidence Act for purposes of examination, and it is not mandatory that such maker produces the report.

In the present appeal, PW6 was a clinical officer and therefore a medical practitioner within the meaning of section 77(1) of the Evidence Act, as she was engaged in the practice of medicine. The P3 form produced in evidence was filled by her and could therefore be produced as evidence. In addition, the medical evidence by PW6 merely corroborated the fact that PW 1 was raped, and even if it was to be excluded under section 50 of the Evidence Act on account that there was no proof that PW6 was acquainted with the handwriting on the medical notes she relied upon, the proviso to section 124 of the Evidence Act provides that no corroboration is required in sexual offences cases where the court believes that the complainant is telling the truth.

I am also in this regard guided by the holding of the Court of Appeal in **Geoffrey Kioji v Republic**, NYR Crim. App. No. 270 of 2010 (Nyeri) where it was stated that:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

The prosecution therefore proved all the elements of the offence of rape and I find that the Appellant's conviction was safe and on the basis of sufficient evidence. I have also considered the defence by the Appellant, and find that it amounted to general denials, and he did not bring any evidence that shed doubt on the statements made by the prosecution witnesses.

As regards the legality of the sentence meted on the Appellant, the principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R (1954) EACA 270**, wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

Under section 3(3) of the Sexual Offences Act the minimum sentence for rape is 10 years imprisonment, while the maximum sentence is life imprisonment. I note that the circumstances of this appeal are quite serious as the complainant was an elderly woman of about 66 years as noted in the P3 form produced in evidence by PW6.

However, I also note from the Appellant's defence and mitigation that he is a young man of 24 years, and that while his incarceration will serve to teach him a lesson, it should also enable him to lead a productive life in his later years. I therefore allow the Appellant's appeal only to the extent of reducing his sentence to 10 years imprisonment to take effect from the date of his sentencing by the trial court. His conviction for the charge of rape contrary to section 3 (1) and (3) the Sexual Offences Act, Act No. 3 of 2006 is otherwise upheld and confirmed.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2015.

P. NYAMWEYA

JUDGE

DELIVERED AT MACHAKOS THIS 30TH DAY OF JULY 2015

JUDGE