REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 34 OF 2014

JAMES NKAIYURA .....APPELLANT

V E R S U S

REPUBLIC ..... PROSECUTOR

JUDGMENT

The Appellant **James Nkaiyura** was charged with the offence of rape contrary **Section 3 (1) (a) (b) as read with sub section (3) of the Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 6th day of December 2011, at ***[particulars withheld]*** village Igembe North District within Meru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **RK** without her consent.

The appellant also faced an alternative charge of indecent act contrary to **Section 11A of the Sexual Offences Act No.3 of 2006**. The particulars of the offence were that on 6th day of December 2011, at ***[particulars withheld]*** village in Igembe North District, within Meru County, the appellant intentionally and unlawfully touched the genitalia of RK with his genitalia, an act which was against her will and consent. The Appellant was tried and convicted of the alternative charge and sentenced to four years imprisonment. The Appellant was aggrieved by the conviction and sentence and filed this appeal setting out the following grounds of appeal:

1. That the essential ingredients of the charge were not been proved beyond reasonable doubt;

2. That the defence tendered by the appellant was weighty and credible;

3. That the trial magistrate erred in law and fact in solely relying with the evidence of the complainant only which lacked any corroboration;

4. That the trial magistrate erred by convicting the appellant on the alternative charge which no evidence was tendered to support the same;

5. That the trial magistrate failed to consider the period of time that lapsed between the date of the incident and when the report was made to the police.

The appellant was represented by Mr. Kimathi while the State was represented by Mr. Musyoka.

When the appeal came up for hearing on 23rd September 2015, Mr. Kimathi, Counsel for the appellant submitted that there was inordinate delay between the time the offence was committed and when the same was reported; that the complainant never raised alarm during the ordeal; that all the witnesses were relatives of complainant and no independent witness was called; that evidence of complainant was not corroborated; that the entire charge was an afterthought; and that there were no eye witnesses to this offence.

Mr. Musyoka, Counsel for the State, in opposing the appeal contended that the complainant's evidence was overwhelming; that she knew the appellant as a neighbor and a pastor; that the offence was committed in broad daylight; that the appellant's defence did not rebut the prosecution's evidence and that the same was a mere denial.

This being the first appellate court, I have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and draw my 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 by the Court of Appeal decision of ***Kiilu And Another v Rep (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..."***
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> ***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 prosecution's case was as follows; **PW1 RK** a student aged 21 years was on 6th December at about 6.00 PM alone at home when the appellant who was her neighbor called her to go to his home. She obliged and asked him why he was calling her whereupon he informed her that her grandmother had decreed that she belonged to him. She told him that she would not follow Meru traditions; that the appellant grabbed her and pulled her inside the house which was under construction telling her that she was defying the ways of the tribe and declared that she had to make love to him to remove any curse for refusing to marry him; that elders had decreed that she had to make love to him. The appellant then tried to remove her clothes but she resisted. He then felled her, removed her bicker and pants, pulled up her skirt, parted her legs and had sex with her for about 10 minutes. She then dressed up and went home where she found her mother and father but did not report to them as the appellant had told her that her parents were aware that he was to remove the curse. On 9th January 2012, PW1 fled to her aunt's home (PW2) having written a letter to her sister explaining why she had to run away from home. Her aunt then asked her why she was not in school and she started crying. She later told her aunt and sister what had befallen her. On 10th January 2012, she returned home with her sister and told her parents what had happened whereupon her father called elders; that the elders denied having asked the appellant to have sex with PW1. The appellant challenged the elders to take him wherever they wanted. The matter was then reported at Lare Police Station and PW1 was later taken to hospital and was issued with a P3 form.

PW2 E K is an aunt to PW1. She recalled that on 10th January 2012, she arrived at her home and found PW1 who started crying and told PW2 that Nkaiyura (the appellant) was had told her that he would marry her and that he had sex with her allegedly to cleanse her. PW2 escorted PW1 to her parent's home; the elders and the appellant were summoned. The appellant denied having sex with PW1 and the matter was reported to the police.

PW3 J M (father to PW1) testified that on 10th January 2012, his daughter, one F K asked her where K (PW1) was as she had seen a letter in the house with frightening contents indicating that she had left

home because Nkanyuira (the appellant) had done bad things to her. He made enquiries and established that she was at her aunt's home (PW2) whereupon he called clan elders to listen to the allegations. PW1 was later brought home by her aunt (PW2) who told her of the allegation that he had given PW1 to Nkanyuira (the appellant). PW3 denied this allegation and the appellant was summoned but he challenged PW3 and elders who had been called to do whatever they wanted. The appellant was later apprehended and the matter was reported at Lare police station.

PW4 James Mithika, a clinical officer at Lare medical nursing home produced a P3 form in respect of RK (PW1) who had a history of sexual assault by a person known to her. On examination, he found out that she had normal genitalia and that menses were flowing. The hymen was absent. He further testified having examined a middle aged man James Nkanyuira (the appellant) but since the alleged assault had taken place many days earlier he was unable to take swabs. He filled the P3 forms and produced the same in evidence.

PW5 Sgt. Samuel Ngere, was the investigations officer in this case. He testified that on 11th January 2012, he was in the crime office at Lare police station when the appellant was brought by administration police officers for an allegedly raping PW1 who reported that the appellant was a pastor and that he had lured her and proceeded to have sex with her allegedly to cleanse her. He further testified that he recovered a letter written by PW1 which showed how depressed she was. He later issued her with a P3 form which was filled and returned to him.

The appellant opted to give an unsworn statement and called one witness. The appellant denied having committed the offence and recalled having been called by PW1's father to his home where he found him with 15 elders and told him that PW1 had written a letter about him. He later left for his house and church whereupon he was arrested later.

DW2 Eunice Nkanyuira the appellant's wife recalled that the appellant told her that elders were looking for her and she accompanied him; that PW1's father claimed that the appellant had made his daughter his wife. She later heard that the appellant had been arrested and charged.

I have considered the submissions by the parties and the grounds of appeal. In addition, I have reevaluated the evidence on record. In order to prove an offence of rape under **Section 3 of the Sexual Offences Act No, 3 of 2006**, the prosecution must prove the following:

1. Accused intentionally and unlawfully committed the act which caused penetration into her/his genital organ;

2. That the other person did not consent to the penetration; or

3. That the consent was obtained by force or by means of threats or intimidation of any kind;

There was no other witness to this incident save for the complainant. This is not uncommon in offences of this nature because they are committed out of sight. Under **Section 143 of the Evidence Act**, evidence of one witness is capable of proving a fact unless a statute specifically provides/requires that more than one witness testify.

The question of identity did not arise. The incident occurred at 6.00 p.m. The appellant is next door neigbour to PW1 and well known to PW1 as a pastor. There is no known reason why PW1 would have framed the appellant.

Section 3 of the Sexual Offences Act defines the offence of rape as follows:

"3. (1) A person commits the offence termed rape if –

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

Section 43 of the same Act defines what intentional and unlawful acts include. Section 43 reads:

"43. (1) An act is intentional and unlawful if it is committed –

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is –

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance3 to such an act, or his or her unwillingness to participate in such an act.

(3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person –

(a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;

(b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or

(c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmissible disease."

In this case, the complaint was not reported to anybody till about a month had elapsed. The complainant did not scream or raise alarm during the incident. The reason she gave was that the appellant informed her that her grandmother and parents were aware of it and that the appellant was removing a curse. It is obvious that after a month, no medical evidence would have been found. PW1's reaction after the ordeal is that she wrote a protest note to the parents and escaped to her aunt's place before disclosing her ordeal. In his judgment, the trial magistrate was impressed by the complainant as a truthful witness. The trial court said as follows:

"Although the complainant impressed me as truthful, there is no medial evidence to support her claim that the accused penetrated her. Having found that there is no proof of penetration, I would be academic to prevail and determine if the complainant had consent to the penetration which she says he never did."

The complainant had explained the reason why she did not report to anybody that she was raped. She explained in detail how appellant called her to his house claiming that her grandmother had decreed that she belonged to him; that since she had refused, he had to remove the curse by having sex with her and he went ahead and forced her into it. She gave a vivid description of the events of the day which involved penetration and that accused also informed her that even her parents were aware that he was to remove the curse. That was the reason why she had not disclose it to her parents and ran away in protest. Since the magistrate said that PW1 impressed him as being truthful, it means that what she told the court was truthful and by the magistrate finding that penetration was not proved was a misapprehension of the law since medical evidence is no longer a requirement to prove a sexual offence. It is sufficient that the court believes the victim and gives reasons for it **(Section 124 of Evidence Act).**

In the case of ***Kassim Ali v Rep CRA 84/05 MSA,*** the court stated as follows:

"… The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

Since the trial court observed that the complainant impressed it as truthful, I have no reason to doubt that she was truthful. The trial court was better placed to observe the demeanor of the witnesses. PW1's conduct after the incident goes to confirm her displeasure with what had happened to her and I am satisfied beyond doubt and find that the appellant had sexual intercourse with PW1.

Whether the complainant consented to the act; I am satisfied from the evidence on record that the appellant used both force and intimidation to rape the complainant. He cheated the complainant that she had been decreed to belong to him but since she had declined, he had to remove a curse and that her parents knew of it. That is the reason why she kept the incident to herself for so long and even ran away from home but protested through a note that she left behind. When the matter was known to the parents, elders were called to arbitrate the issue which was not resolved. I have no reason to doubt that the appellant did commit the said offence without complainant's consent. His unsworn defence was a mere denial which did not carry much weight. The Appellant's witness, his wife (DW2) did not add any value to the defence. She never alluded to what happened on the date the offence was allegedly committed.

As to whether independent witnesses were not called, the only other witnesses would have been the elders whom PW3 summoned to arbitrate the issue after it had happened. PW1 and 2 said the appellant disregarded them. But even DW1 and DW2 confirmed that the appellant was indeed summoned by elders. The elders did not witness the commission of the offence and their evidence would not add much value to the case.

In the end, I am satisfied that the prosecution proved beyond any doubt that the appellant did have sexual intercourse with the complainant without her consent. In ***Miller v Minister of Pensions (1947) 2 ALL ER 372, 373, Lord Dening*** had this to say on proof beyond a reasonable doubt:

"That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed by a sentence of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short will suffice."

The trial court erred in finding the appellant guilty on the alternative charge. I quash that conviction and set aside the sentence on the alternative charge. Instead, I find the appellant guilty of the offence of rape on the main charge and convict him accordingly. One convicted of an offence of rape is liable to be

sentenced to not less than 10 years imprisonment. I therefore sentence the appellant to 10 years imprisonment. Sentence to run from the date the appellant was sentenced by the lower court on 26/3/2014.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF OCTOBER, 2015.

R.P.V. WENDOH

JUDGE

29/10/2015

In the Presence of:

Mr. Mulochi for State

Mr. Muriithi Holding Brief for Mr. Kimathi for Appellant

Ibrahim/Peninah, Court Assistants

Appellant, Present