



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 78 OF 2013

(From original conviction and sentence in Criminal Case No. 448 of 2012 of the Principal Magistrate's Court at Mavoko – T. A. Odera, P. M.)

JUSTUS KIPKORIR NDIWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Justus Kipkorir Ndiwa was charged with the offence of 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 offence are that on the 23rd day of May 2012 at [Particulars Withheld] Farm Athi-River District within the Machakos County intentionally and unlawfully caused his genital organ (*penis*) to penetrate the genital organ (*vagina*) of V M without her consent.

2. In the alternative the Appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11A of the Sexual Offences Act No. 3 of 2006.

The particulars of offence are that on the 23rd day of May 2012 at [Particulars Withheld] farm Athi River District within Machakos County, intentionally touched the genital organ (*vagina*) of V M with his genital organ (*penis*) against her will.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

4. The prosecution case was that on the material date about 8.00 a.m., PW1 V M the complainant herein left her house in [Particulars Withheld] area of Athi River. She was going to see her mother-in-law in Slaughter area of Athi-River. While the complainant was walking the Appellant came from behind her and greeted her. That the Appellant asked her for the directions to EPZ area. The complainant gave him the directions. A conversation then ensued and the Appellant informed her of a job vacancy and promised her a job at a company which makes food colours near "London Distributors." The complainant was interested in the job and they agreed to meet after the complainant's visit to see her mother-in-law.

5. When they met later the Appellant lead the complainant to a KMC site which was located at a different direction from the company where they were to look for a job. That the Appellant explained they were late and he lead her to the railway line to a bushy area where there was no road ahead. When the

complainant asked why they had taken that direction, the Appellant did not take the question well. The complainant sensed danger and started running back. The Appellant gave chase. The complainant telephoned her husband while she was still running and told him what had happened. The Appellant caught up with the complainant, held her and snatched the phone from her and threw it away.

6. The complainant started pleading with the Appellant and offered him her phone and Ksh 275/= to leave her alone. The Appellant refused. He felled her down, warned her not to scream and ordered her to remove her panty. The Appellant then removed his belt, loosened his trouser, removed his penis and had sex with her without any protection. Afterwards the Appellant left after warning the complainant not to tell her husband what had happened.

7. The complainant later telephoned her husband, PW2 P K M who is a “*boda boda*” operator. The husband rushed to the scene using his motor cycle but the Appellant had already left. The matter was reported at Athi-River police station. The complainant was referred to hospital for treatment.

8. On 8th August, 2012 while the complainant was on her way home after a job hunting session, she spotted the Appellant and followed him and saw him enter Steel Metal Company. The complainant telephoned her husband and informed him accordingly. The husband joined the complainant and together with security guards and community policing members they arrested the Appellant and escorted him to the Chief’s office. The Chief referred them to Athi-River police station. After investigations the Appellant was charged with the offence herein.

9. When placed on his defence, the Appellant gave sworn evidence. No witnesses were called. The Appellant stated that on 8th August, 2012 he was on his way to Steel Metal Company when he met his friend and lover, the complainant. The Appellant then informed the complainant that he had decided to end their relationship as her morals were not good. A quarrel ensued and the Appellant called the complainant a prostitute. The Appellant left the complainant at the gate of Steel Metal Company and went in to see the Personnel Manager. On the way out the Appellant found the complainant in the company of two men. One of the men then asked the Appellant if he knew the complainant. The man then slapped the Appellant and the Appellant’s phone fell down from his pocket. The man recovered the phone and gave it to the complainant. The said man alleged that the Appellant was spoiling their girls. A security guard intervened and asked them to call the police. The men threatened to kill the Appellant then left and came back with community policing members.

10. The Appellant was escorted to the Chief’s office. The man who had assaulted the Appellant then said that the complainant was his wife and he demanded compensation for adultery. The Appellant then informed the Chief that the complainant was his girlfriend since the year 2008 and that he never knew that she was married. A report of rape was then made against the Appellant. The Appellant denied the same and insisted that he be taken to the police station as he did not want the Chief to hear the case due to issues of tribalism. The Appellant further stated that the complainant referred to him by a name not known to him but he ended up in court.

11. The Appellant further stated that the complainant had attempted to plant a pregnancy on him in year 2001. That the complainant also aborted in the year 2012 and demanded Ksh 12,000/= from the Appellant but he was only able to give Ksh 3,000/=. That in the year 2010 the complainant borrowed Ksh 16,000/= from him to buy a motor cycle. That on 23rd May, 2012 while the Appellant was at his rural home, the complainant telephoned him about her having abortion complications and he referred her to Nairobi Women’s Hospital, Lang’ata or Kitengela Branch on 24th May 2012. When the Appellant later returned to Athi River, he was arrested for the offence herein which he denied.

12. The Appellant was convicted on the main count of rape and sentenced to ten (10) years imprisonment.

13. The Appellant was aggrieved by the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- a. That the charge sheet was defective.

- b. That the medical evidence failed to link the Appellant to the offence.
- c. That the Appellant was not examined by a doctor.
- d. That the prosecution evidence was inconsistent and uncorroborated.
- e. That the arrest took place after three months.
- f. That the prosecution case was not proved beyond doubt.
- g. That the defence case was not considered.

14. During the hearing of the Appeal, the parties relied on their written submissions. I have considered the said submissions.

15. This being the 1st appellate court, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

16. The complainant (PW1) gave a detailed and consistent account of evidence. Her evidence left no doubt that she was raped. The complainant telephoned her husband (PW2) to go to her rescue. The offence took place in broad daylight. The complainant's evidence that they met twice on that day and walked together for some time is an indicator that the complainant had the opportunity to observe the Appellant. Indeed the complainant described what the Appellant wore at the material time and was able to identify him about three months later when the arrest took place. The evidence of the husband corroborates that of the complainant regarding the scene of crime and his being telephoned by the complainant. According to PW2, he found the complainant crying and they ended up reporting the matter to the authorities. Both PW1 and PW2 maintained their evidence during cross-examination.

17. The evidence of PW1 and PW2 concerning the report made to the authorities is corroborated by the evidence of the community policing member, PW3 Revi Fundi Mwendwa, and the evidence of the investigating officer, PW6 PC (w) Paulina Katura. It has come out from the evidence of the investigating officer and that of PW2 that even at the stage of arrest the Appellant's position was that she did not know the Appellant.

18. PW4 Dr. Anjela Kiraba and PW3 Maureen Mwikali Maitha a Clinical Officer who examined the complainant testified herein. Their evidence was that no abnormality or any spermatozoa or disease was noted. However, the lack of medical evidence is not fatal to the prosecution case. As stated by the Court of Appeal in **Kassim Ali vs Republic (2006) eKLR** stated as follows:-

“So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”.

19. The defence case boils down to issue of a frame up due to a love affair gone sour. The complainant's position is that she did not know the Appellant before. The complainant's evidence on the circumstances surrounding the arrest was corroborated by that of the husband (PW2) and the community policing officer (PW3). The defence of a frame-up and the alibi given by the Appellant are not believable in view of the strong prosecution case. After re-evaluating the evidence, I have found no reasons to differ with the finding of the trial magistrate who heard the witnesses and observed their demeanour.

20. Although one of the Appellant's grounds of appeal is that the charge sheet was defective, a scrutiny of the same reveals no defects. The charge sheet outlines the essential ingredients and particulars of the offence. The Appellant was aware of the charges that he faced and vigorously participated in the trial by cross-examining the prosecution witnesses at length.

(See for example **FLAPPYTON MUTUKU VS R. (2014) eKLR**).

21. Nothing turns on whether the Appellant knew a few details regarding the complainant's personal details by the time the complainant testified. The lack of an eye witness cannot be used against the prosecution case. Sexual offences are unlikely to be committed in the glare of the public.

22. With the foregoing, I find no merits in the appeal. The sentence is within the law. Consequently, the

appeal is dismissed.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 28th day of October, **2015**

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B. THURANIRA JADEN

JUDGE