



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 103 OF 2013

CHARLES KARIUKI MWANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against sentence in Kangema Principal Magistrate's Court Criminal Case No. 12 of 2010 (Hon. D. Orimba) on 24th April, 2010)

JUDGMENT

The appellant was charged with the offence of rape contrary to **section 3(3) of the Sexual Offences Act, No. 3 of 2006** the particulars of which were that between the night of 2nd and 3rd January, 2010, at around 2330 hours at Kiriaini shopping centre within Murang'a North district of the central province, the appellant intentionally and unlawfully committed an act which caused penetration with his genital organ into the genital organ of C.W.M, without her consent.

In the alternative, the appellant was charged with the offence of an indecent act with an adult contrary to **section 11(6) of the Sexual Offences Act, No. 3 of 2006**. In this alternative count, it was alleged that on the nights between 2nd and 3rd January, 2010 at around 2330 hours, at Kiriaini shopping centre within Murang'a North district of the central province, the appellant committed an indecent act with an adult namely C.W.M.

The second count against the appellant was that of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the nights between 2nd and 3rd January, 2010 at around 2330 hours at Kiriaini shopping centre within Murang'a North District of the central province, the appellant unlawfully assaulted C.W.M.

After hearing six prosecution witnesses, the appellant and his witness, the learned magistrate convicted the appellant on both the principal count of rape and the second count of assault causing actual bodily harm.

Being dissatisfied with the decision of the learned magistrate, the appellant appealed to this court citing several grounds on which his appeal is based. In what he has described as the amended supplementary grounds of appeal, the appellant faulted the learned magistrate's decision on grounds that, he erred both in law and in fact when he held that the prosecution had proved its case beyond reasonable doubt whereas the charge had not been proved; that the medical evidence was clear that the appellant was not involved in the commission of the crime; that his defence was not considered and that the entire prosecution evidence was not trustworthy.

This court's task as the first appellate court is to reconsider and evaluate the evidence afresh and ultimately come to its own conclusions regardless of the subordinate's court's decision although it is important to bear in mind that in coming to its decision the subordinate court had the advantage of seeing and hearing the witnesses. This legal position in determining appeals such as the one before court was reaffirmed in the case of **Dinkerrai Ramkrishan Pandya versus Republic (1957) E.A. 336**. It was applied by the Court of Appeal in **Okeno versus Republic (1972) EA 32** where at page 36 the court said:

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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.”

The first of the prosecution's six witnesses was the complainant, **C.W.M.** In her sworn statement, C told the court that that she was a barmaid at [particulars withheld] bar. On or around 2nd and 3rd January, 2010, at around 11 pm, she was near Muramati bar on her way home when she noticed someone following her. According to her there was enough light.

The person behind her came closer and held her right hand and asked her “will you give me or not”. When she asked him what it is that he wanted to be given, this person, whom she told the court was the appellant, told her that he wanted to have sexual intercourse with her. When the complainant declined, the appellant is alleged to have held her by the neck, wrestled her to the ground, removed her trouser and under wears and raped her. Though the complainant pleaded with him to let her go and even offered the **Kshs. 3900/=** she had, the appellant is said to have refused the money and even thrown it away. According to the complainant, the appellant told her that he had been sent by one Wangari to kill her. The complainant screamed for help when she heard people talking; the appellant is said to have taken off and ran away when these people came to the complainant's rescue. He ran away with the money and the panga he was armed with but left behind his cap which was recovered and admitted in evidence as a prosecution exhibit. The entire episode is said to have taken one and a quarter hours within which time the complainant is said to have identified the appellant. The complainant identified the people who rescued her as **Rahab (PW2)** and **Esther Wanjiku (PW3)**. She also produced a treatment note and a P3 form that was later formally admitted in evidence when the clinical officer who examined her testified.

Initially, the appellant did not cross-examine the complainant but later applied to have her recalled for cross-examination. During cross-examination, the complainant told the court the appellant had forcefully pulled her for a distance of about 200 meters from where he got her and raped several times on the material night before she was rescued. She also said that she had seen the appellant on several occasions before this incident although she knew him as Maina and not Charles Kariuki Mwangi; when she reported the matter to the police she told them that she knew the person who raped her. She said that she went to the hospital for treatment the same night.

Rahab Njumbi Kiragu (PW2) was one of the people who ran to rescue the complainant. In her sworn testimony, she said that she worked as a barmaid at Ngerangu, at Kiriaini. She recalled that on 3rd January, 2010 at around 12.10 am she was walking home alongside her colleague Esther Wanjiku when they heard a lady shouting for help. When they reached where the shouts were coming from, a person she described as a boy stood up and started running away. She recognised him by the clothes he was wearing as a person she had seen during the day. She had even served him in the bar where she was employed. The complainant was lying on the ground crying. This witness together with her friend assisted her dress up and escorted her to the police to report the incident. She recognised the appellant not only as a person who been in her bar during the day but also as a person she knew before. She knew him by name, Charles Kariuki Mwangi. This witness said that the scene where the crime was committed was not very far from the road and that there was sufficient light there.

Esther Wanjiku Kinyanjui (PW3) testified that she was Rahab Njumbi Kiragu's (PW2's) colleague at

Ngarange Kanini bar. She testified that on 3rd January, 2010, at around 12.15 am she was walking home in the company of Rahab when they heard a lady calling for help. When they reached where this lady was, they saw someone run away. She recognised him as the person she had seen during the day. The red hat he was wearing was recovered at the scene. She identified him as Mwangi. The witness testified that the complainant was found at the scene crying. They assisted her to dress and escorted her to the police. This witness said that they were able to recognise the appellant because there was street light and moonlight as well.

The person who is alleged to have been hired by the appellant to kill the complainant was **Nancy Wangare Wangai (PW4)**. In her evidence she denied having hired anybody to kill the complainant though she confirmed that there had been a dispute between them but the dispute had been settled in court.

The medical officer who examined the complainant, **Mark Njenga** testified as the fifth prosecution witness. His findings were that at the time she examined the complainant, she was generally in a fair condition though her eyes were red and had bruises on the neck. The officer did a vaginal swab. He detected spermatozoa and a whitish discharge. According to the medical officer, there was evidence of an assault and the injury sustained was six days old. He formed the opinion that there was evidence of sexual intercourse. Although the officer examined the complainant on 11th January, 2010, according to the treatment notes, the complainant had been treated on 6th January, 2010. The officer testified that a victim of sexual assault should always be examined within 72 hours of the assault.

The police officer who received the report from the complainant was corporal **Philip Rip (PW6)** from Kiriaini police station. The witness confirmed to have received the report on 3rd January, 2010. The complainant is said to have named the appellant by the name of Charles Kariuki Mwangi. The complainant is said to have handed over the cap belonging to the appellant to the police. The witness testified that he could not arrest the appellant immediately because he disappeared after the incident.

When the accused was put on his defence, he chose to give a sworn testimony and though he said he was going to call four witnesses only one witness testified on his behalf. In his testimony, the appellant said that he hailed from Kiriaini and that on 3rd January, 2010 he was at the home of Nancy Muthoni where he had been employed as a shamba boy. On the material day he was with his employer from morning till 10 pm when he retired to sleep. He said that he was arrested on 10th January, 2010 at his place of work. He denied having committed the offence or having known the complainant. He testified that the police initially arrested his brother who led them to where he was working.

The appellant's employer **Nancy Gathoni Maina (DW2)** testified that indeed the appellant was his employee. She confirmed that on the material date when the offence is alleged to have been committed, she was with the appellant until 10 pm and that he did not hear the appellant leave the house thereafter. On cross-examination, however, she said that she was not aware whether the appellant left the home after 10 pm.

The offence of rape with which the appellant was charged and convicted is defined in **section 3(1)** of the **Sexual Offences Act**. This provision of the law provides:

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.*

The conclusion that can possibly be made from the complainant's evidence is that her genital organs were forcefully penetrated without her consent and subject to proof to the required standard the offence of rape as understood in section **3(1) (a)** and **(b)** of the Act was thereby committed.

Part of the proof that would be required to prove this offence is the medical evidence which constitutes an expert's opinion on whether there was penetration of the victim's genital organs. It is for this reason that the medical officer who is said to have examined the complainant had to testify and give an expert opinion as to his findings upon examination of the complainant. In view of the relationship between the complainant's evidence and that of the medical officer, it is necessary to look closely at their respective evidence.

The alleged rape is said to have occurred either in the late hours of 2nd January, 2010 or the early hours of 3rd January, 2010. In answer to a question during cross-examination, the complainant said that after the rape ordeal she went to the hospital the same night which would either be 2nd or 3rd January, 2010. If it was 3rd January, 2010, it was not the same night but the early hours of 3rd January, 2010 in view of the evidence of **Esther Wanjiku Kinyanjui (PW3) and Nancy Wangare Wangai (PW4)** who said that they rescued the appellant a few minutes after midnight.

Contrary to what the complainant told the court, **Mark Njenga (PW5)** who examined the complainant, said that the complainant was treated on 6th January, 2010 almost three days after the alleged rape; she was not treated on 3rd January, 2010 as alleged by the complainant herself. This court has had occasion to peruse the original record from the subordinate court and gathered that what was admitted in evidence as a treatment note, which would have shed some light on this issue, is a copy of a document that is not clear on its face on whether the complainant was attended to on 3rd January, 2010 or the 6th January, 2010.

An equally important question is why a copy of the document was produced and admitted in evidence without any explanation to the whereabouts of its original.

Going back to the examination which Mr Mark Njenga did on the complainant, it was done on 11th January 2010 which was almost eight days from the date of the incident. According to his findings, which were contained in the P3 form that he produced and was admitted in evidence, he was of the opinion that there was evidence of sexual intercourse and assault which, in his view, was six days old. Six days before 11th January, 2010 would be 5th January, 2010 and not 3rd January, 2010 when the complainant is alleged to have been raped and assaulted.

From the evidence of the complainant and the medical officer, questions that would legitimately arise and which in my view would cast doubts on the prosecution case are; why the complainant told the court that she went to hospital on 3rd January, 2010 when she did not; in the absence primary documentary evidence that the complainant was treated on 3rd January, 2010 or 6th January, 2010 is it not possible that the complainant never went to hospital as alleged or at all? The medical officer established that there was sexual intercourse upon examination of the complainant, but wasn't there a possibility that such intercourse would have happened any other time before 11th January, 2010 when he examined the complainant and not necessarily on 3rd January, 2010? It has already been noted that the age or the injuries does not coincide with the date of the alleged offence, is there a possibility that the offences with which the appellant was charged were never committed on 3rd January, 2010 if at all?

Without clear answers to these questions, and I have not discerned any from the record, it cannot be concluded with any certainty that the offences of rape and assault were proved beyond reasonable doubt.

One other issue that merits consideration is the evidence on the identification of the appellant as the perpetrator of the crimes for which he was charged and convicted. According to the complainant, she noticed someone following her in the night and that she saw him because there was enough light. If the conditions for identification or recognition of the stranger following her were that favourable, there is no doubt that the complainant should have been able to immediately identify or recognise the appellant the moment she saw him since he was a person she had known before. Her evidence, however, was that she was able to identify the appellant only after they had talked for a while.

The complainant testified further when she reported the matter to the police, she informed them she knew the person who had raped her. According to her, his name was Maina. She was emphatic that she did not know the appellant's full name. On the other hand the police officer who received the complainant's report testified that when he received the appellant's complaint she gave him the name of Charles Kariuki Mwangi as the person who had raped her; he never mentioned the name Maina. This officer did not make any reference to **Esther Wanjiku Kinyanjui (PW3)** and **Nancy Wangare Wangai (PW4)** who testified that they not only recognised the appellant but that they also escorted the complainant to the police to make her report. The contradictions in the evidence of the investigating officer and that of the complainant on the identification of the appellant leaves doubt as to whether the appellant was properly identified as the person behind the crimes for which he was convicted, if at all these crimes were committed.

In view of the conclusions I have arrived at after analysing the evidence on record afresh, the appellant's appeal has merit and ought to succeed. Accordingly, I quash the convictions and set aside the sentences meted out against the appellant and order that he be set at liberty unless he is lawfully held under any other warrant.

Signed, dated and delivered in open court this 27th day of January, 2014

Ngaah Jairus

JUDGE