



No. 162/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 46 OF 2011

T VAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No.114 of 2009 by Hon A.G. Kibiru, , Ag. P.M., on 23/2/2011)

JUDGMENT

1. **T V**, the appellant was charged with the offence of **Rape** contrary to **Section 3(1) (a)** as read with **Section 3(3) of the Sexual Offences Act**. Particulars thereof being that on the **28th** day of **January, 2009** at around **0000hours** at [*particulars withheld*] **Village, Museve Sub-Location, Kyangwithya East Location** in **Kitui District** of the **Eastern Province** intentionally and unlawfully had carnal knowledge with **M N** an adult aged **69 years** without her consent.

In the alternative he was charged with the offence **Indecent Act** with an adult contrary to **Section 11(6) of the Sexual Offence Act No. 3 of 2006**. The particulars thereof being that on the **28th** day of **January, 2009** at around **0000hours** at [*particulars withheld*] **Village, Museve Sub-location, Kyangwithya East Location** in **Kitui District** of the **Eastern Province** he committed an act of **Indecency** with **M N** an adult aged **69 years** by touching her private parts namely vagina.

2. The appellant was tried, convicted on the main charge and sentenced to **ten (10)** years imprisonment. Being dissatisfied with the conviction and sentence he filed an appeal on grounds that the learned trial magistrate erred in both law and fact by failing to indicate the rank of the prosecutor during plea taking and failing to indicate the name and rank of the prosecutor during delivery of judgment thereby occasioning serious doubts as to the qualification of the public prosecutor as provided by **Section 85(1) of the Criminal Procedure Code**; by failing to comply with the provisions of **Section 211 of the Criminal Procedure Code** hence rendering the whole trial *null and void*; failing to consider that the prosecutions' case was inconsistent and contradictory making the conviction secured thereon unsafe; by relying on purported visual identification by recognition by PW1 which was doubtful and questionable.

3. The prosecution's case was that PW1, **M N (the complainant)** was inside her house at midnight when the appellant a person she knew for a very long time knocked at her door. He introduced himself. He pushed the door and entered inside whereby he had carnal knowledge of her without her consent. The accused ran away. The matter was reported to the police. The complainant was examined at the hospital and treated. Thereafter the appellant was arrested and charged.

4. In his defence the appellant stated that on the material date he was asleep inside his house with his wife.
5. The learned State Counsel **Mrs. Abuga** opposed the appeal but did not specifically address the issue of failure to indicate the rank of the prosecutor who prosecuted the case at the outset.
6. It is the duty of this court, being a first appellate court to subject the evidence on record of the Lower Court to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see or hear witnesses testify. (see **Okeno versus Republic [1972] E.A. 32**).
7. Having carefully taken into consideration submissions by the appellants counsel **Ms Kariithi** and the **State Counsel**, in respect of the issue whether the prosecutor was qualified pursuant to **Section 85(1)** of the **Criminal Procedure Code**. Following the amendment of the law which does not seem to be within the knowledge of the appellant any person irrespective of the rank can be appointed and be permitted to conduct prosecution as long as he /she is gazetted, hence having authority to discharge prosecution duties. A perusal of the court record shows that at the point of plea taking the prosecutor's name is indicated as **Nyambane**. On the **25th June, 2009** the rank of the prosecutor is indicated as **Inspector Nyambane**. Throughout the trial the prosecution was conducted by a prosecutor. On the date of delivery of the judgment, it is indicated the prosecutor was present. If indeed the appellant believed that **Inspector Nyambane** a Public Prosecutor gazetted per **Legal Notice No. 172/2010** was not qualified to act as a public prosecutor he ought to have raised an objection in the course of the trial at the Lower Court for consideration by the court. He however failed to do so. In any case the prosecutor was a qualified one contrary to the allegation by the appellant.
8. Secondly, it is stated that the trial was rendered *null and void* due to the trial magistrate failure to comply with **Section 211** of the **Criminal Procedure Code**.
9. I have perused both the original handwritten proceedings and the typed copy. There was an omission in the typed proceedings. But the original handwritten proceedings clearly shows that the learned trial magistrates complied with **Section 211** of the **Criminal Procedure Code** at **page 48**. There was no misdirection which would make the trial **null and void** as stated.
10. Identification of the appellant was put in question. PW1 told the court that the accused was her neighbour. As she prepared to sleep she heard a knock on the door and the appellant asked her to open for him the door so that he could shelter from rain. The door was not locked. He tried to lock him out but he pushed it, overpowered her, he entered, wrested her and raped her. She said she recognized his voice. On cross-examination she said he introduced himself as **V's son**.
11. In respect of voice identification the court had this to state in the case of **Karani versus Republic [1985] KLR 290.**)

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and he recognized it and that there were conditions in existence favouring safe identification”.

12. Sole identification of the appellant in this case depended on the complainant's memory. Evidence adduced revealed that the appellant was the complainant's nephew. PW3 a brother and guardian to the complainant said that following the sexual ordeal that left the complainant with injuries and having defecated on herself, she went to his house stark naked. He also said that the complainant was mentally retarded. It was emphasized by counsel for the appellant that due to the said condition she could not have been orientated in time and space. It is important to note that mental retardation is not mental illness. The degree of retardation of the complainant was not tested. But, it is evident that she testified in court giving evidence coherently as stated by the trial magistrate. She was subjected to cross-examination and was able to answer questions appropriately. She recognised the appellant's voice because she was familiar with it having known the appellant her nephew for a long time. The recognition was free from error.
13. In his defence the appellant came with an *alibi defence* that was not raised at the outset to enable the prosecution disapprove it. The evidence was not helpful as correctly pointed out by the trial court.

14.The sentence imposed was within the law.

15.The upshot of the foregoing is that there is absolutely no reason to interfere with the findings of the trial magistrate, the conviction and sentence passed against the appellant. Consequently, the appeal is dismissed.

DATED, DELIVERED and SIGNED this 22nd day of **JANUARY, 2014.**

L.N. MUTENDE

JUDGE