REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 164 OF 2012

JULIUS WAWERU MUCHIGA …….……..... …….APPELLANT

-VERSUS-

REPUBLIC ……..……..RESPONDENT

(From the original conviction and sentence in Criminal Case Number 1278 of 2007 in the Senior Resident Magistrate's court at Gichugu – Hon. B.J. Ndeda (SRM)

JUDGMENT

The appellant ***JULIUS WAWERU MUCHIGA*** was charged in the lower court with the offence of Rape contrary to **Section 3(1) (a)** of the **Sexual Offences Act 2006.**

The particulars supporting the charge alleged that on the 7th day of November 2007 in Kirinyaga District within Central Province, the appellant had unlawful carnal knowledge of ***SMM*** without her consent.

After full trial, the appellant was convicted and sentenced to fifteen (15) years imprisonment.

Aggrieved by the conviction and sentence, the appellant filed this appeal raising a total of seven grounds which can be summarized into two major grounds namely:-

1. That the learned trial magistrate erred in law and in fact by failing to properly address his mind to the evidence on record and in finding that the evidence proved the guilt of the appellant as charged beyond any reasonable doubt.
2. That the learned trial magistrate erred in rejecting the appellant's defence and mitigation.

The case for the prosecution is that the complainant, an elderly lady aged about 70 years of age was in her home on the 7th day of November 2007 in the morning when the appellant, a person she knew before being her neighbour went there to check on charcoal he was burning in the compound.

On the same day at around midnight as she slept, she sensed the presence of an intruder in the house. She became nervous and woke up. She lit a lamp and through its light, she saw and recognized the appellant who had hidden under her bed.

The appellant blocked her mouth, laid her on the bed, tore her under pant and had sexual intercourse with her without her consent. He then disappeared taking with him her torn under pant.

After the ordeal, the complainant reported the matter to PW3 at Mururi Administration police camp. PW 3 visited her home and found that entry into the house had been gained by removing a piece of timber (off

cut) from the wall of her house near the window and some cardboard. The appellant was subsequently arrested by PW3 and handed over to PW4 at Kianyaga police station.

In the course of investigations, PW4 issued both the complainant and the appellant with P3 forms and took them to Kianyaga District Hospital for medical examination. He recalled that the P3 forms were completed in respect of the two of them and he collected them from the hospital.

However, only the P3 form filled in respect of the complainant was produced in court as exhibit by PW5 ***JOHN MWANGI*** a clinical officer attached to Kerugoya District Hospital.

In his evidence, PW5 claimed that on examining PW1, he did not notice any physical injuries on her genitalia though there was a foul smelling discharge from her vagina. A vaginal swab revealed deposits of spermatozoa in her vagina. He however did not mention having examined the appellant.

In his defence, the appellant opted to give a sworn statement in which he denied having raped the complainant as alleged. He claimed that the complainant fabricated the charges against him after he refused to concede to her demand of paying her additional money for some trees he had previously bought from her for the purpose of burning them into charcoal.

This being the first appellate court, I am mindful of my duty re-examine and reconsider a fresh the evidence on record to draw my own conclusions regarding the soundness or otherwise of the conviction having in mind the fact that I did not have the advantage of seeing or hearing the witnesses. **See**

- ***MWANGI VS REPUBLIC (2004) 2 KLR 28***
- ***SIMIYU VS REPUBLIC (2005) 1 KLR 192***

Having re-evaluated the evidence on record and considered the grounds of appeal alongside the submissions made by the appellant and Mr Sitati for the state, I find that the only evidence adduced by the prosecution which linked the appellant to the commission of the alleged offence was the testimony of the complainant. Her claim that the appellant was the person who had sexually assaulted her on the night in question was not corroborated by any other evidence since nobody else witnessed the incident and no forensic or documentary evidence was produced to implicate the appellant. This is despite the fact that according to the evidence of PW4, the appellant had been subjected to some undisclosed medical examination but the result of that medical examination was not availed to the trial court.

The prosecution's failure to tender that evidence in my view weakened its case as it denied it the opportunity of adducing evidence which would have corroborated the complainant's claim that it is the appellant and not any other person who raped her at the time alleged.

From the evidence on record, it is not in dispute that PW1 was in fact raped that night. The only question that needed to be determined was whether the appellant was positively and correctly identified as the person who had raped the complainant.

My analysis of the evidence adduced on the issue of identification as narrated by the complainant leads me to the conclusion that the circumstances prevailing at the time the appellant was allegedly identified and or recognized as the complainant's assailant were not conducive to a positive and correct identification of the culprit.

Needless to say, the offence was committed at night at about 12 a.m. in the complainant's bedroom moments after she was awakened from sleep by the scary feeling that there was an intruder in her house.

She confessed to have been nervous as she lit her lamp whose light she claims enabled her to recognize the appellant as her assailant. She did not however tell the court what kind of lamp it was; for instance whether it was a pressure lamp or lantern lamp or any other kind of lamp and the nature and intensity of light it produced. Such information would have assisted the trial court to make a finding whether the light was bright enough to aid the complainant to see and positively identify her assailant.

From the complainant's evidence, it is apparent that things happened very fast and it is not clear at what point she saw her assailant: - Was it as he emerged from under the bed or when he blocked her mouth or dragged her to the bed where he allegedly committed the offence?

Whatever the case , my view is that having been awoken from sleep at midnight and given her nervous state as admitted by her in her evidence coupled by the fact that she was an elderly lady aged about 70 years, an age at which a person's mental faculties are not usually as alert as they ordinarily ought to be, the complainant may not have been in a proper frame of mind to see clearly and make a positive and correct identification of her assailant. Her alleged recognition of the appellant in such circumstances cannot be said to have been free of the possibility of error especially considering that it is not clear what kind of light was used to make the said recognition. It was possible for the complainant to have made an honest mistake regarding her identification or recognition of her assailant.

The learned trial magistrate in his judgment did not interrogate the circumstances surrounding the alleged recognition of the appellant in order to satisfy himself that they were favourable to a positive and correct identification or recognition of her assailant.

The complainant also claimed that it is the appellant who had removed a plank of wood from the wall of her house that morning in order to create a way to gain entry into the house later that evening giving the impression that the offence was pre-planned.

It is however clear from the evidence on record that nobody including the complainant claimed to have seen the appellant removing the said piece of wood from the house and it is not clear how PW1 formed the opinion that it is the appellant who had done so. This claim amounted to an unsubstantiated allegation which did not have any evidential value.

It is not lost on this court that the complainant also testified that she had also recognized the appellant as her assailant through his voice as he warned her against screaming.

Even if the court were to accept this evidence, my take is that as the appellant had denied having committed the offence and maintained his innocence throughout the trial, at the end of the day, the evidence on record would amount to the word of the complainant against that of the appellant and in the absence of independent evidence linking the appellant to the commission of the offence, such as the recovery of the complainants under pant which was allegedly taken away by the assailant, i am satisfied that the evidence adduced in this case was insufficient to sustain a safe conviction especially in view of the appellants claim that the complainant had a reason to fabricate the charges against him.

I am thus satisfied that the appellant was wrongly convicted in this case and his conviction cannot be allowed to stand. I consequently allow the appeal, quash the conviction and set aside the sentence. The appellant should be set at liberty forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED at KERUGOYA THIS 17th DAY OF JANUARY, 2014 in the presence of:-

The appellant

Mr Sitati for the state

Mbogo Court Clerk.