REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.132 OF 2012

PETER MAINA MUREITHI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case number 709 of 2010 in the Senior Resident Magistrate's court at Baricho – HON.J.N. Mwaniki – (S.R.M)

JUDGMENT

The appellant ***PETER MAINA MURIITHI*** was tried and convicted in two counts with different offences.

In count 1,he was convicted with the offence of rape contrary **to Section 3(1)(a)** of the **Sexual Offences Act** and in count 2 with the offence of stealing from a person contrary to **Section 279(b)** of the **Penal Code.**

It was alleged In the first count that on the 1st day of August 2010 in Kirinyaga South District within central province, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of ***FM*** without her consent.

In support of the second count, the particulars alleged that on the same date and place, the appellant stole one mobile phone make Nokia 1100 and cash ksh.1,000 from the person of the said ***FM.***

Following his conviction in the two counts, the appellant was sentenced to life imprisonment in the first count and to fourteen years imprisonment in the second count. The sentences were ordered to run concurrently.

The appellant was aggrieved by both conviction and sentence. In his appeal, he raised the following main grounds which are reproduced verbatim:

1. The learned trial magistrate erred in law and in fact by totally believing that I actually committed the offence whereas all the p.ws safe for the clinical officer ganged against me to give rehearsed evidence.
2. The learned trial magistrate erred in law and in facts by convicting me with the offence of rape which was not proved beyond reasonable doubts as the clinical officer stated very clearly that no spermatozoa were noted during the examination.
3. I am a first offender and the sentence meted upon me is manifestly harsh and excessive.
4. I am a young person of twenty (20) years and a first offender and a life sentence in jail will have a negative impact on my life.

5. I feel very remorseful and therefore beg for mercy and leniency.

When the appeal came up for hearing, the appellant chose to rely entirely on written submissions which he presented to the court.

On behalf of the state, learned state counsel Mr Sitati opposed the appeal arguing that the evidence adduced before the trial court proved the guilt of the appellant as charged in the two counts and that the appellant was correctly convicted. He urged the court to dismiss the appeal for lack of merit.

The brief facts of the case are that the complainant who testified as PW1 and the appellant are neighbours.

PW1 testified that on 1st August 2010 at 8 p.m. as she was walking home, a person who she identified and recognized to be the appellant attacked her from behind by grabbing her neck and strangling her. He knocked her down and demanded for money. She directed him to her kiondo in which she had kept ksh.1,000 and her mobile phone make Nokia. The appellant took the money and the mobile phone after which he allegedly tore her pants and raped her before taking off with the money and phone.

After the appellant left, the complainant started screaming and members of the public who included PW2 her husband and PW3 the area elder went to her rescue. She narrated to them what had happened and gave them the name of her assailant as Peter Maina the appellant.

In her evidence on cross-examination, PW1 stated that though the incident occurred at night and it was dark, she was able to see the appellants face clearly as he raped her since neither his face nor her face was covered by anything.

The appellant was arrested the following morning and according to the evidence of PW2 and PW3, upon arrest and following some persuasion, the appellant produced a mobile phone from his house make Nokia and surrendered it to the witnesses. He also surrendered ksh.350 said to be the unused balance of the money stolen from the complainant the previous night.

The money and the mobile phone were produced in evidence as exhibits during the trial and the complainant identified the mobile phone as the phone the appellant had stolen from her the night he allegedly raped her.

The matter was reported to the police on the same night of the incident and PW1 was immediately escorted by PW4 No.375418 PC Joseph Soita to hospital for examination. He is also the police officer to who the appellant was handed over upon arrest together with the mobile phone, money ksh.350 and a biker which the complainant had allegedly won during the incident.

In his defense, the appellant gave an unsworn statement and did not call any witness. He denied having committed the offences as alleged and after narrating how he was arrested, he claimed that the charges were framed against him by the complainant for reasons he did not disclose.

This being the first appellate court, I have re-examined the evidence on record afresh as I was required to do following guidance by the court of appeal in:

- **OKENO VS REPUBLIC (1972) EA 32**
- **MWANGI VS REPUBLIC (2004) 2 KLR 28**

Having re-evaluated the evidence and after considering the submissions made by the appellant and the state counsel alongside the grounds of appeal, I find that though the complainant maintained in her evidence that the appellant had raped her after stealing her mobile phone and ksh.1,000, her claim that she had been raped was not supported by the evidence of PW5 the clinical officer who had examined her on the day after the incident and completed her P3 form.

According to his evidence, though he noted soft tissue injuries on the complainant's neck, buttocks, chest and right elbow, he did not see any kind of injury on her genitalia and no traces of spermatozoa were noted.

This in effect means that there was no evidence of penetration or evidence that the complainant had been engaged in any sexual activity prior to her examination.

If the complainant was indeed raped on the night of 1st August 20210, unless there was evidence that she had taken a shower before she was medically examined by PW5 on the following day and there was no such evidence in this case, one would reasonably have expected that some deposits of spermatozoa would have been found in her genitalia upon examination.

It is significant to note that the appellant had maintained his innocence throughout the trial and in the absence of medical evidence collaborating the complainant's evidence that she had been raped as alleged, I find that a reasonable doubt existed whether or not the appellant had indeed committed the offence charged in count 1 which doubt should have been resolved in favour of the appellant.

It is therefore my finding that the learned trial magistrate failed to properly evaluate the evidence adduced before him and in the result arrived at the erroneous conclusion that count 1 had been proved against the appellant beyond reasonable doubt. I am thus satisfied that the conviction of the appellant in count 1 relating to the offence of rape was unsafe and it cannot be allowed to stand.

I accordingly quash the conviction in count 1 and set aside the sentence of life imprisonment imposed by the trial court.

With respect to count 2, it is my finding that the evidence on record sufficiently proved to the required standard that the appellant indeed stole a mobile phone make Nokia and ksh.1,000 from the person of the complainant as alleged.

PW2 and PW3 were clear in their evidence that after the appellant was arrested on the following day, he produced the mobile phone and some money after he was made to believe that the matter would be settled out of court. This evidence was not shaken by the appellant on cross-examination. The mobile phone was identified by the complainant in the course of her evidence as the phone stolen from her by the appellant on the evening the offence was committed.

Though the appellant had denied in his defence that the phone had been recovered from him on the day after it was stolen and claimed that it was the complainant who had produced it at the police station in a bid to frame him with the offence, PW4 who was the police officer who received the appellant at the police station together with the exhibits and who was obviously an independent witness in this matter did not say in his evidence that it is the complainant who gave the mobile phone to him at the police station. He clearly testified that upon receiving the appellant from members of the public, he was informed that the appellant had voluntarily surrendered the mobile phone and ksh.350 to the arresting public after some persuasion.

Besides, if it is true that it is the complainant who had produced the mobile phone with the aim of framing the appellant with the offence, the appellant would have put this claim across to the complainant during cross-examination which he failed to do. The fact that he only made the claim when making his defence suggests that the same was only an afterthought.

From the evidence on record, I am in agreement with the learned trial magistrate in his finding that the charges in count 2 had been proved against the appellant to the required legal standard of proof beyond reasonable doubt.

I am therefore satisfied that the appellant was correctly convicted in count 2 and I consequently uphold that conviction.

On sentence, the appellant complained that the sentence imposed on him was manifestly harsh and excessive considering that he was a first offender.

The court of appeal in **MACHARIA VS REPUBLIC(2003) KLR 115** citing with approval the case of **OGALO S/O OWUOR(1954) EACA 270** laid down the principles upon which a superior court can interfere with the sentence imposed by the trial court in the following terms,

> ***"…the court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v R, (1950) 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors . To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of*** **the case R v** ***Shershewsky (1912) C CA 28 TLR 364".***

In this case, considering the nature and the value of the property stolen and the fact that the mobile phone was later recovered and returned to the owner and also in view of the fact that the appellant was a first offender, I find that a sentence of fourteen years imprisonment which is the maximum sentence prescribed by the law for the offence of stealing from a person was manifestly harsh and excessive in the circumstances of this case.

The appellant has to date served a period of slightly over three years in prison. I consider the period served as sufficient punishment for the offences for which he was convicted.

I therefore allow the appeal against sentence in count 2. I set aside the sentence imposed by the learned trial magistrate and substitute it with the period already served.

The appellant should be released 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