



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 32 OF 2012

MUTIE MWITA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. B.M. Kimemia Principal Magistrate delivered on 22/2/2012 in Kitui Principal Magistrate Sexual Offence Case No. 28 of 2011)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Mutie Mwita** was charged with the offence of rape contrary to **section 3 (1) (b) (3)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on 14th day of July 2011 at around 6.00 p.m. at **[particulars withheld] village, [particulars withheld] Sub-location, [particulars withheld] Location** in **Kitui County** of the **Eastern Province**, unlawfully and intentionally caused his penis to penetrate the vagina of **N M** without her consent an adult aged 28 years.”

2. In the alternative, the Appellant was charged with the offence of indecent act contrary to **section 11A** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on the 14th day of July 2011 at around 6.00 p.m. at **[particulars withheld] village, [particulars withheld] Sub-location, [particulars withheld] Location** in **Kitui County** of the **Eastern Province** intentionally did an act of indecency by touching private parts of **N M** namely vagina an adult aged 28 years”.

3. The prosecution case was that on 14/7/2011 at about 6.00 p.m., the complainant, 28 year old **N M (PW1)** was at the farm harvesting peas. The Appellant who is her neighbour passed through the fence and went to where the complainant was. The Appellant who was armed with a panga pushed the complainant down and removed her panty. The complainant then lowered his trousers to his knees then lay on her and forcefully had sexual intercourse with the complainant while threatening to cut her with the panga if she screamed. The Appellant thereafter ran away.
4. The complainant went home and reported the matter to her mother. A report was made at **Mutitu Police Station**. The complainant was issued with a P3 form and was examined at **[particulars withheld] Sub-district Hospital** where it was confirmed that unprotected penetration had taken

- place. The Appellant was arrested and subsequently charged with the offences herein.
5. When put on his defence, the Appellant elected to give unsworn evidence. No witnesses were called. It was the Appellant's case that he was arrested from his home. He was then informed of this case and placed in police custody. The Appellant denied the offences herein and stated that there was a land dispute between his family and the family of the complainant who wanted to take the Appellant's land by force. The Appellant further stated that he suspected his mother was killed by the complainant's mother.
 6. After a full trial the Appellant was convicted of the offence of rape and sentenced to serve 13 years imprisonment. The Appellant was dissatisfied with both the conviction and sentence and appealed to the court on the following grounds:
 - v. **That the conviction was based on unreliable evidence.**
 - v. **That evidence was adduced by incompetent witnesses contrary to section 48 of the Evidence Act Cap 80 Laws of Kenya.**
 - v. **That there was no proof as required under section 2 (1) paragraph No. 6 of the Sexual Offences Act No. 3 of 2006.**
 - v. **That the charge sheet was defective.**
 - vi. **That the trial magistrate erred in rejecting the strong defence case.**
 7. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially expounded on the grounds of appeal. It was pointed out that the evidence of the prosecution witnesses was unreliable because of inconsistencies, contradictions and lack of corroboration. It was further submitted that the Clinical Officer who examined the complainant was not a qualified expert as provided for under **Section 48** of the **Evidence Act**.
 8. The learned State Counsel opposed the appeal. It was submitted that the complainant recognized the Appellant who was known to him as a neighbour. That the offence took place in broad daylight and further that there was use of threats and force. That the medical evidence confirmed the offence. The defence was termed as untenable and that the grudge alluded to by the Appellant arose after the occurrence of the offence herein. The court was urged to uphold both the conviction and the sentence.
 9. This being a first appeal, 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**.
 10. The complainant (PW1) testified that the Appellant was well known to her as a neighbour. The offence occurred at about 6.00 p.m. which is during day time. According to the complainant she recognized the Appellant. It was the complainant's evidence that the Appellant who had a panga with him pushed her down to the ground and threatened to cut her with the panga if she screamed. It was also the complainant's evidence that the Appellant then removed her panty and proceeded to forcefully have sexual intercourse with her. The complainant identified her torn and blood stained panty in the trial court as an exhibit. The acts described by the complainant show that the complainant did not consent to the sexual intercourse. The use of a panga to threaten, the torn panty and the pushing down of the complainant reflect non consensual sex. Although the trial magistrate observed that the complainant appeared retarded, the trial magistrate who saw and observed the demeanour of the complainant while she was testifying believed her. It is apparent from the record that the complainant was able to testify without the need of an intermediary.
 11. PW2 **N M** the complainant's mother testified that the complainant made a report of the incident to her the same day at about 6.30 p.m. The mother made a report to the village headman and to the police and the complainant was issued with a P3 form and escorted to hospital. The report the complainant gave to the mother soon after the offence was that it was the Appellant who had raped her. The mother also identified the stained and torn panty in court as an exhibit. The mother's evidence shows consistency between the complainant's evidence given in court and the narrative she gave to her mother soon after the offence.
 12. The evidence of the Clinical Officer, PW4 **Michael Makali** who examined the complainant on the material date at about 10.30 p.m. confirmed that there was penetration of the complainant's vagina with bruises on the labia minora and tears on the hymen. It matters not whether the complainant was a virgin or not. Although the medical officer and the complainant PW1 and the complainant's mother (PW2) differed in their evidence as to whether it was the petticoat or the panty that was

- blood stained, this cannot be considered as a material difference. It comes out clearly from the evidence of the complainant, the mother and the clinical officer that the complainant had the sexual encounter complained about. There are no material contradictions in their evidence.
13. The evidence of the Investigating Officer PW5 **P.C. Fred Kipchumba** further confirms that a report of the rape was made at **Mutitu Police Station** on the material day at about 9.30 p.m. and the Appellant named as the culprit.
 14. This court has also considered the Appellant's defence that blames this case as a frame up due to a land dispute. However, according to the Appellant the grudge started in August 2011, which is after the material date. Having evaluated the evidence on record, I am satisfied that the conviction was based on sound evidence. The defence raised did not cast any reasonable doubts on the prosecution case.
 15. The Appellant also complained that the charge sheet was defective, stating that the charge ought to read "**contrary to section (3) (1) (a) and (b) as read with section 3 (3)**". However, there is no prejudice caused by the manner in which the provisions of the law were stated. In any event, the same would be curable under **section 382** of the **Criminal Procedure Code** as there was no failure of justice. Likewise, no prejudice was caused by the inconsistency on the date of arrest.
 16. On whether a Clinical Officer is a competent expert witness as provided for under **section 48** of the **Evidence Act**, the matter was put to rest by the **Court of Appeal in Raphael Kavoi Kiilu – vs- Republic (2010) e KLR** where it stated as follows:-

“Under section 2 of the Clinical Officers Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act States:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.”

17. With the foregoing, this court finds the appeal unmeritorious and the same is dismissed. I uphold the conviction and sentence by the lower court.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 20th day of February 2014.

B. THURANIRA JADEN

JUDGE