



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 156 OF 2012

BETWEEN

VINCENT NDEGE NYAGA APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case No. 135 of 2011 by Hon. M.W. Wachira, CM on 25th October, 2012)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to **section 3(3)** of the *Sexual Offences Act (Act No. 3 of 2006)*. It was stated that on 14th January 2011 at [*Particulars Withheld*], he intentionally and unlawfully caused his penis to penetrate the anus of JNM without his consent. In the alternative, he was charged with committing an indecent act with an adult contrary to **section 11(A)** of the *Sexual Offences Act*. It was stated that intentionally touched the anus of JNM with his penis against the complainant's will.
2. The appellant was found guilty of rape and convicted. He was sentenced to ten years imprisonment which is the mandatory minimum sentence prescribed by the *Sexual Offences Act*. He now appeals against conviction and sentence.
3. The complainant, a prisoner testified that on 14th January 2011, he was asleep on the same mattress with the appellant. He states that about 4.00 a.m, the appellant tore his trouser at the back and inserted his penis into his buttocks. He struggled with the appellant screaming causing other prisoners to wake up. The other prisoners separated them. The prison wardens were informed in the morning whereupon he was taken to hospital for examination and treatment.
4. PW 2, an officer at the prison in general duties, was instructed by the duty officer to escort PW 1 and the appellant to Itabua Police Station, PW 1 lodged the complaint and was issued with a P3 form. PW 1's statement was also recorded. PW 3, an officer at Itabua Police Station, confirmed that prison officers reported to the police station with two prisoners and the complaint by PW 1 was recorded in the Occurrence Book. He confirmed he issued a P3 for which was returned to the station on 17th January 2011. He also went to the prison on 19th January to record statements. He stated the prisoners declined to record statements.
5. PW 4, a medical doctor, produced the P3 form filled by another doctor who had proceeded for further studies. According to the P3 form, the anal opening was tender and there were tears on the

posterior and anterior aspects of the slider. There was stool on the examination finger indicating loosening of the splinter which had tears. The doctor opined that these tears were an indication of anal penetration. She also took an anal swab which upon testing did not confirm spermatozoa.

6. The appellant on his part gave unsworn testimony. He stated that he knew the complainant as a fellow prisoner and on 13th January, 2011, the appellant approached him with contraband cigarettes and bhang to sell to prisoners. However, prison officials searched and took them away. In the evening, the complainant demanded the contraband, he was informed that the prisons officers took them away. PW 1 told then told him that he would take action against him. The appellant testified that that it was only in the morning while they were being counted that PW 1 stated that he was sodomized.
7. The appellant called four witnesses to testify on his behalf. DW 2, a prisoner who was in charge of the cell where the accused was, stated that there was no complaint made by PW 1. DW 3, a fellow prisoner, testified that he learnt about the indecent act from the officer of the in-charge. DW 4, a prisoner who was an elder in the cell when the complainant complained against the appellant, stated that he was aware that there were differences and disagreements regarding contraband but that PW 1 did not report to the cell elders about the rape. DW 5, a prisoner, testified that on the night of 14th January 2011, there were no incidents that night. He noted that complaints ought to be reported to the cell elders.
8. After hearing all the evidence, the learned magistrate was satisfied that PW 1 was raped by the appellant. She discounted the appellant's defence as an afterthought. The appellant challenges conviction on basis that the learned magistrate relied on the uncorroborated evidence of a single witness. He contends that the medical evidence relied upon could not be admitted as the officer who testified is not the one who conducted the medical examination and that a DNA test ought to have been conducted. He also faults the learned magistrate for disregarding the evidence of the five defence witnesses. The State supports the conviction on the ground that all the evidence show that the appellant committed the offence.
9. As this is the first appeal, the duty of the court is to evaluate the evidence independently and reach its own conclusions having regard to the fact that it neither heard nor saw the witnesses testify. The result of this appeal depends largely on whether the appellant penetrated the anus of the PW 1 without his consent. The act of penetration was established by the medical doctor PW 4. The doctor who testified was not the doctor who performed the medical examination. Nevertheless it was established that the doctor had proceeded to pursue her post graduate studies in South Africa. Further, PW 4 was able to identify the writing of the doctor as they had worked together for two years.
10. The real issue is whether the appellant committed the act. PW 1's evidence is that at about 4.00 am when the act occurred he screamed and struggled with the appellant until other prisoners had to separate them. The prosecution did not call any prisoner as a witness to establish the fact of penetration and lack of consent. An incident that caused of this kind would have been reported. PW 2 was only informed of the incident at 1.00 p.m on 14th January 2011 when he was requested to take the prisoners to the police station. No officer, to whom, a report would have been made the first thing in the morning was called to testify.
11. On the other hand, five witnesses testified on oath on behalf of the defence. They were all in the cell at the material time and they all denied PW1's accusation against the appellant. DW 2, the in charge of the cell in particular testified that there was no complainant in the morning. The learned magistrate in considering the defence witnesses' testimony stated, "*However, none of the witnesses produced any evidence before court to prove they were in prison at the time. Moreover, PW 3 testified that when he went to prison to record statements for other prisoners, they declined to record statements. Nothing prevented them from recording statement to effect that there was no commotion in their ward*".

12. In my view, this approach by the learned magistrate was misdirection. The defence witnesses were cross-examined and the prosecutor had an opportunity to put to them any questions regarding their status as prisoners. He did not. The prosecution did not lead any evidence to corroborate PW 1's assertions that there was commotion at night. Such an incident in a prison environment would have been officially recorded but no evidence was led to this effect. The duty of the defence is not to disprove the prosecution case but to merely cast doubt on it. The duty on the prosecution is to prove that the appellant committed the offence beyond reasonable doubt.

13. Having evaluated the entire evidence, I find that the prosecution failed to establish that the appellant committed the felonious act for which he was charged and convicted. The appeal is allowed, the conviction and sentence is therefore quashed. The appellant is set free unless he is otherwise in lawful custody.

DATED, SIGNED and DELIVERED at EMBU this 30th day of April 2014

D.S. MAJANJA

JUDGE