



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 166 OF 2011

LESIT, J.

DAUDI HASSAN MOLU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

R U L I N G

1. The Appellant Daudi Hassan Molu was charged of Rape contrary to section 53(1) (a) and (c) and (3) of the Sexual Offences Act. In the Alternative the Appellant faced a charge of committing an Indecent Act with an adult contrary to section 11(6) of the Sexual Offences Act.
2. The Appellant was tried and at the end was convicted of the main charge of rape and sentenced to ten years imprisonment.
3. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In the grounds of appeal the Appellant raised the following issues:
 - a. **That the learned trial magistrate erred in law and facts in relying upon criminal officers evidence without his her qualification.**
 - b. **That the learned trial magistrate erred in law and facts in failing to find that the charges were not supported by the medical evidence.**
 - c. **That the learned trial magistrate erred in law and facts in conducting the trial partially and irregularly.**
 - d. **That the leaned trial magistrate erred in law and facts in flouting the provisions of section 169(1) of the CPC.**
 - e. **That I wish to be present during the hearing of this appeal.**
 - f. **That the grounds herein have been drafted in absence of certified copy of the trial proceedings. I pray to be served with certified copy of the same to enhance me draft further firm supplementary grounds.**
4. When the Appellant hired the services of a counsel Ms Nelima filed Supplementary Petition of Appeal with the following grounds.

- a. **That the learned magistrate erred in law and in fact in convicting the appellant based on evidence that was contradictory in nature.**
 - b. **That the conviction was against the weight of evidence.**
 - c. **That the learned magistrate erred in law and in fact in convicting the appellant of the offence of rape yet the medical evidence did not support the charge.**
 - d. **That the learned magistrate erred in law and in fact in making a finding that the complainant PW1 was a truthful witness when there was evidence to the contrary.**
5. I am a first appellate court and as such I have subjected the evidence adduced before the trial court to a fresh evaluation and analysis drawing my own conclusions. I am aware of my limitations for reason I neither saw nor heard any of the witnesses and so cannot comment on their demeanour and I have given due allowance for the same.
 6. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Okeno Vrs. Republic** 1972 EA 32 is relevant. It was stated in that case as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424.”

7. The facts of the prosecution case were that the complainant, PW1 a married woman was walking home 34 kilometers from Basa Shopping Centre where she had gone shopping. She noted that the Appellant whom she knew was following her. So Appellant caught up with her and told her he liked her. She replied that she did not like her. The Appellant then held her by the neck, threw her down and raped her. She reported the matter to her brother in law and eventually to the police. She was examined and a P3 form filled.
8. The Appellant denied the charge. He denied raping the complainant and stated that the case was a frame up. He also said that the matter had been settled at home and he could not understand how it came to court.
9. Ms Nelima urged that the prosecution case was full of contradictions. The first contradiction concerned injuries. It was her submission that the complainant said she was held by the neck and knocked down. She complained of hip injury. PW4 the Clinical Officer who produced the P3 form found bruises on complainant’s left hand and external genitalia.
10. Mr. Mulochi, Prosecution Counsel opposed the appeal. Counsel stated that the evidence by the prosecution witnesses was overwhelming against the Appellant and that the same was free of any contradictions.
11. Regarding injuries on the complainant, the complainant’s own evidence detailed how the Appellant held her by the neck then knocked her down and raped her. The injuries found as per the P3 forms shows bruises to the left hand consistent with being knocked down as per the complainant evidence. The other injury of bruises on the external genitalia is also supportive of complainant’s evidence. That the Appellant knocked her down and forcefully had sexual intercourse with her. I find no contradiction with P3 form not showing pain in complainant’s hips as pain may not be visible to the eye.
12. Ms Nelima also urged that the manner of Appellant’s arrest was an issue as it was not clear who led to his arrest. Ms. Nelima took issue with evidence of PW5 the investigating officer who said PW2 identified Appellant to him while PW2 in his evidence denied being present during Appellants arrest.
13. I looked at the evidence of PW 5. He said that one Abdullahi Duba identified the Appellant to him the learned trial magistrate concluded that Abdullahi Duba was PW2’s names are Abdullahi Abduba. Those cannot be the same names. Granted the latter Abdullahi was not called as a

- witness. Nevertheless I do not see this an issue as the Appellant admitted he was arrested for this offence and did not make an issue out of it. Nothing turns on that point.
14. Ms Nelima questioned the place of incident urging that while the complainant claimed it was 1km from the centre, PW5 the Investigation Officer visited the scene and described it as 2 ½ kilometers from the center and in a bushy place.
 15. From the complainant's evidence she was walking home which was 3 kilometres from Basa Shopping Centre where she had done shopping. She testified that the Appellant grabbed her about one kilometer from the centre.
 16. PW5 the Investigating Officer testified that he looked for a vehicle and drove to the scene with the complainant and found 2 ½ kilometers from the centre.
 17. The complainant was walking she did not pretend to give actual measurements of the road from the centre to the scene. She gave an approximate mileage. The Investigation Officer drove by vehicle and that way it was possible to give accurate mileage. In the circumstances I do not find the difference of 1 ½ an issue.
 18. The learned counsel for the Appellant argued that there was no evidence that the complainant had been raped by the Appellant and directed the court to the evidence of the Clinical Officer who testified that there was no evidence of Sexual intercourse "only may be an attempt" counsel took issue with fact no spermatozoa were found. Counsel relied on the High Court Case of **Stephen Kokala versus Republic CA No. 90 of 2006.**
 19. In Kokala's case supra, Ochieng J. found;

"Meanwhile, it is noted that the trial court did find that the complainant had no injuries on her genitalia. A perusal of the P3 form which was signed by PW3 actually states that the complainant had normal genitals."

The clinical officer had found bruises on the neck of PW1. Yet PW1 had not testified that her assailant had held her by the neck. She had only talked of having been held on the mouth and hands. Therefore, it is not clear how the bruises to her neck were caused or by whom.

20. I do not agree to be persuaded by the authority cited. It is a judgment of a court of concurrent jurisdiction and therefore is only persuasive. The reason is that the question whether rape has been committed is a question of fact not merely that of scientific proof.
21. The Clinical Officers both in the cited and the instant case thought they could confirm Sexual intercourse by establishing the presence of spermatozoa in the complainant's genitalia. Having found none, they concluded there was no evidence of rape. The word they used was rape.
22. How can rape be proved by presence or absence of spermatozoa in the complainant's genitalia? That is a dangerous argument which should not be allowed the light of day. It is undeserving of consideration.
23. If for instance there is a lapse of time between the time of alleged rape and the medical examination, which could lead to loss of the spermatozoa. If a condom was used, such a case of rape never be proved no such evidence will be found in a **Okeno Vrs. Republic** 1972 EA 32 is relevant. It was stated in that case as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

- 24.The court should consider the evidence adduced before it to determine whether rape has been proved or not. The suggestions to court by the Clinical Officers that they could determine whether rape was committed by some medical procedure is a very strange suggestion and ought not to be accepted.
- 25.The complainant testified that the Appellant raped her and she described how it happened. The complainant's evidence shows that she did not give the Appellant consent to have sexual intercourse with her. She said it took place on the road, in a lonely stretch. She immediately reported it to her brother in law PW2, the chief and others. Apart from PW2 one other person, PW3, was present when the complainant reported what the Appellant did to her.
- 26.The complainant was examined on the third day after the incident. The P3 form was filled six days after incident. It is not surprising that spermatozoa was not found.The complainant had even washed herself between the time of rape and the examination.
- 27.The Appellant denied the charge in court. However he said he settled the matter with the complainant at home and wondered why he was eventually charged in court.
- 28.I concur with the learned trial magistrate finding on the evidence of the P3 form. The learned trial magistrate also found that the complainant knew Appellant before that incident took place during day time and that he was truthful. I see no grounds upon which to fault the learned trial magistrates finding of fact in this case.
- 29.I find that the conviction entered against the Appellant was safe. I accordingly uphold it.
- 30.On the sentence it was the minimum sentence the Appellant was liable to face upon conviction. I confirm it.
- 31.I find that the Appellants appeal lacks in merit and I accordingly dismiss it.

DATED SIGNED AND DELIVERED THIS 31st DAY OF JULY, 2014

LESIIT J

JUDGE.