



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 242 OF 2012

PATRICK MATU KANG'ATA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 3574 of 2010 in the Chief Magistrate's Court at Kibera – D. O. Onyango (PM) on 28/9/2010

JUDGMENT

1. The Appellant **Patrick Matu Kang'ata**, was charged with rape contrary to **Section 3(2) as read with Section 3(3)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on the 29th day of August 2010, at Ngando village of Karen in Nairobi he intentionally and unlawfully committed a sexual act by inserting his penis that caused penetration into the female genital organ (vagina) of Margaret Kiriro Muthoni without her consent. In the alternative the appellant was charged with indecent act contrary to **section 11(a)** of the **Sexual Offences Act No 3**. It was alleged that on the same date and place the appellant unlawfully committed an indecent act on Margaret Kiriro Muthoni by touching her private parts, namely vagina. Following a full trial, the appellant was convicted and sentenced to serve 15 years imprisonment.
2. A summary of the prosecution's case is that **PW1** the complainant was employed as a house help for the appellant and was at home alone with the appellant and his six month old baby on 29th August 2010, when the appellant attacked her. She testified that the appellant emerged from his bedroom wearing nothing but a towel and got hold of her. He lifted her bodily and carried her back to his matrimonial bed as she screamed, and had forceful sexual intercourse with her. When he finished, **PW1** picked the baby who had been left in the living room and went to Karen Police Station, where she reported the incident. Following investigations the appellant was arrested and charged.
3. In his defence the appellant gave sworn evidence and called no witness. He denied the charged and alleged that **PW1** framed him after he slapped her for dropping the baby. That she fabricated the allegations against him in order to extort money from him.
4. The appellant was convicted following a full trial and sentenced to serve 15 years imprisonment. This appeal stems from his dissatisfaction with the said conviction and sentence. In his appeal the appellant raised eight grounds of appeal in which he complained that there was no evidence of penetration. Further that the court relied on its own theories and opinions not supported by the evidence and failed to thoroughly analyse, evaluate and scrutinize the evidence itself. He also complained that the trial court relied solely on the demeanor of **PW1** and did not adequately consider the appellant's defence. Lastly, the appellant also stated that the sentence imposed against him was manifestly harsh and excessive.

5. When the appeal came before the court for hearing on 3rd July 2014 Mr. Wamwayi, learned counsel appearing for the appellant submitted that the appellant had been convicted on a defective charge. He contended that the appellant was charged and convicted under **Section 3(2)** of the **Sexual Offences Act** which is merely descriptive and does not itself provide for the offence or its ingredients. That for that reason alone the trial was vitiated and therefore the conviction should be set aside and the sentence quashed. Miss Kimiri learned counsel for the respondent conceded that the charge under **Section 3(2) of the Sexual Offences Act** was nonexistent, but she prayed for an order for re-trial.
6. At the direction of the court Miss Kimiri filed her arguments in support of an order for retrial and Mr. Wamwayi filed his arguments in rebuttal. Miss Kimiri urged that the interests of justice would be served if a retrial was ordered since the evidence on record was watertight. She also argued that the appellant would suffer no prejudice since the right to be released on reasonable bail terms under **Article 49(1)(h)** and to a fair trial under **Article 50** both of the **Constitution**, would be available to him. In her opinion the appellant's trial was concluded speedily and the appellant has only served a period of two years out of the prison term imposed upon him.
7. Miss Kimiri cited the principles in the often quoted case of **Fatehali Manji v Republic [1966] E.A. pg. 343**, and also cited the cases of **Mwangi v Republic [1983] KLR 522** and **Mary Waithera Irungu v Republic [2013]** (unreported).
8. Mr. Wamwayi, in rebuttal disagreed that the prosecution's case could be said to be watertight. He pointed out that the learned trial magistrate had disregarded and discounted the medical evidence that would have corroborated the complainant's evidence. That the complainant did not identify the bed sheet used or the clothes she wore neither was her under pant produced in evidence. That the injuries she alleged to have suffered to her thighs were not seen by the doctor at Nairobi Women Hospital. That the trial court's finding that the appellant wanted the complainant to withdraw the complaint was speculative in the absence of such evidence on record.
9. Mr. Wamwayi contended further that the trial court based its conviction on the demeanor of the complainant who had testified two years earlier, yet no remarks had been embedded in the record as to the said demeanor when the complainant testified. He urged that an order for retrial would not serve the interest of justice but would only serve to punish the appellant. He cited the cases of **Pascal Clement Braganza v Republic [1957] E.A. 152** and **Ahmed Sumar v Republic [1964] E.A. 481**.
10. From the record there is no dispute that the charge was defective. The first issue for determination is therefore whether by itself, the defect in the charge was of such a nature as to vitiate the trial and warrant the setting aside of the conviction arrived at by the trial court. The statement of the offence reads as follows:

“Rape contrary to Section 3(2) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006.”

11. The offence was therefore described as rape and **Section 3(3)** of the **Sexual Offences Act** which provides for the punishment thereof was also properly cited. Further, the facts and the evidence disclosed the offence of rape and from the appellants cross examination there is no doubt that he understood the charge which he faced in court, and there is no evidence that he misapprehended the import thereof.
12. The test as to whether or not the defect is fatal, is whether it prejudiced the appellant in the conduct of his defence, or caused a miscarriage of justice. I have assessed the lower court record and applied the litmus test in **Section 382 Criminal Procedure Code** which provides as follows:

“Section 382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

From the record of the lower court and the submissions made before me it has not been demonstrated that

the appellant suffered any prejudice neither is any discernible on the face of the record.

13. A properly framed charge contains three basic parts: the commencement, the statement of the offence and the particulars of the offence. The particulars must be clear enough to enable the accused person to know the offence he is charged with. It is fundamental that the charge should allege all the essential constituents of an offence. In my view this has been achieved in the instant case, and the defect alluded to herein is therefore curable under **Section 382 Criminal Procedure Code**.
14. For the foregoing reasons I find that there is no justification to quash the conviction on grounds of a defective charge sheet and proceed to subject the entire record to a fresh and wholesome scrutiny which the appellant is entitled to in his first appeal. In so doing I am alive to the fact that I did not have the advantage of observing the witnesses as they testified and cannot rely on their demeanor.
15. I have scrutinized and reevaluated the evidence a fresh and find that the nonchalant in which the prosecution handled their evidence has created a doubt in their case. The medical evidence comprised of the testimony of Dr. Kamau the Police Pathologist who examined **PW1** two days after the said assault. He observed no injuries on her genitalia or other parts of the body and was not able to tell whether she had been sexually assaulted.
16. No witness was availed from Nairobi Women's Hospital where **PW1** was attended to initially, to testify as to her state when she arrived at the hospital. Most perplexing is the fact that although **PW1** submitted her skirt, petticoat and under pant to the Government analyst, and that **PW4** the Government Analyst did testify that he subjected the stains he found on a skirt a petticoat, under pant and bed sheet to analysis, these clothing items and bed sheet were not availed in court during the trial for **PW1** to identify them.
17. There is therefore real danger that the clothes **PW4** referred to belonged to another victim since it has not been demonstrated that they were uncommon items that could only belong to **PW1**. It was not lost on the court that whereas **PW4** stated in his report that he analysed the stains on a white bed sheet, he did admit that the bed sheet produced in court was cream in colour. This may well be a matter of semantics but it could also be that a different bed sheet was produced in court. Further the report indicated that **PW4** received all the exhibits on 1st November 2010 while in his evidence and that of **PW3** they stated that the blood samples were recovered much later on 21st March 2011. The learned trial magistrate discounted this evidence because of the said material discrepancies and he was right to do so.
18. Without the evidence of **PW4** and having found that the evidence of **PW2** amounted to very little, what remains on record is the word of **PW1** against that of the appellant. The learned trial magistrate accorded more weight to the evidence of **PW1** because in his observation of her demeanour she was a truthful witness. From the handwritten manuscript **PW1** gave her testimony on 6th October 2010 and the judgment was rendered two years later on 28th September 2012. I therefore find that in the circumstances of this case it would be unsafe to base the conviction solely on the demeanor of **PW1** in view of the time that had elapsed since this was not captured during her testimony.
19. For the foregoing reasons I find that there exists a doubt whose benefit I now accord the appellant. A retrial will not be ordered where the sole purpose is to help the prosecution fill in the gaps they left behind during the trial. I accordingly quash the conviction and set aside the sentence imposed upon him, and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this 24th day of September 2014.

L. A. ACHODE

JUDGE