No. 420/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 136 OF 2013

ALFONSE MUSEMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(*Being an appeal from the original conviction and sentence in Tawa Resident Magistrate's Court Criminal Case No. 302 of 2012 by Hon. H.M. Nganga, R.M on 13/6/13)

JUDGMENT

1. Alfonce Musembi, the appellant was charged with the offence of rape contrary to **section 3(1)** as read with **sub -section (3)** of the **Sexual Offences Act No. 3** of **2006.** Particulars being that on the **8th** day of **October, 2012** at **[Particulars Withheld]** in **Mbooni East District** within **Makueni County** intentionally and unlawfully caused his penis to penetrate the vagina of **F M M** without her consent.

2. In the alternative the appellant was charged with committing an indecent Act with an adult contrary to **Section 11(A)** of the **Sexual Offences Act No. 3** of **2006.** Particulars being that on 8th day of **October, 2012 at [Particulars Withheld] in Mbooni East District** within **Makueni County** intentionally and unlawfully did an indecent act to **F M M** by touching her private parts namely vagina with his penis without her consent.

3. He was subjected to trial, found guilty and convicted on the main charge. He was sentenced to **fifteen (15)** years imprisonment.

4. Being aggrieved by the conviction and sentence thereof the appellant appealed on grounds that:-

i. The magistrate erred in law and substance by basing the conviction on a single identification evidence item that was flawed, contradictory inconsistent, and ultimately inconclusive and defective in law;

ii. It was erroneous on the part of the magistrate to resolve all the salient doubts that arose in favour of the prosecution instead of resolving the doubts in favour of the defence;

iii. The trial magistrate erred in fact by shifting the burden of proof to the accused person even

though the prosecution had failed to prove the case beyond a reasonable doubt.

5. The facts as presented by the prosecution were that on the **8th October, 2012** at about **6.00pm** PW1, **F M M,** the complainant was from the river having fetched water. She was using a donkey to carry the water. As she descended the valley she realized she was being followed from behind. She checked only to see a person pushing a bicycle. She was familiar with the man's physical appearance. The man dropped the bicycle, hit her and held her neck. He strangled her. She could not defend herself. She fell down and he threatened to kill her using a knife that he held if she talked. He pulled her into the bush, and removed her underpants. He unzipped his pair of trousers and penetrated her vagina, hence having sex with her. He was interrupted by a sound of motor-cycle. He put the knife into his pocket and run of.

6. She went to where she left the donkey. She encountered one **Florence** who was joined by her husband, PW2, **Cosmas Kioko Mbuvi.** She narrated her ordeal to her. Florence escorted her. They found her mother. They reported the matter to the police. She was subjected to medical examination. Investigations carried out culminated into the arrest of the appellant.

7. In his defence, denying having committed the act, the appellant stated that on the material date he was at **Kanyangi Market** where he had taken vegetables. He returned home, had a bath and rested. Further, he stated that his father was unwell. On **16/10/12** he left his sister's home and used the route following the direction given by his sister. He had a bicycle. He passed some two (2) ladies along the way. He moved on and encountered a man who arrested him and took him to the Police Station.

8. The learned trial magistrate analysed evidence adduced and reached a finding that the appellant did commit the sexual act against the complainant intentionally and unlawfully.

9. At the hearing of the appeal the appellant canvased the same by way of written submissions.

10. In response thereto, **Ms Ronoh,** learned State Counsel stated that identification of the appellant was positive. Evidence of sexual penetration was adduced. She urged the court to uphold the conviction and sentence meted out.

11. This is the first appellate court, its duty is to subject evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see nor hear witnesses testify. (***see Pandya versus Republic [1957] E.A. 336; Okeno versus Republic [1972] E.A. 32).***

12. As a court, I have carefully considered evidence adduced, submissions filed by the appellant, the authorities cited and the law applicable.

13. The learned trial magistrate has been faulted for basing the conviction on a single witnesses' evidence. It is trite law that a fact may be proved by the testimony of a single witness. In the case of ***Anil Phukan versus State of Asam 1993 AIR 1462*** it was held as follows-

> ***"A conviction can be based on a testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone."***

14. In the case of ***Chilla versus Republic [1967] E.A. 722 at page 723*** it was stated thus:-

> ***"The Judge should warn … himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the court is satisfied that there has been no failure of justice"***

15. This is a case where the trial magistrate was alive to the legal position in respect of a single identifying witness in sexual offences. He did quote the proviso to **Section 124** of the **Evidence Act** that provides:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

16. He considered the principles of law applicable to sexual offences and reached a finding that circumstances that prevailed were:-

"***Ideal for positive identification"***

17. The complainant herein testified that she knew the appellant by facial appearance. This meant that the appellant was not a stranger to her. The appellant pretended to be examining his bicycle an indication that it was damaged. The complainant ignored him and passed. The appellant then seized the opportunity to hit her. He held her neck and strangled her. He pushed her into the bush and penetrated her. She estimated the time the act of sexual intercourse took to have been between 20-30 minutes.

18. On examination by PW6, **Joseph Biwott** a clinical officer found that indeed she sustained physical injuries, there was tenderness on the interior neck.

19. The incident happened at 6.00pm. There was sufficient light to enable her recognize/identify her assailant. In evaluating the evidence the learned magistrate stated thus;-

"***It is clear in my mind that the circumstances obtaining were ideal for positive identification. The incident occurred at around 6pm or shortly thereafter. PW1 testified that there was sunlight and it was not yet dark. There was no indication that she may have been blind folded and did not have a clear sight of her assailant. It is therefore the finding of the court that on the 8th October, 2012, PW1 had all the opportunity to mark the physical features of her assailant including his facial appearance".***

20. When put on his defence the appellant came up with an *alibi* defence. On the fateful date he was elsewhere, **Kanyangi Market** where he had taken vegetables. It was an assertion of the appellant that he could not have committed the offence because he was not at the scene when the crime committed took place. In the case of ***Msembe and Another versus Republic [2003] KLR 521*** the court stated that:-

"… Burden of proof for the defence of alibi rests with the prosecution alone and the accused herein does not assume the burden of proving it."

21. The prosecution had a duty of proving beyond a reasonable doubt that the appellant herein was properly identified by the complainant. The trial court in believing the honesty of the complainant had observed her demeanour. The learned magistrate found her evidence truthful and consistent. He dismissed the alibi defence. The evidence adduced by the prosecution in respect of identification of the appellant was strong and there was no logical explanation that the appellant could not have been at the scene of crime. In the premises conviction on evidence of identification by a sole witness having cautioned himself was not erroneous on the part of the magistrate.

The question to be answered is whether there were any doubts that should have been resolved in favour of the appellant and whether the burden of proof was shifted?

22. Evidence of the complainant of having been penetrated is corroborated by medical evidence adduced. After the act, she was examined by PW6 who found that she had sustained laceration on both the labia minora and labia majora. The hymen was perforated/broken. There was presence of spermatozoa with red cells. He formed an opinion that there was evidence of sexual penetration. The complainant was penetrated at 6.00pm or thereabout and she sought treatment some two (2) to three (3) hours later. The fact that there was spermatozoa in her genital organ is evidence of a male organ having been inserted into her female organ which emitted the spermatozoa. This was evidence beyond a reasonable doubt of penetration.

23. PW1 denying having consented to the sexual act stated that as the appellant violated her he held a weapon (knife) that he threatened to use against her person. This was a threat to use violence against her. Looking at the nature of injuries sustained by the complainant. She had bruises on both thighs. The post rape care form filled indicates that the clothes she wore, the pant was torn between the legs and was wet. The biker was also torn and wet. It is likely that she consented to the act. Had she consented her pants would not be torn and it is unlikely that she could have sustained bruises on the thighs. This was evidence of coercion.

24. Coercive circumstances having been established it was proof of the act having been committed intentionally and unlawfully. This was indeed rape.

25. In his findings the learned trial magistrate indeed stated :-

> ***"Be as it may on full evaluation and consideration, I find accused person's defence of alibi farfetched and an afterthought "***

26. It is always good practice for an accused to come up with the defence of *alibi* right at the outset. This is meant to give the prosecution an opportunity of rebutting it. Failure to do operates as a surprise to the prosecution. The duty of proving the accused guilty however, does not shift from the prosecution to the accused. ***(See Republic versus Johnson [1961] All ER 69).***

27. Stating that the alibi defence was an afterthought was not shifting the burden of proof to the appellant. In the premises there was no misdirection.

28. From the foregoing, I find the Lower Court having addressed itself correctly to the facts and Law. I find no basis of interfering with its decision in respect of the conviction.

29. With regard to the sentence imposed, the appellant was a first offender. The minimum sentence provided for is ten **(10)** years imprisonment. I set aside the sentence of **fifteen (15) years** and substitute it with a sentence of **ten *(10*) years.** The appeal therefore succeeds in respect of sentence only. Appeal on conviction stands dismissed.

30. DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** day of **OCTOBER, 2014.**

L.N. MUTENDE

JUDGE