REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 45 of 2008

MUNYOKI MUTEMI...……..APPELLANT

V

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 1505/2006 by Hon. Odenyo, SRM on 7/2/2008)

JUDGMENT

1. The Appellant, **Munyoki Mutemi** was charged with the offence of rape contrary to section 140 of the Penal Code.

2. The Particulars of the offence being that on the 21st day of November, 2005 at [PARTICULARS WITHHELD] Mwingi District within the Eastern Province unlawfully had carnal knowledge of **M.S.R** without her consent.

3. In the alternative he had been charged with indecent assault on female, contrary to section 144(1) of the Penal Code.

4. Particulars thereof being that on the 21st day of November, 2005, at [PARTICULARS WITHHELD] Mwingi District within Eastern Province unlawfully and indecently assaulted **M.S.R** by touching her private parts.

5. Having denied charges, the appellant was tried and found guilty on the main charge. He was convicted and sentenced to 10 years imprisonment. Being aggrieved by the conviction and sentence the appellant has appealed on the following grounds that:-

§ The trial magistrate misdirected himself and erred both in law and fact by failing to make a finding that the prosecution's evidence was contradictory and could not sustain the charge.

§ That the trial magistrate erred in both law and fact by failing to reach a finding in respect of a connection between the complainant and the appellant.

§ The trial magistrate failed to consider the weight of evidence adduced and also to consider the fact that the P3 form was filled by a clinical officer instead of a doctor.

§ That the trial magistrate erred in fact and law by failing to consider the appellant's defence.

6. The facts of the case were that on the 21st November 2005 PW1, **M.S.R** the complainant was on her way home having come from the river. She branched off the road to ease herself. A person she identified as the appellant herein emerged and wrestled her. She screamed and fought back but he over-empowered her. He inserted his penis into her vagina and penetrated her without her consent. After the ordeal, she went home. On her way home she encountered her mother but since she was going to vote she had to wait until she returned home. That is when they went to report to the police. She was referred to hospital where she underwent treatment.

7. PW2, **H.N** was on her way when she saw the accused in the act lying on the complainant. On seeing her, the accused released the complainant and ran off. The daughter narrated what had been fallen her. She however had to vote at the referendum first. She returned home and escorted the complainant to the police station, then hospital for treatment.

8. PW3, **Fredrick Mutua** a clinical officer examined the complainant and found her having sustained minor bruises on the external vagina. There was discharge from the cervix. A swab carried out indicated pus cells which was evidence of a sexually transmitted disease.

9. PW5, **No. 48930 P.C Ephantus Mwangi** received the report from the complainant, thereafter he arrested the appellant.

10. In his defence the appellant denied having committed the offence. He said on the fateful day after casting his vote at the referendum, he went to graze cattle.

11. Both counsels for the accused and the State Counsel filed written submissions.

12. This is a first appellate court. I am seized of the fact that I did not have an opportunity of seeing or hearing witnesses who testified. It is however incumbent upon me to re-evaluate the evidence adduced and draw my own conclusions (see ***Okeno versus Republic [1972] E.A. 32; Njoroge versus Republic [1987] KLR 19).***

13. It has been submitted by Counsel for the Appellant that the complainant did not identify the person who raped her.

14. It is in evidence that the incident occurred at 11.00am or thereabout. This was in broad day light. The person struggled with the complainant until he overpowered her. It was her evidence that the appellant was well known to her. He was her village-mate. In his cross-examination the appellant did not dispute that fact.

15. As a court, I am aware of the fact that in evaluating evidence of identification, I am enjoined to ensure beyond all reasonable doubt that the witness was honest and not mistaken about the evidence adduced. The Court of Appeal in the case of ***Anjononi & Others versus Republic [1980] KLR 59*** emphasised the value of recognition evidence of an accused by the complainant as opposed to the identification of a stranger.

16. This is a case where the complainant knew the appellant before; therefore it was a case of recognition. The fact that the appellant did not test what the complainant said in cross-examination was evidence that he did not doubt her honesty.

17. In this case, PW2 also found the accused in the Act. Her evidence corroborated that of PW1.

18. It has been submitted that the evidence of PW1 was contradicted by that of PW2. What was said by

PW2 was that she was on her way and she did see the accused in the Act, on top of PW1. If PW1 did not realise that PW2 had seen the appellant on top of her it cannot be viewed as a contradiction.

19. One of the grounds of appeal was that PW2 was unable to reach a conclusion regarding the connection between the appellant and the complainant. However, there was no submission on this particular aspect.

20. It was submitted that there was no cogent evidence to warrant a conviction. The appellant was charged with the offence of rape. The complainant was examined by a clinical officer and a medical report (P3) filled thereafter. PW3, the clinical officer who examined her her noted an injury on her vagina. She had discharge from her cervix. She even contracted a sexually transmitted disease. There was evidence of penetration. Her evidence that the appellant had carnal knowledge of her without her consent is not controverted.

21. The trial magistrate found that the bruises on the external part of PW1's vagina meant some force was exerted on her by some foreign body. This was indeed consistent with failure to consent. The evidence cannot be said to have lacked weight.

The clinical officer who filled the P3 form having been a mid-level practitioner of medicine was qualified to fill the P3 (medical report). Being an officer who performs general medical duties with an experience of 7 years, it cannot be said that it was un-procedural for him to fill the P3 form. Needless to add, that a DNA test was not a requirement to prove an offence of rape.

22. On reaching his finding the trial magistrate took into consideration the appellant's defence. To quote him he stated;-

"***Accused talked of leaving for the grazing fields at around 10.00am. Being cognizant of the rural set up where time is usually estimated in relating to the position of the sun, I find that it can as well be that the accused left for the alleged grazing fields after committing the Act."***

23. Considering the brief evidence he gave. The trial magistrate indeed took into consideration what the appellant stated and evaluated it prior to reaching his finding.

24. Having considered the evidence and submissions on record, I am satisfied that the Appellant was properly convicted of the offence as charged. The sentence passed was appropriate. I therefore dismiss the

appeal entirely.

25. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** day of **MAY, 2013.**

L.N. MUTENDE

JUDGE