REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 86 of 2011

JULIUS MUTUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant JULIUS MUTUGI was charged with an offence of rape contrary to Section 3(1),(a), (b),(3) of the Sexual Offences Act, No. 3 of 2006. The particulars of the charge were that on 3.10.2010 in Tharaka North District , intentionally and unlawfully caused his penis to penetrate the vagina of LK without her consent.

The appellant was convicted of the offence and sentence to imprisonment for ten(10) years. Being aggrieved by conviction and sentence he filed this appeal setting out 7 grounds of appeal as follows:-

1) That the learned Senior Resident Magistrate erred in law in failing to give consideration to the appellant's defence of alibi.

2) The learned Senior Resident Magistrate failed to appreciate the law relating to the treatment of the defence of alibi.

3) The learned Senior Resident Magistrate erred in law and fact in failing to find that the identity of the attacker was not properly proved in view of the circumstances and the evidence of the complainant.

4) The learned Senior Resident Magistrate erred in law in convicting the appellant on the uncorroborated evidence of a single witness.

5) The learned Senior Resident Magistrate erred in law by relying on the evidence that was not on record, causing serious prejudice to the appellant.

6) The learned Senior Resident Magistrate erred in law in failing to find that the prosecution's failure to call a crucial witness, namely Mrs. Mutembei, who is alleged to have given refuge to the complainant after the attack, was fatal to the prosecution.

7) The sentence passed by the learned Senior Resident Magistrate was excessive in the circumstances.

This is first appeal from conviction and sentence. I am therefore the first appellate court and I am guided by the principles enunciated in the case of **OKENO V REPUBLIC (1972) EA 32** where the Court of Appeal set out the duty of first appellate court in the following terms:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to 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 v. Republic [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 findings and conclusions; 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 v. Sunday Post, [1958] EA 424.)"**

The appellant was represented by Mr. Murango Mwenda, learned Advocate who made the following submissions. On ground No.1 and 2 of the petition of the appeal he submitted that the trial Magistrate failed to analyze the defence of alibi set up by the appellant during the trial and failed to appreciate the law on defence of alibi. He submitted the appellant's defence was that he was at his home throughout the night when the complainant alleged to have been raped by the appellant. That in support of his defence the appellant called three(3) witnesses who were with him during the material night. He submitted therefore the appellant having given such a defence the burden of proof shifted to the prosecution to provide evidence that dislodge that alibi. He submitted that prosecution did not produce such evidence and as such court was under obligation to treat the appellant's defence of alibi as truthful. He urged the trial court erred in failing to give appellant's defence analysis and the courts mere statement that it had considered evidence he urged was not sufficient. He urged further on page 9 of trial court's judgment it made strange remarks in relation to the appellant's defence of alibi when it stated that the appellant could not tell where he was between 10p.m and 11 p.m. he urged under Page 16 of the court proceedings the appellant had explained that he was left by his two visitors sleeping with his wife DW2. He submitted that appellants defence was supported by his three witnesses.

On ground No. 3 of the appeal he submitted that the offence took place in a dark night as per evidence of PW1, the complainant. PW1 alleged to have used the torch light to identify the attacker. He submitted that no record of intensity of the torch light was stated to the court. He urged as such one has to ask himself was the light sufficient which could enable complainant to see and identify the appellant without difficulties? He further submitted from the evidence on record it is not clear when the complainant first shone the torch whether the door to her house was shut or not. She later testified the door was later kicked.

He also paused the question as to whether when the complainant was taken out of her house whether there was light. He concluded by urging that the court ought to have found the circumstances were difficult and not safe to convict on the basis of identification.

On ground No. 4 he urged that the evidence of a single witness on sexual offences court can convict on basis of single witness but certain criterion must be met. He urged that the court had to warn itself of dangers on convicting on evidence of a single witness and reasons must be recorded for such conviction. He urged before conviction court must be convinced the evidence of the victim is truthful. He urged that is what is required under S.124(2) of the Evidence Act(Cap.80). He urged the trial court did not record reason for believing the victim was telling the truth and as such the conviction was not proper.

On ground No. 5 he submitted the trial Magistrate erred in relying on evidence that was not on record. Mr. M. Mwenda learned Advocate, for the appellant referred to the evidence of the Doctor(PW4). He referred to the said evidence and stated the Doctor never gave evidence as to there being penetration or evidence of the neck being tender. He urged that the trial Magistrate in his judgment talks of examinion of 4/10/2010 whereas the Doctor talks of examination being on 5/10/2010. He urged

that the court's judgment was influenced by the said date as it stated that the evidence on complainant was intact.

On ground No.6 Mr. Mwenda learned Advocate for the appellant submitted that the prosecution failed to call a crucial witness and such failure gave fatal blow to the prosecution case. He urged failure to call Mrs. Mutembei, who was mentioned on page 5 of the proceedings in the evidence of the complainant, PW1, was fatal to the prosecution case. He submitted if the complaint is true, had been raped by a person she knew she would have naturally told Mrs. Mutembei the name of the person. He urged that the complainant never even mentioned to Mrs. Mutembei as having been raped.

He further submitted that the prosecution failed to call Mrs. Mutembei as she would have been adverse to the prosecution case. He urged the court to allow the appeal.

The appeal was strongly opposed. Mr. Jackson Motende learned State Counsel, urged me to dismiss the appeal arguing that the Prosecution evidence in its totality supports the charge of rape. He urged that the trial court took into consideration the defence of alibi.

On the issue of identification/recognition he urged that the appellant was recognized by the complainant. He further argued that the evidence of a single witness can be used to convict and referred to Section 124(2) of the Evidence Act and Section 43 of the Sexual Offences Act. He referred court to attached list of authorities. He further argued that medical evidence was sufficient and it corroborated complainant's evidence. He concluded by urging court to dismiss the appeal.

Mr. M. Mwenda, learned Advocate for the appellant in reply referred me to the case of **MWANGI V REPUBLIC (1984) KLR 595,** being authority relied upon by the respondent at page 603-604 and submitted that it supported the appellant's contention.

The conviction of the appellant was based on the evidence of a single recognizing witness. It is important when assessing the evidence of a single witness to examine the conditions of lighting at the time recognition is made in order to satisfy oneself that the conditions that prevailed at the time of recognition were conducive for positive recognition of the culprit.

The Court of Appeal has in several cases specifically set out what one has to look for in such evidence.

In the case of **CLEOPHAS OTIENO WAMUNGE –V REPUBLIC (1989)** the Court of Appeal stated as follows:-

"The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ. In the well-known case of R. VS Turnbull 1976 (3) All E.R. 549 at pg. 552 where he said:

'Recognition may be more reliable that identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.' "

In the case **of PAUL ETOLE & ANOTHER V REPUBLIC C.A NO. 24 OF 2000 page 2 and 3** Court of Appeal stated:

"The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or

substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

I have carefully examined the evidence of the complainant and the basis upon which she claims she saw and recognized the appellant. My first observation is that the complainant did not give the name of the appellant who she claimed to have known for a long time as a Sub-Area for her area and as a Chairman of a Nursery School she used to teach to Mr. Mutembei. The complainant did not even give the description of how the assailant was dressed at the material night. I am concerned with the complainant's evidence of lighting that enabled the complainant to recognize her assailant. The complainant stated that when her assailant knocked the door she shone the torch and the assailant went and hid behind her house. There is no evidence that the complainant opened the door and was able to see the assailant. She did not say anything about the intensity of the torch light or what type of torch she was using and how long the assailant remained under her observation. She did not say where the appellant was standing in relation to the door and which part of his body she shone the torch at. She did not mention whether there was obstruction or not as she was observing the assailant. She did not explain how she was able to see the assailant who had gone and hid behind her house. She did not explain how she was able to see the assailant open for the goats before he kicked the door open. The complainant did not explain how she was able to recognize the assailant as the appellant. The complainant claimed to have seen the appellant at 7.00 pm when he visited her and they ate Chapati together. She must have seen how he was dressed by then, and it was not difficult for her if the assailant who came at 11.0 p.m was the appellant to explain how he was dressed, having as she alleged seen him earlier on.

I am in view of the foregoing not satisfied that the learned trial Magistrate carefully evaluated the complainants evidence in regard to the condition of light and what it was that enabled the complainant to make the recognition of her attacker. The mere fact that the complainant had a torch, which she never stated on its intensity of light and the fact that she focused on her assailant is not sufficient bearing in mind the complainant was using her torch whilst inside a closed door. The nature of the door was not disclosed. It was important for the complainant to describe the intensity of the torch light and describe exactly what she saw of the assailant that enabled her to recognize him. As it turns out the complainant reported to PW5 No.92935 PC Fredrick Muchiri on 4/10/2010 at 2.00 p.m.

PW5 stated PW1 stated she was raped by someone known to her. She did not give the appellant's name though she had been taken to police post with the appellant who had been arrested by members of public.

Further of significant PW2 brother to the complainant and PW4 father to the complainant never mentioned PW1 having given them the name of the appellant as the person who had raped her. The complainant if had been raped by a person she knew very well, she should have given his name, and more particularly details about the assailant. I find none in her evidence.

On evidence of single witness in a sexual offence court can convict on basis of single witness. Section 124(2) of the Evidence Act provides:-

"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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."

In the case of **OLWENO –V- REPUBLIC(1990) KLR 509** Khamoni, J as he then was held:-

"1. Where the only evidence of identification of an accused person is given by a single witness, the court should scrutinize that evidence under two different tests:

a) The first test should be whether the conditions under which the single witness claims to have identified the accused person were such that there was positive identification.

b) The second test to which the evidence of a single witness should be subjected to is whether it could be relied upon, without any other evidence, to sustain a conviction."

In the case of **MWANGI – V- REPUBLIC(1984) KLR 595** the Court of Appeal at Nakuru at page 603-604 stated:-

"The relevant law in Kenya is succinctly set out in Chila V the Republic(1967) EA 722 at page 273:

"The law of East Africa on corroboration in sexual cases is as follows. The Judge should warn the assessors and himself of the danger of acting on the 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 appellate court is satisfied that there has been no failure of justice."

Having carefully considered the trial Magistrate judgment, I find that the court did not warn itself of the danger of acting on the uncorroborated testimony of the complainant and further convicted the complainant without giving reasons for believing the complainant's evidence was truthful. The trial court failed to consider that under Section 124(2) of the Evidence Act, he was under obligation to record reasons for believing the complainant's evidence was truthful. The trial court did not record why it believed the complainant was telling the truth. In the case of **MWANGI – V- REPUBLIC(SUPRA)** it was held where the trial court had not warned itself of the danger of acting on uncorroborated testimony of the complainant, any conviction based on such evidence will normally be set aside unless the appellate court is satisfied that there has been failure of justice.

I find the trial court failed to warn itself of the danger of relying on uncorroborated evidence of a single witness to convict the appellant. I further find there has been failure of justice by trial court in acting on testimony of a single witness and which evidence required corroboration and was not corroborated.

The appellant gave defence of alibi and called three witnesses. The trial Magistrate stated the appellant's defence failed to cast any doubt on the prosecution case. The trial Magistrate did not consider the issues raised by the appellant in his defence. The trial Court failed to note the appellant having raised a defence of alibi the burden shifted to the prosecution to produce evidence that dislodged the defence of alibi.

I would like to reiterate that it is settled law that an accused person bears no burden of proving his defence is true or of proving his innocence. It is sufficient if an accused person in answer to the charge puts forward a defence which introduces into mind of a court a doubt, either in prosecution case against him or doubt that is not unreasonable that he was involved in the commission of the offence against him. Looking at totality of the evidence before the lower court, I find that the appellant in his defence introduced a doubt in the mind of the court that was no unreasoanble whether indeed he participated in the commission of offence of rape against the complainant(see KIARIE V. REPUBLIC 1984) KLR 739.

The trial court did not consider that defence of alibi and therefore failed to investigate the important issue whether indeed any rape was committed against the complainant by the appellant.

The appellant contended that the trial Magistrate did not properly analyze evidence of the Doctor and relied on extraneous matters. The trial court, it was urged relied on evidence that was not on record. The

trial court in its judgment on page 8 stated that the Doctor stated that the complainant's neck was tender and that the complainant had experienced forced vaginal penetration. The court further stated the complainant had been examined on 4/10/2000 and stated that the evidence on the complainant was still intact. The Doctor in his evidence as PW4 testified that the findings were abrasions of vaginal wall and that P3 was filled on 5/10/2010. The Doctor did not mention of any penetration leave alone forceful penetration but P3 form clearly shows forced vagina penetration. The P3 form was issued on 4/10/2010 and complainant seen on the same day.

In view of the foregoing I find that the trial court did not rely on evidence out of record or on extraneous matters and as such ground No. 6 of the appeal fails.

Having carefully considered this appeal I come to the conclusion that the evidence adduced against the appellant fell far too short of proof to the required standard in criminal cases. I find the conviction against the appellant was unsafe and should not be allowed to stand.

Accordingly, I quash the conviction and set aside the sentence. I order the appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF MAY, 2013.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. ***Mr. Murango Mwenda for the appellant***
2. ***Mr. Jackson Motende for State.***

J. A. MAKAU
JUDGE