



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 211 of 2011

NICHOLAS MUSYOKA MUTISYA PLAINTIFF

V

REPUBLICDEFENDANT

(Being an appeal from the conviction and sentence of J.W. GICHIMU RM delivered on 15/11/2011 in TAWA Senior Resident Magistrate Criminal Case No.236 of 2011) Before Hon. B. Thurania Jaden Judge)

JUDGMENT

The appellant, NICHOLAS MUSYOKA MUTISYA was charged with the offence of Gang rape contrary to section 10 of the Sexual Offences Act No.3 of 2006

The particulars of offence were that on 2nd day of July, 2011 at [particulars withheld] Village, Kalawani Sub location, Mbooni West District within the Makueni County, in association with others not before court intentionally and unlawfully caused his penis to penetrate the vagina of TNM without his consent.

In the alternative charge he was charged with committing indecent act with an adult contrary to section 11(a) of Sexual Offences Act No.3 of 2006. The particulars of the offence were that on the 2nd day of July, 2011 at [particulars withheld] Village Kalawani sub-location, Mbooni West District within the Makueni County intentionally and unlawfully touched the vagina of TNM with his penis without her consent.

When he was arraigned before the High Court, the appellant pleaded not guilty. After a full trial, the appellant was convicted and sentenced to fifteen (15) years imprisonment.

The appellant was dissatisfied with the conviction and sentence and appealed to this court on the grounds that the evidence of recognition was not supported by the first report; the prosecution evidence was contradictory and unreliable; the appellant was not medically examined; essential witnesses were not called; circumstances were difficult for identification and that the prosecution case was not proved beyond reasonable doubts.

This being a first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witness [see Okeno Vs. Republic (1972)].

The case for the prosecution is that the complainant, PW.1 TNM went to a bar for some drinks after work. She continued drinking and left at about 10.00 p.m. While the complainant was walking home she found a group of about six men on the way. The complainant was attacked by the men who felled her to the ground and raped her in turns. The matter was reported to the police and the complainant issued with a P3 form and referred to the hospital for treatment. The appellant was identified by the complainant as one of the culprits. The appellant was subsequently arrested and charged jointly with another who was later acquitted.

In his defence the appellant denied the offence. He stated that he had been drinking at a bar where there was also a lady drinking in the company of two men. The following day while the complainant was at the market he heard that a woman had been raped the previous night. The appellant went to the scene of the rape incident where the rape victim was. The rape victim named one NAHASHON as one of the people who had raped her. However, the appellant was arrested a few days later and was subsequently charged with the present offence.

The evidence of the complainant was corroborated by that of the clinical officer, PW.7 THOMAS LETING on the aspect of rape. The other witnesses, PW.2 RN, PW.3 WKM, PW.4 RMK, PW.5 APC ALBANUS NDEKE and PW.6 PC GEOFFREY NJUE gave evidence that dwells on the events that occurred after the rape. None of these gave evidence concerning the rape.

The evidence pointing at the appellant as one of the complainant attackers remains that of the complainant only. The offence took place at night. The complainant testified that there was moonlight and she was able to see and recognize some of her attackers who included the appellant. The intensity of the moonlight was not described. The circumstances of identification were difficult. There was a possibility of mistaken identity. The appellant ought to have been given the benefit of doubt.

The appeal has merit. Consequently, I quash the conviction and set aside the sentence. The appellant is at liberty unless otherwise lawfully held.

B. THURANIRA JADEN

JUDGE

Dated and signed at Machakos this 23rd day of May 2013.

B. THURANIRA JADEN

JUDGE