



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 29 OF 2012

BETWEEN

MARTIN MUCHANGI NJUE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case 1341 of 2001 by E.K. Nyutu R.M on 24th October, 2008)

JUDGMENT

1. The appellant in this case appeals against a judgment and conviction dated 24th October, 2008. He was charged and tried with the offence of rape contrary to **section 140** of the **Penal Code**. The particulars of the offence were that on 3rd May 2001 at **[Particulars Withheld]** Lodge Embu Township in Embu Municipality, he had carnal knowledge of one JWN. He was convicted and sentenced to 15 years in prison.
2. The evidence tendered by the prosecution was as follows. The complainant, PW 1, a business lady testified that on 31st May 2001 at about 9.30 pm, she was waiting for her aunt to arrive from Nairobi at the BP Petrol Station. A man called Kyalo came to her assistance and offered her a place to sleep since it was late. She agreed and was taken to **[Particulars Withheld]** Lodge where he rented room. She was then locked in the room and after a few minutes, Kyalo returned with the appellant. Kyalo and the appellant undressed the complainant. Kyalo held her legs while the appellant pinned her on the floor. Kyalo had sexual intercourse with her and then the appellant. Her screams were heard by a watchman who came towards the room. When the appellant and Kyalo heard the watchman approach the room, they threw her out of the room and locked themselves in.
3. The complainant told the watchman what happened. She then went to Embu Police Station to report. Corporal Cherop, PW4, testified that the complainant came to the Police Station at about 10.30 pm to report that she had been assaulted. PW 4 called other police officers and they proceeded to **[Particulars Withheld]** where the appellant and Kyalo had locked themselves. Among the officers called was PW 5, Corporal Nyaga, a dog handler who was on patrol and who was called and told to meet PW 5 at the **[Particulars Withheld]** Lodge. He proceeded to the scene where he met PW 4 and the complainant. The complainant pointed out the room in which the appellant and Kyalo had locked themselves. They laid siege at the room until about 5.00 a.m when the room was opened and the two were arrested.

4. PW1 was then referred to Embu Hospital for examination on 1st June 2001 in the morning. PW 6, the doctor who testified, confirmed that the complainant had sexual intercourse even though this was not the first time. Her hymen was perforated but was not tender and there was a whitish discharge noted. The doctor also concluded that there was penetration but that this was not the first time the PW 1 had sexual intercourse.
5. The accused was put on his defence where he gave unsworn testimony. He denied the charge before the court. He stated that on 1st June 2001 he went to his place of work at Embu Jua Kali where he met three officers who accused him and two others of being involved in a theft case. They were arrested. He alleged that the police demanded Kshs 1000.00 and since he did not have money, he would be charged with another offence.
6. The learned Magistrate considered the entire evidence and concluded that the prosecution had made out its case and accordingly convicted the appellant. In the petition of appeal, the appellant attacks the judgment on the ground that the learned Magistrate convicted him on the basis of inconsistent and uncorroborated evidence.
7. This is the first appeal and the court is enjoined to conduct an independent evaluation of the evidence and reach its own conclusions having regard to the fact that it did not hear or see the witnesses.
8. The learned magistrate properly directed herself on the issue of corroboration. **Section 124** of the **Evidence Act** entitles the court to convict on the basis of uncorroborated evidence for reasons to be recorded. The proviso to the section states, ***“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.”***
9. The reason for the conviction given by the court were that PW 1 had never met the appellants hence there was no evidence of the malice or a grudge. The evidence of arrest of the appellant was confirmed by PW 1, PW 2 and PW 3 and was inconsistent with unsworn statement of the appellant who did not give credible evidence of an alibi on 31st May 2013.
10. In order to establish the offence of rape under **section 146** of the **Penal Code** the prosecution must prove that the accused had sexual intercourse with the complainant and that the complainant did not consent to the intercourse. I have evaluated the evidence and I find that there are two issues that the magistrate did not deal with. First, the watchman who heard PW 1 scream was not called as a witness. His evidence was critical because he may have remained at the scene from the time the complainant went to report to the police and up to the time the complainant came with the police. He is the one who heard the complainant scream. The watchman’s evidence was also important in establishing that the appellant had intercourse with the complainant without her consent or at any rate by force. I also note that despite the fact that the incident took place at the lodging, the manager or someone from the lodge was not called to testify to identify the person who rented the room or who occupied the room or under what circumstances the appellant, Kyako and complainant came into the lodging.
11. The complainant testified that two people raped her, Kyalo and the appellant. PW 2 confirmed in his testimony that two suspects were arrested. Kyalo was not charged. PW 3’s testimony only refers to one accused who was arrested and taken to the police station. PW 1 also testified that the appellant and Kyalo were taken to the Police Station. No explanation was proffered as to why Kyalo was not arrested and charged yet he is the one who lured the complainant to the lodging where she was raped. The evidence of PW2 and PW3 on the persons arrested is inconsistent.
12. Apart from the fact that the learned magistrate concluded that PW 1 did not know the appellant, what other facts point to sexual intercourse without consent? The evidence of the doctor does not

demonstrate lack of consent. He confirmed that she had changed her clothes and the nature of the whitish discharge was not established. From his evidence I conclude that there may have been sexual intercourse but nothing shows it was non-consensual. The watchman who heard her scream and would corroborate the evidence of lack of consent was not called nor was any reason given for the failure to record his statement or call him as a witness.

13. Finally, if indeed Kyalo was arrested. Was he one of the people who was released as stated by the appellant in his unsworn testimony?

14. Based on what I have stated, I find that the prosecution evidence was insufficient to sustain a conviction of the appellant. The conviction in the circumstances was unsafe. The appeal is allowed, the conviction and sentence quashed.

15. The appellant shall be released unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2013

D. S. MAJANJA

JUDGE