REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 221 OF 2012

JACKSON KINYUA NDAMBIRI ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT GICHUGU (T.M. MWANGI – S.R.M) IN CRIMINAL CASE NO. 770 OF 2010 DELIVERED ON 12TH MAY, 2011.

JUDGMENT

The appellant herein was convicted and sentenced to a prison term of ten (10) years for the offence of attempted rape contrary to Section 4 of the Sexual Offences Act. It was alleged that on 14th November 2010 in Kirinyaga County he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of WKG without her consent.

He has filed this appeal against conviction and sentence and raised the following grounds:-

1. ***That he pleaded not guilty***
2. ***That the learned trial magistrate erred in law and in fact by not considering that the complainant had reported and insisted that he had raped her but could not produce any medical evidence to support that accusation***
3. ***That the learned trial magistrate erred in law and in fact by relying on evidence of the exhibits produced before the Court. The exhibits had blood stains considering the complainant is a 35 year old adult this is a serious matter which needed a medical attention but she did not go to hospital. This raised doubt over the authenticity of the alleged crime of attempted rape***
4. ***The learned trial magistrate erred in law and in fact by failing to consider that the complainant alleged that she was raped on 14th around 2 p.m. but she did not report to the police until 15th the following day at 9 a.m. The Police post is less than 1 Km from the scene of crime.***
5. ***That the learned trial magistrate erred in law and in fact by relying on hearsay. There was no eye witness despite the complainant saying it was day light. The complainant did not shout for help even after the alleged act. Both the investigator's and PW2's evidence was hearsay from the complainant***
6. ***That the learned trial magistrate erred in law and in fact by not considering his defence.***

The complainant's evidence in the trial Court was that at 2 p.m. on 14th November 2010 as she was going to look for a veterinary doctor, she met the appellant grazing cows and upon seeing her the

appellant ran to her armed with a panga and instructed her to remove her pants. He held her by the shoulders.Twisted her around and told her that she would give him what he wanted.He stripped her and she fell down but held his private parts when he tried to remove her underpants. When she held his private parts, he pleaded with her not to dismember them. She then released them and left him seated in pain. She went and looked for NYAGA (PW2) and NJERU whom she took back to the scene to collect her belongings and she later reported to the police. The appellant was arrested in December.

SIMON NYAGAH (PW2) testified that on the material day at about 2.30 p.m. he met the complainant who was very annoyed and told him that she had met a man who had threatened her with a panga if she did not remove her panties. He then led her to the scene which he saw had evidence of a struggle and there were rope prints on the ground which led to a homestead where she identified a cow as one which was being grazed during the incident and upon enquiring from the homestead, they were informed that it was KINYUA who was grazing the cow. The complainant described the person who had attempted to rape her as being dark.

P.C ODUOR (PW3) of Kianyaga Police Station testified that he and P.C. LENAKIO visited the scene of the incident and found signs of a struggle. He retained the complainant's yellow skirt and white petticoat which had patches of blood. He later charged the appellant.

In his sworn statement in defence, the appellant testified that as he was on his way to work on 18th November 2010, he met one father Munyui who told him that there was a report that he (appellant) had attempted to rape the complainant and was therefore to be arrested. Appellant said he would himself go to the Police Camp and surrender to CPL Kavuti.

He added that on the day of the incident, he was not at home but had left at 6 a.m. for Mukure area. He said this case is a frame up.

As a first appellate Court, I must consider and evaluate the evidence that was before the trial magistrate and make my own conclusions as to whether or not the appellant's conviction was safe.

The appellant was the only eye witness to this incident and of course the law allows the Court to convict on such evidence if satisfied as to its veracity.The complainant told the trial Court that she knew the appellant well. She even knew appellant's grandmother and when she went to appellant's home soon after the incident, the appellant ran away. However, SIMON NYAGAH (PW2) who met the complainant soon after the incident said that the complainant described her assailant as a "***dark"*** person. In his evidence PW2 said:-

" She told me she had gone in search of a veterinary doctor and when she used a short cut route she met a man who threatened to cut her with a panga if she refused to remove her panties. She told me her assailant was dark".

Since the complainant said she knew the appellant well, it is rather strange that she could only describe her assailant as a "***dark"*** person. That casts doubt on her testimony. Further, she told the trial Court that when they went to the appellant's home, the appellant went away. But PW2 who was with her gave no such evidence. At the homestead, they were informed that it was KINYUA who was grazing the cow. That evidence was of course inadmissible as it was hearsay.

The appellant put forward the defence of alibi saying he was not in the village on the material day. It is true that this alibi was not raised at an early stage of the trial as indicated by the trial magistrate on the authority of ***KARANJA VS REPUBLIC 198 3 K.L.R 501***. Nonetheless it was still the duty of the Court to weigh that defence together with the other evidence to see if the appellant's guilt was established beyond reasonable doubt bearing in mind that once an alibi is raised, the burden of proving that the same was false was wholly on the prosecution. There was no such burden cast on the appellant to prove that his alibi was true. It was the responsibility of the trial Court to weigh and intrinsically test the said alibi as against the prosecution case to see if it might reasonably be true or if it can safely be rejected as false ***– KARUKENYA & 4 OTHERS VS REPUBLIC 1987 K.L.R 458***. The defence ought not to be

dismissed in a perfunctory manner. In this case, the trial magistrate simply rejected the defence as an afterthought. He did not weigh it against the fact that the complainant, having said she knew the assailant, did not name him only describing him to PW2 and "***dark".*** That would suggest that he was not sure of who had attempted to rape her as this ought to have created a doubt as to the appellant's identity the benefit of which should have been resolved in favour of the appellant.

For my part, I find that the appellant's conviction was un-safe in the circumstances. I accordingly allow the appeal against both the sentence and conviction.

The appellant shall be set free unless otherwise lawfully held.

B.N. OLAO

JUDGE

23RD OCTOBER, 2013

23/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant present

Mr. Sitati State Counsel present

Language – Kiswahili/English

COURT: Judgment delivered this 23rd October 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal explained.

B.N. OLAO

JUDGE

23RD OCTOBER, 2013