REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 69 of 2011

(An appeal against both conviction and sentence of the Resident Magistrate's Court at Hamisi in Criminal Case No. 12 of 2008 [P. A. OLENGO, SRM] dated 14th February, 2011)

EDWARD MTABU ……..……..……. APPELLANT

VERSUS

REPUBLIC ….....……..…….. RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with rape contrary to Section 3 (1) (c) as read with (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 28th December, 2007 at [particulars withheld] in Hamisi District within Western Province, unlawfully had carnal knowledge with L K aged 80 years without her consent. He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve 30 years imprisonment. Being aggrieved by the decision of the trial court, he has appealed to this court on several grounds. He filed initial grounds of appeal and later filed supplementary grounds. His grounds of appeal are as follows -

1. That the magistrate erred in law and fact in failing to observe that the charge sheet was incurably defective.
2. The magistrate erred in law and fact in considering the evidence of identification by PW1 to be satisfactory yet the identification was not free from error or mistake due to the prevailing circumstances at the scene of crime and PW1 failing to reveal the names of the assailant to the investigating authority hence leading to the miscarriage of justice.
3. The trial magistrate made a non-direction on the fact that the evidence tendered on record was not corroborated, but was contradicted on material particulars giving rise to great discrepancies leading to a misjudgment.
4. The trial magistrate erred in law and fact by failing to observe that the prosecution had failed to establish a prima facie case beyond reasonable doubt against the appellant such as the fact that whoever arrested the appellant was a vital witness.
5. The trial magistrate made unlawful direction in the fact that the appellant was not taken to any doctor for examination to give an expert opinion raising eyebrows of doubt.
6. The magistrate erred in law and fact on the face of record to convict the appellant on the evidence tendered based on speculation and conjuncture of the evidence of family members without any independent testimony from surrounding neighbours.
7. The trial magistrate made a misdirection to reject the appellant's strong alibi defence which was not demolished by the prosecution side thus the appellant was prejudiced.

The appellant also filed written submissions which I have perused.

The learned Prosecution Counsel, Ms. Opiyo opposed the appeal. Counsel argued that the charge sheet was proper. Secondly, that the appellant was positively identified. Thirdly, that the prosecution proved their case beyond any reasonable doubt. That the evidence of prosecution witnesses was corroborated. Lastly, Counsel submitted that the defence of alibi was correctly rejected.

In brief, the facts of the prosecution case are that the complainant PW1 L K met the appellant on the road to a shop on 28/12/2007 at 6.00 p.m. During that encounter, the appellant exclaimed how the complainant had not died with her buttocks. After going back home, the complainant went to bed to sleep. The appellant thereafter broke the window of the house of the complainant, blocked her mouth and raped her. A report was made to the Assistant Chief and the complainant was taken to Kaimosi hospital for treatment on 29/12/2007 by her daughter PW2 Z M. The complainant was treated and a P3 form was filled. The P3 form was produced by PW4, Catherine Chesire, a Clinical Officer. The complainant was found to have some lacerations and injuries on her chest. There were also blood stains in the vagina. The appellant was arrested and charged with the offence.

When put on his defence, the appellant gave unsworn statement. He stated that he was arrested on 7/1/2008 while working with a colleague. He was taken to Cheptulu Police Post and remained there for 10 days and was later taken to Serem Police Station where he remained for 3 days before being charged in court on 20/1/2008. He called one defence witness, Patrick Makamu who testified that on 7/1/2008 they were digging gold together with the appellant when the appellant was arrested.

Faced with this evidence, the learned magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was thus convicted and sentenced. Therefrom arose this appeal.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences - *see* ***Okeno –vs- Republic (1972) EA 32***.

The conviction herein was predicated on identification of the appellant by a single witness. The incident occurred at night. There was need for the trial court to have evaluated all the circumstances of identification in order to conclude that indeed it was the appellant who committed the alleged offence. There was need for caution before founding a conviction on the evidence of identification. The courts have reiterated this position in many cases. It will surfice if I cite the case of ***Nzaro -vs- Republic [1991] KLR 70*** where the Court of Appeal emphasized that there was need for the court to warn itself and to be cautious before convicting on the reliance of the correctness of identifications which have been alleged to be mistaken.

The incident herein occurred at night. The complainant does not indicate the time of the night when the incident occurred. The incident occurred in a house. No description was given of any light or source of light that would enable the complainant identify the appellant as the culprit. There is no evidence that the complainant identified the appellant either through appearance or voice.

A court can convict on evidence of identification by a single witness. In the case of ***Abdalla Bin Wendo & Ano. vs R. [1953] 20 EACA 2066*** the Court of Appeal reiterated that a conviction can be founded on the testimony of a single identifying witness. However, such evidence has to be tested with great care especially when the conditions favouring the correct identification are difficult.

In the present case, the conditions for correct identification were difficult. There was need for the prosecution to establish whether the identification relied upon was visual or by voice or both. They did not do so. Therefore, in my view, the identification of the appellant was not free from the possibility of error or mistake.

The evidence that remains against the appellant is that he made some immoral remarks against the complainant on the road earlier in the day. In my view, those remarks could only give rise to suspicion. In criminal law, suspicion however strong cannot be a basis for inferring guilt which must be proved by evidence beyond reasonable doubt – see case of ***Sawe vs Republic [2003] KLR 364***.

Having re-evaluated all the evidence on record, I find that the prosecution failed to prove its case against the appellant beyond any reasonable doubt as required in criminal cases. The conviction of the appellant is therefore unsafe and cannot be sustained.

Consequently, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence imposed by the subordinate court. I order that the appellant is set at liberty unless otherwise lawfully held.

Dated and delivered at Kakamega this 28th day of November, 2013

George Dulu

J U D G E