



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 351 OF 2010

CHARLES MUTISYAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Senior Principal Magistrate's Court Criminal Case No. 730 of 2009 by Hon. E. Juma Osoro, SRM on 27/5/2010)

JUDGMENT

1. **Charles Mutisya**, the appellant was charged with the offence of rape contrary to section 3(1) (a) as read with Section 3(3) of the Sexual Offences Act No. 3 of the 2006. Particulars of the offence thereof being that on the 26th July, 2009 at about at about 6.30pm at **[particulars withheld]** village, Yatta Location of Kitui District within the Eastern Province, in association with another not before court, wilfully and unlawfully had an act of penetration to **J M M** aged 20 years without her consent. In the alternative he faced a charge of Indecent Act with an adult contrary to Section 11(6) of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 26th July, 2009 at 6.30pm at **[particulars withheld]** village, Yatta locating of Kitui District within the Eastern Province, in association with another not before court, wilfully and unlawfully had an act of indecency with **J M M** an adult aged 20 years by touching her private parts namely vagina without her consent. The appellant was tried, convicted and sentenced to 10 years imprisonment on the main charge.
2. At the trial, the prosecution called six (6) witnesses.
3. PW1, **J M M**, hereinafter "*the complainant*" stated that on the 26th July, 2009 at 6.30pm, while from church she encountered the appellant with **Mue Muli**. They offered to buy her soda. She agreed. After taking the soda she wanted to leave. They prevailed upon her to wait as they were cooking. She then excused herself to ease herself. She managed to leave. However, while on the way the two (2) who had a bicycle caught up with her. **Mule** held her hand and pulled her into a nearby thicket. She attempted to scream but he gagged her mouth using a scarf. The appellant joined **Mule**. They dragged her further into the thicket. They pushed her onto the ground. **Mule** undressed her. He removed her biker and underpants. They made her lie facing upward. **Mule** lay on her and had carnal knowledge of her. The appellant also undressed and had carnal knowledge of her. Each one of them repeated the act. They told her to stand but she could not. The two (2)

- asked her to dress up. They escorted her home and threatened to kill her if she disclosed to anyone what they had done. She complied. However, the following day she was in a lot of pain. She told her mother what had befallen her.
4. PW2, **M M** heard from **Mutungu** (PW5) that her daughter PW1 had been with the appellant and one **Mule**. When she got home PW1 was asleep. When confronted she denied having had an encounter with the appellant and **Mule**. The following day she noticed the complainant walking with her legs astride. She sought an explanation. The complainant then confided in her that she had been raped by the appellant and **Mule**. She examined her private parts and noted injuries sustained. She was also bleeding. They reported to the Chief, then the police. The complainant was examined at Kitui District Hospital and treated.
 5. PW3, **D M M N** participated in taking the complainant to hospital. It was his evidence that she walked with difficulty.
 6. PW4, **Martin Njue**, a clinical officer examined the complainant. She had pus cells in the urine which suggested urinary tract infection. He also examined the appellant who had a similar infection.
 7. PW5, **John Mutungu** saw the complainant being bought soda by **Mule**. They were with the appellant at the rear part of the bar, seated at a table. It was at 6.30pm. He therefore went and informed PW2. PW6, No. 54346 **PC Joseph Kauge** received the report and observed the complainant who had difficulty in walking. He arrested the appellant and also escorted him to hospital for examination. After investigating the case he caused the appellant to be charged.
 8. When put on his defence the appellant said he was at the uncle's home. He said that on the material day his uncle sent him to visit his aunt. He went there to help her prepare land for tilling. He stayed there until 15/8/2009 when the police arrested him having been identified by the complainant. He was taken to hospital for examination and found to have an infection. He denied being the person identified as the complainant's assailant. He averred that he was framed up because he supplied water to the complainant's home that they failed to pay for.
 9. Being aggrieved by the conviction and sentence the appellant has appealed on the grounds that the learned trial magistrate erred in law and fact by basing its conviction on evidence that was weak, contradictory, did not link the appellant to the offence committed and failed to take into consideration the defence tendered.
 10. This being a first appellate court, I am under a duty to analyse and re-evaluate evidence adduced before the trial court, in order to come up with my own conclusion on the evidence adduced with overlooking the conclusion reached by the trial court. I must also bear in mind that I had no opportunity of hearing and seeing witnesses who testified (see *Okeno versus Republic [1972] E.A. 32, Muhammed Rama Alfani & 2 others versus Republic Criminal Appeal No. 223 of 2002*).
 11. In his defence the appellant stated that he was not at the scene of the incident. He alleged that he was working as usual. His uncle had told him he was to travel to his aunt's place the following day. He was not specific as to where he was that evening. The prosecution's evidence was that he was in company of the complainant. PW5, a person who knew them very well saw them together as she drank a soda that **Mule** had purchased. PW5's evidence corroborated that of the complainant that they were together. **Mr. Mukofu**, learned State Counsel submitted that they were seen together at 6.00pm. Circumstances favoured correct identification. The complainant was not a stranger to the appellant. She excused herself, left them but they followed her and caught up with her. At the point of being pulled into the thicket she was alone. Her evidence was therefore that of a single witness.
 12. It is trite law that a fact may be proved by the testimony of a single witness. A court can safely convict on such evidence (see *Maitanyi versus Republic [1986] KLR, 190*). In a case of a sexual offence, corroboration is not required as long as the court is satisfied that the victim is telling the truth (see *Section 124 of the Evidence Act*.)
 13. In this case the court in reaching its decision noted that corroboration was immaterial. It believed the complainant. I do agree with the learned trial magistrate that circumstances that prevailed then were conducive. They enabled the complainant to recognise the appellant. And as stated, recognition is more accurate, satisfying and reliable (see *Anjononi and Others versus Republic [1980] KLR 59*).
 14. The evidence of the complainant that she was accosted by the appellant and **Mule** who had carnal

knowledge of her in turns. It was her evidence and that of PW2, PW3 and PW6 that thereafter she walked with discomfort. This would suggest she sustained injuries. Clinical examination however, revealed she suffered no injuries but had contracted some infection. An examination of the appellant proved beyond doubt that he had a similar infection. This medical evidence corroborated that of the complainant. This evidence establishes the fact of the appellant having penetrated the complainant. It was the evidence of the complainant that the two (2) men carried her into the thicket without her consent. They used force to pin her down prior to penetrating into her genital organ using theirs. The penetration was intentional and unlawful.

15. The conviction reached by the learned trial magistrate was safe and I do confirm it.

16. With regard to the sentence imposed, a person who commits such an offence is liable to imprisonment for a term not less than ten (10) years imprisonment. This being the case the sentence imposed is within the law. Consequently, I do confirm it. The appeal therefore lacks merit. I dismiss it entirely.

DATED, SIGNED and DELIVERED at MACHAKOS this 21ST day of NOVEMBER, 2013.

L.N. MUTENDE

JUDGE