REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 147 OF 2010

NMM..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an Appeal from the Conviction and Sentence by L. MUTAI Principal Magistrate Embu in Criminal Case No. 234 of 2011 on 17th August 2011)

J U D G M E N T

NMM the appellant was charged and convicted of the offence of **attempted rape contrary to Section 4 as read with Section 9(2) of the Sexual Offences Act No. 3/2006.** The particulars as stated in the charge sheet were as follows:-

> ***On the 5th day of February, 2011 in Embu municipality thin Embu County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of PW without her consent.***

Upon conviction he was sentenced to 5 years imprisonment. He was aggrieved by the judgment and has filed this appeal challenging the conviction and sentence.

The following are his grounds:-

1. ***The appellant pleaded not guilty to the trial.***
2. ***The learned trial magistrate erred in law and facts when she failed to consider the fact that the house where PW1 alleged the crime took place and other persons but not heard the commotion.***
3. ***The learned trial magistrate erred in law and facts when she failed to consider the fact that PW1 was never attended by a medical officer.***
4. ***The learned trial magistrate erred in law and facts when she convicted him relying on evidence which was in consisted and uncorroborated.***
5. ***The learned trial magistrate erred in law and facts when she allowed PW1 to produce exhibits on two different occasions ignoring the facts that exhibit are supposed to be in custody of the investigating officer.***
6. ***The learned trial magistrate erred in law and facts when she failed to consider the contradiction on the charge sheet where the main count showed that the crime took place on 5th January,***

2011 and yet it was supposed to be the same day and time.

7. ***The learned trial magistrate erred in law and facts when she consider the fact that PW3 and P4 had recorded their statements to the police on 5th February 2010 where PW1 wrote her son 5th February 2011.***

The Prosecution case is that PW1 was in her house with her children on 5/2/2011 8 p.m. when the appellant and his grandfather (PW3) came there. They ate food. Her children went to sleep. The appellant went out but returned. She asked him to go and spend the night at PW3's but he refused. He switched off the lamp and immediately jumped on her, held her neck and removed her sweater and brazier. He squeezed her breasts and neck. She put up a fight but could not scream since her neck was held. She freed herself but he grabbed her and took her back to the sitting room and knocked her down. He went over her and started removing her skirt. She pushed him and a chair hit him. She managed to run out of the house and locked him inside. She alerted a neighbour who alerted others. PW2, PW4 and others came and removed the appellant from PW1's house. They found him naked from waist downwards. The matter was reported and the appellant was charged. The appellant is a nephew to the husband of PW1 and a grandchild to PW3. In his unsworn defence he denied the charge. He stated that PW1 and her husband demolished their house causing them to move to Muthatari. And that at the material time he had visited his grandfather.

When the appeal came for hearing the appellant presented the Court with written submissions. He has pointed out a disparity in the dates in the main count and the alternative count. He also states that he could not commit such an offence to her aunt who knew her well. He has also faulted the Court for relying on the evidence of a single witness. Ms. Ing'ahizu the learned State Counsel opposed the appeal saying there was overwhelming evidence against the appellant. And that PW2, PW3 and PW4 corroborated that of PW1.

As a first appeal Court, I have the duty of re-evaluating the evidence on record and come to my own conclusion. I am also alive to the fact that I did not see the witnesses. Ref. ***1. OKENO VS REPUBLIC [1972] EA 32***

2. MWANGI VS REPUBLIC [2004] 2 KLR 28

I have considered the submissions by the appellant and the State together with the grounds of appeal. I have equally evaluated the evidence on record. I would wish to first address grounds **No. 6 and 7** of the appeal. The appellant faced a main charge of attempted rape and an alternative count of committing an indecent act with an adult. The date of the offence in the main count is indicated as 5/2/2011 and not 5/1/2011 as submitted by PW1. The issue of the alternative count showing 5/1/2011 was addressed by the Court when the Prosecutor applied for amendment on 3/8/2011. The leaned trial magistrate declined to grant the application because the said application was being made so late in the day when the Prosecution had called its last witness. And having heard the case she was clear in her mind that error would have no effect on the direction the matter had taken. And it can be seen in the judgment that the appellant once convicted on the main count the alternative count became irrelevant. The Court could not therefore make any findings on it. The witnesses clearly indicated that the offence occurred on 5/2/2011 and their statements were recorded thereafter. They further explained that their witness statements showed that they were recorded on 5/2/2010 and this was a clear error by the officer who recorded them. This was very well explained by the witnesses. I therefore find no merit in ground **6 and 7.**

Grounds 2 – 5 deal with matters of evidence and I will deal with them together. This offence occurred on 5/2/2011 8 p.m. The appellant came to PW1's house in the company of his grandfather (PW3) who is PW1's father in law. They ate and PW3 left. The appellant also left but returned. By then PW1's children aged between 4 – 8 years had gone to sleep. PW3 confirmed he had left the appellant at PW1's house. He had gone to greet her. He was later brought food by the appellant and they ate and the appellant took the plates back to PW1. It confirms that it's PW1 who prepared food for them. PW3 further says the appellant was to join him later but he did not and was later escorted to PW3's house by neighbours with allegations of rape. PW1 had also indicated that he had asked the appellant to go and spend the night at PW3's but he refused to go. The appellant himself in defence admitted having visited

the grandfather at the material time. He however did not deny having gone to PW1's house. All he denied was committing the offence.

I do find that the evidence of PW1 and PW2 placed the appellant at the *locus quo.* Secondly PW2 and PW4 who are the neighbours whom PW1 reported to actually found the appellant locked up in the house of PW1. He was naked from the waist down wards. What was he doing in PW1's house at that time of the night and in the condition he was? From the evidence it is clear that PW1's husband was not at home. PW4 had asked the complainant if she had contacted her husband. The evidence of PW2 and PW4 is corroborated by that of PW3 at page 11 lines 1 – 2 when he said

"The accused was later escorted to my house by neighbours."

PW1 explained herself well in Court and the learned trial magistrate believed her. She identified the black bra (EXB1) that she was wearing and was torn by the appellant on the material day. This exhibit had been kept by the police and not PW1. At page 6 lines 1 – 3 the Prosecution stated this:-

"I do seek for an adjournment to enable me avail the exhibits which police failed to. I also pray to be allowed to recall PW1 on the next hearing for purposes of identifying the exhibit."

It was therefore the fault of the police that the exhibit which PW1 had taken to them had not been availed in Court on the 1st day of hearing. PW1 cannot be blamed for that. The appellant has submitted that he could not do this kind of thing to a person who knows him. The court is dealing with the facts as presented. There is no rule which states that one cannot commit an offence against a person who knows him. The reason we have an offence called incest is because people defile and rape their relatives whom they know very well.

After analyzing all the evidence and all the circumstances, I come to the conclusion that the offence complained of was committed and the appellant was well identified as the person who did it. He was lucky to have escaped with the minimum sentence of 5 years.

I have no reason of interfering with the findings of the learned trial Magistrate. The result is that the appeal is dismissed. The conviction and sentence are confirmed.

Right of appeal explained.

DATED AND DELIVERED AT EMBU THIS 24TH DAY OF DECEMBER, 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Miiri for State

Appellant

Njue CC