REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 151 OF 2012

SIMON MURIMI MUKUBA …………….…………….APPELLANT

-VERSUS-

REPUBLIC ………………………………………….RESPONDENT

(From the original conviction and sentence in Criminal Case Number 394 of 2009 in the Senior Resident Magistrate's court at Gichugu – Mr. B.J.Ndeda-(SRM)

JUDGMENT

The appellant **SIMON MURIMI MUKUBA** was tried and convicted by **Hon B.J. Ndeda** Senior Resident Magistrate at Gichugu for the offence of rape **contrary to section 3(1)(a) of the Sexual Offences Act**. The particulars of the offence alleged that on the 2nd of October, 2007 in Kirinyaga District of the Central Province, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **MWN** without her consent.

Following his conviction on 29th October 2010, the appellant was sentenced to 10 years imprisonment. And being dissatisfied with that conviction and sentence, he filed this appeal citing eight grounds *which can be condensed into the following two main grounds:*

1. **That the learned trial magistrate erred in law and in fact by failing to find that some key witnesses were not called to testify in support of the prosecution case and he proceeded to convict the appellant on the basis of insufficient uncorroborated evidence.**
2. **That the learned trial magistrate erred in law and in fact by not considering the appellant's defence.**

The case for the prosecution is that the complainant ***MWN*** who testified as PW1 was walking home from her place of work when at around 7.30 pm, she was accosted by a person she identified as the appellant herein.

It was her evidence that the appellant held her by the right hand and told her she should accept what he wanted. Apparently as an indication of what he wanted, he poked her pubic hair with his finger. She responded by saying that she will not accept his overtures where upon he drew a knife, dragged her to the nearest bush where he had carnal knowledge of her for a long time without her consent. When he was through with her, he disappeared into the bush. By this time it was now dark and fearing to go home alone, she went to a nearby homestead , reported to the people she found there what had happened to her after which they escorted her up to the gate to her home.

In her evidence in chief and under cross-examination, PW1 claimed that she was certain that it is the appellant who had raped her because she saw and identified him through moon light.

PW2 who is the complainant's brother and PW3 her mother both testified that on the material day, PW1 went home at around 10 p.m. crying and claimed that she had been raped by Murimi Mukuba referring to the appellant. In addition, PW 3 noted that her clothes were soiled. The matter was reported to the police and the appellant was subsequently arrested and charged with the offence.

In his defence, the appellant gave an unsworn statement and did not call witnesses. He admitted having had sexual intercourse with the complainant on 2nd October 2007 but added that it was consensual sex since the two of them were lovers who had cohabited from the year 2006 to 2007 . He therefore denied having raped her as alleged. When the appeal came up for hearing, the appellant relied on written submissions which he presented to the court.

The state through Learned state counsel Mr Sitati opposed the appeal submitting that the evidence on record proved without doubt that the appellant had committed the offence as charged and that he had been properly convicted.

This being a first appeal, this court is enjoined to re-evaluate and to consider the evidence a fresh in order to draw its own conclusions bearing in mind that it never heard or saw the witnesses. I am guided by the following Court of Appeal authorities;

- ***OKENO VS REPUBLIC(1972) EA 32***
- ***KIMEU VS REPUBLIC(2002) 1KLR 756***

After analyzing the evidence presented before the trial court, I find that it was not disputed that the appellant and the complainant had sexual intercourse on the date alleged. What was in dispute were the circumstances under which the sexual intercourse took place and whether the complainant had consented to it. In other words, did it happen in a bush without the complainant's consent or in the comfort of the appellant's home on his bed with the complainant's consent?

The Learned trial magistrate correctly observed in his judgment that there was no doubt that the appellant and the complainant had engaged in sexual intercourse on the material day but that the only issue which fell for his determination was whether this happened with or without her consent.

This was a key issue for determination because for the offence of rape to be proved, the prosecution must adduce cogent and credible evidence to prove that not only did the act of penetration occur but that it happened without the consent of the complainant. Lack of consent is an essential ingredient of the offence of rape which must be proved beyond doubt before a conviction can be properly entered against an accused person.

After correctly addressing his mind on the issue of consent, the trial magistrate however failed to specifically make a finding as to whether the prosecution had adduced sufficient evidence to prove beyond doubt that the appellant had had carnal knowledge of the complainant without her consent but on page 13 line 17 of his judgment, he summed up the evidence before him on this point as follows;

"But as to whether there was rape as per the law strictly speaking it's the accused's word versus the complainant's word.."

In convicting the appellant, the learned trial magistrate chose to believe the word of the complainant because according to him, her evidence had been corroborated by the evidence of PW2,PW3 and PW5. In my view, this was a misdirection on his part because it is clear from the evidence that these witnesses were not at the scene of the alleged crime and did not testify on how the act of intercourse took place. They only relied on what PW1 had told them and though PW3 had claimed in her evidence that on seeing PW1 she noted that her clothes had been soiled, these clothes were for undisclosed reasons not submitted to the police at the time the matter was being reported and they were therefore not produced as exhibits

before the court.

Had the said clothes been produced , they would have constituted collaborative evidence to support PW1's claim that the appellant had dragged her into a bush and had sexual intercourse with her without her consent. It would also have discounted the appellant's contention in his defence that what the two shared was consensual sexual intercourse in his home . The fact that PW4 noted some injuries on PW1's private parts is in my opinion not evidence of lack of consent. The nature of those injuries show that they only went to prove the act of penetration and not the existence or lack of consent.

In my considered view, the word of the complainant that she had not consented to the sexual intercourse cannot by itself in the absence of any other evidence be sufficient to prove beyond doubt that indeed there was no consent especially in light of the defence's contention that the meeting between the appellant and the complainant on the material day had been pre planned and that the two of them were lovers.

In the absence of independent evidence to support either of the versions given by the complainant and the appellant, I am persuaded to find that the evidence on record was insufficient to prove beyond doubt that the appellant had raped the complainant as alleged. The evidence created a reasonable doubt whether or not there was consent and since the offence of rape cannot be proved without prove of lack of consent beyond reasonable doubt, I find that the learned trial magistrate misdirected himself in concluding that the prosecution had proved the guilt of the appellant in this case to the standard required by the law .

In the result, I am satisfied that the conviction of the appellant in this case was not well founded. It was unsafe.

I consequently allow the appeal, quash the conviction and set aside the sentence. The appellant is to be set free unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED at KERUGOYA THIS 11TH DAY OF DECEMBER, 2013 in the presence of:-

The appellant

Mr Sitati for state counsel

Kariuki Court Clerk