



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

Criminal Appeal 106 of 2008

FRANCIS MUGENDIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

From original conviction and sentence in Cr. case No. 465 of 2008 by D.O. ONYANGO – SRM at the Principal Magistrate’s Court Runyenjes on 20th May 2008

J U D G M E N T

The Appellant herein was charged with the offence of Rape contrary to section 3(1)(a) as read with section 3(3) of the Sexual Offences Act.

The particulars stated in the charge sheet were as follows;

FRANCIS MUGENDI:

On 2nd day of June 2007 at around 4.00pm, at KAMUGERE village, MUKUURI sub-location, KAGAARI NORTH LOCATION, EMBU DISTRICT within EASTERN PROVINCE unlawfully had carnal knowledge of a girl namely C.W.I. aged 19 years without her consent.

The matter proceeded to full hearing and the Appellant was convicted and sentenced to serve 15 years in prison. And being aggrieved by the Judgment he has appealed against both conviction and sentence raising the following grounds;

1. That the learned trial Magistrate erred in law and fact by convicting the Appellant and failing to put due consideration that he pleaded not guilty to the charge.
2. That the learned trial Magistrate erred in both points of law and fact by putting reliance on the evidence adduced by P.W.1 and P.W.2 which was surrounded by a lot of doubts.
3. That the learned trial Magistrate erred in law and fact by relying on the evidence adduced by

prosecution witnesses P.W.1 – P.W.5 that was uncorroborative and full of contradictions.

4. That the learned trial Magistrate erred in both points of law and fact by failing to consider that the vital witnesses were not summoned to clear the doubts i.e. the members of public who were alleged to have arrested the Appellant.
5. That the learned trial Magistrate erred to act in law and fact by overlooking the Appellant's complains over his rights that he was put in the police custody for more than 24 hours as the law of Kenya provides.
6. That the learned trial Magistrate erred in both points of law and fact by rejecting the Appellant's defence which was full of truth without reasons.

When this Appeal came before me for hearing the Appellant presented written submissions to the Court. He has submitted that P.W.1 and P.W.2 should not have been believed because it took P.W.1 two days to report the alleged incident. More so he says that no one was called as an eye witness yet the offence is alleged to have been committed near his home.

He also submitted that the case was not investigated and the medical evidence did not prove the charge as there was no bleeding. He has also raised the issue of violation of his Constitutional rights namely; his having been brought to Court outside the 24 hours period.

The State through M/s Matiru opposed the Appeal. She submitted that P.W.1 positively identified the Appellant, and her evidence was well corroborated by P.W.2 (mother) and P.W.5 (Doctor). Further more the appellant disappeared after this incident.

The duty of this Court as 1st Appellate Court is to re-consider and re-evaluate the evidence on record and arrive at its own independent decision. This Court also bears in mind that it did not see nor hear the witnesses who testified in the Court below. I am guided by the ***COURT OF APPEAL IN SIMIYU & ANOTHER –V- REPUBLIC [2005] 1 KLR 192.***

The evidence of P.W.1 was that on 2/6/2007 at 4 pm she escorted her friend Carolyn Nyaga after the latter had visited her. On her way back she met the accused whom she knew well, as she used to see him in their village. He appeared drunk. He blocked her way and held her right hand. She struggled and screamed to free herself in vain. No one responded. He pulled her to a nearby maize plantation and pushed her to the ground. He pushed her dress upwards, tore her pant and removed it. He also pushed her petticoat towards her upper abdomen and then unzipped his trouser and finally raped her. When he finished he left her at the scene. She took her pants and went home. Her parents had gone for a wedding so they were not at home. Since she is epileptic she took her drugs and slept. Her mother returned on 3/6/2007 at 8.00pm. She did not tell her until the next day which was 4/6/2007. She was taken to hospital on 4/6/2007 and that was when the matter was reported. A torn soiled orange dress, soiled yellow petticoat and torn blue pant were identified as what P.W.1 was wearing that day. She explained that EXB1a was torn when accused was dragging her to the maize plantation. And the pant was torn by the accused after dragging her to the maize plantation. She gave the accused's name to the police. She knew him as Mugendi. The accused could not be traced at his home for some time. She explained that she was feeling embarrassed and that was why she did not inform anybody immediately after the incident.

P.W.2 who is a mother to P.W.1 stated that the daughter reported the incident to her when she arrived home on 3/6/2007 at 9.30pm from a wedding. She told her the culprit was the accused. She checked her private parts and confirmed her complaint. She escorted her to hospital the next day and a report made to the police and a P3 issued. The accused is their neighbour who even knew that P.W.1 was epileptic.

P.W.3 received the accused on 13/8/2007 from Embu police station. This was because the alleged offence had been committed within the area of Runyenjes police station. He compiled the file and had the accused charged.

P.W.5 (doctor) confirmed that P.W.1 had been physically and sexually assaulted. He produced the P3 Form EXB.1. He explained that P.W.1 had pain on upper limbs with scratch marks. She also had a painful vulva, tender or perforated hymen which made it difficult to take vaginal swab. His fingers became blood stained when he inserted the same into the vagina of P.W.1.

The accused when placed on his defence made an unsworn statement in which he said he was framed because of blocking a footpath passing through their home. And that the complainant's relative took him to the police who demanded shs.10,000/= to release him. He did not have the money.

The learned trial Magistrate heard all this evidence and believed the prosecution witnesses. P.W.1 was aged 19 years when testified. She was in standard 7. It came through her evidence and that of her mother (P.W.2) that P.W.1 was epileptic and was usually on drugs. The 1st issue to be determined is whether P.W.1 was sexually assaulted.

There was no eye witness to this incident. The most crucial evidence was from P.W.1 herself. She explained what happened. The doctors evidence also confirmed that the complainant had been physically assaulted and sexually penetrated. All the details are there in the P3 form.

The Appellant submitted that there was no evidence of bleeding save for the one caused by the doctor (P.W.5) who inserted his fingers in P.W.1's vagina. P.W.1 had informed the Court that this was her second such encounter with a man. So it's obvious her hymen had been broken earlier. What the doctor stated was that when he inserted his fingers the same came out blood stained. Had the doctor managed to take the vaginal swab it could have revealed the cause of those blood stains. However the bottom line is that the medical evidence corroborated P.W.1's statement that an act of penetration had occurred.

2. The next issue is whether the act of penetration was consented to by P.W.1.

P.W.1 explained how she was dragged into the maize plantation and her clothes including pants being torn.

The doctor also confirmed that she had painful upper limbs with scratches and a painful vulva. All these are pointers to a forceful penetration. The answer therefore is that P.W.1 did not consent to this Sexual act at all.

3. The 3rd issue is who actually raped P.W.1.

The alleged incident took place on 2/6/2007 at 4.00pm. It was broad daylight. P.W.1 stated that the person who did this to her was a neighbour and well known to her and his name was Mugendi. This was the name she gave to her mother and to the Police.

The offence took place on 2/6/2007 and the Appellant was only arrested on 22/8/2007 because he disappeared after this incident. The members of the public who arrested the Appellant handed him over to the police and their work ended there. They were not eye witnesses so their evidence was not vital in any way. The important issue was that the report had been made to the police on 4/6/2007 and the Appellant was a wanted man and anybody with information could inform the police or even escort him to the police station. And that's what members of the public did. Ground 4 of the appeal therefore fails.

There were no contradictions in the evidence of the witnesses especially P.W.1 and P.W.2. P.W.1 clearly indicated that when she went home she did not find her parents so she took her epileptic drugs. When her father came she did not tell him. Her mother came the following day at night. She later reported to her and she was taken to hospital and a report made to the police on 4/6/2007. That is the evidence P.W.2 gave. P.W.1 did not say that she never reported this incident to anybody at all. She reported to her mother though not the same day. She further explained the reason for the delay as the embarrassment she felt following the incident.

The police officer confirmed receiving the report and that the Appellant went underground. I do not

find any contradiction in the evidence of these witnesses. Infact their evidence corroborated each other very well. Grounds 1, 2 and 3 also must fail.

In ground 6 he says his defence was not considered. In his defence the Appellant had denied the charges and explained his reason for his arrest as having blocked a foot path that used to pass through their home. What had this to do with P.W.1? He never said it was P.W.1 or her family who were benefiting from that footpath. He did not put to P.W.1 and P.W.2 anything about the alleged foot path while he cross-examined them. The learned trial Magistrate well considered the Appellant's defence at page 17 of his judgment and he found that it could not displace the overwhelming evidence of P.W.1. The learned trial Magistrate analysed the evidence very well and arrived at the correct conclusion. He has clearly explained the reasons for arriving at that conclusion. Ground 6 therefore fails.

Finally the Appellant in Ground 5 states that he was arraigned in Court after the 24 hours rule.

P.W.3 and P.W.4 indicated that the Appellant was arrested on 22/8/2007. The record shows he was first arraigned in Court on 10/9/2007 i.e. about 19 days after arrest which days include weekends. This case was finalized on 20/5/2008 i.e. within a period of 8 months. The prosecution did not offer any explanation for the delay which was caused by the police and not the Court. Once the plea was taken the trial Court went on without any hitches and the same completed within record time. It would therefore not be in the interest of justice to set the Appellant free just because of that violation. He too violated the rights of the complainant (P.W1.) by what he did to her. Relying on the case of **JULIUS KAMAU MBUGUA -VS- REPUBLIC [2010] e KLR C.A. NAIROBI**. I do find that the Appellant may file a suit for compensation of his violated rights before the right forum. Otherwise I find no merits in the Appeal. The sentence is lawful. I uphold the conviction and sentence of the Court below and dismiss the Appeal.

Right of Appeal explained.

DATED, SIGNED AND DELIVERED AT EMBU THIS 14TH DAY OF JUNE 201 2

H.I. ONG'UDI

JUDGE

In the presence of;

M/s Matiru for State

Njue – C/c

Appellant