REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 19 of 2010

KAVUVU MULI……………………...................................………………………APPELLANT

VERSUS

REPUBLIC ..……………………….....................................…………………........RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Senior Principal Magistrate's Court Criminal Case No. 759/2008 by T.M. Mwangi delivered on 5/11/2009

JUDGMENT

Kavuvu Muli, hereinafter "*the appellant*" was charged before the Principal Magistrate's Court at Kitui with the offence of rape contrary to section 3(i) (a) (b) of the Sexual Offences Act. He was charged with the alternative count of indecent act with an adult contrary to section 11(1) of the Sexual Offences Act. Particulars of the 1st Count were that on 5th November, 2008 at about 11.30 p.m. at Kakeani village, Kakeani location, Kitui District of the Eastern Province, the appellant unlawfully and intentionally had carnal knowledge of **KM** without consent. On the other hand the particulars of the alternative charge were that on the same day and place, the appellant committed an act of indecency with **KM** a woman aged 56 years by touching her private parts, namely vagina. The appellant entered a plea of not guilty on both counts and was soon thereafter tried.

The complainant, **SKM, Ndiku Kathike, Muinde Maithya**, **P.C. Erick Mukokha, P.C. Kirunja** all testified on behalf of the prosecution as PW1, PW2, PW3 PW4 PW5 and PW7respectively. The appellant testified on oath for the defence as DW1. Their evidence as briefly captured by the trial court is as follows;-

The complainant, PW1 at about 11.30p.m on 5th November, 2008 was asleep in her house when she heard a bang on window. Though naked at the time she woke up to investigate. Her bed was next to the door and when she got to the door, a person whom she later identified as the appellant suddenly held her by the neck and strangled her and at the same time pushed her towards the bed. He removed his trousers and raped her. The complainant identified the appellant after she had lit a matchstick just before the appellant accosted her. The appellant too asked her if she had recognized him to which the complainant answered in the negative. That way she was able again to recognize the appellant by his voice. She had feigned lack of recognition of the appellant because she was afraid that he would have harmed her if she had said that she had recognized him. Otherwise the complainant had known the appellant since his birth and that she even saw his mother when she was pregnant with the appellant.

When the appellant was done, he fell asleep on the bed. The complainant took advantage of the situation and ran out of the house and went to his son's house. Her daughter in law, **NK** (PW2) opened the door for her. The complainant told her what had happened to her. Since she was naked; PW2 covered her with a

lesso. Though they all screamed, nobody came to their aid. They therefore decided to sleep until the following day. On 6th November, 2008 at about 7 a.m. they together with a neighbor, **Muinde Maithya** (PW3) went back to the complainant's house. Inside the house they came across a muffin hat. Thereafter they followed foot prints which started from under the window of the complainant's house to a homestead. In the homestead, a lady directed the 3 to where the appellant's father was. Confronted with the muffin hat, the appellant's father without hesitation confirmed that it belonged to his son, the appellant. It was then they decided to file a complaint with Ndolos Police Post. The complaint was received by **P.C. Alfred Kinoti Kivunja** (PW5). He recorded the complaint and issued the complainant with the P3 form. He also took possession of the muffin hat. The complainant was subsequently examined by **William Kamweya** (PW6), a clinical officer based in Kitui District Hospital, who thereafter filled the P3 from. In his opinion, no injury was noted in the vagina. He was therefore unable to tell whether there was penetration or not because the complainant was an old woman who was not a virgin; which means that during penetration there was unlikely to be tear. He further confirmed that again even if there was consent to sex, then there was likely to be no tear. On 12th November, 2008 at about 10p.m, **P.C. Erick Makokha** (PW4) was detailed to arrest the appellant. He accomplished the mission and the appellant was subsequently arraigned in court as already stated.

Put on his defence, the appellant elected to give a sworn statement of defence and called no witnesses. He stated that the complainant's son had been employed by his sister. His sister fell out with her employee soon thereafter. The employee was not paid his dues by his sister when he left her employment as aforesaid. The sister gave the appellant dues belonging to the employee for onward transmission. However, the appellant passed the money to the complainant. Later the complainant denied having received the money. The appellant was then forced to pay the complainant for the 2nd time, the same amount. The appellant thereafter raised the issue with the elders who instructed the complainant to refund the amount to the appellant. This prompted the complainant to frame him with the case.

Having thoroughly evaluated the evidence on record both for the prosecution and defence, the learned magistrate was persuaded that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to 15 years imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal through **Messrs Musyoka & Muigai Advocates** on the grounds that;

"**1.** ***The learned trial magistrate erred in law and fact by finding that there was evidence to support the charge of rape.***

2. ***The learned trial magistrate erred in law and fact by finding that the charge of rape as contained in count No. 1 of the charge sheet was proved beyond reasonable doubt.***

3. ***The learned trial magistrate erred in law and fact by failing to take into account and analyze the appellant's evidence and submissions.***

4. ***The learned trial magistrate erred in law and fact by relying on contradictory testimonies or prosecuting witnesses to convict the appellant***.

5. ***The learned trial magistrate erred in law and fact by accepting the prosecution case as proved without taking into consideration the defence case.***

6. ***The learned trial magistrate erred in law and fact by ignoring the legal principles governing corroboration of evidence and when to convict on the basis of such evidence.***

7. ***The learned trial magistrate erred in law and fact by convicting the appellant on exhibits that were handled by unauthorized persons and were not properly identified to court.***

8. ***The conviction was against the weight of the evidence adduced***."

When the appeal came before me for *interpartes* hearing on 13th June, 2012, **Mr. Muigai** and **Mr. Mukofu,** learned counsel for appellant and State Counsel respectively consented to arguing the appeal by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

The State though conceded to the appeal on the ground that the medical evidence tendered by the clinical officer.

The offence of rape as defined by section 3(1) (a) and (b) of the Sexual Offences Act; thus-

3(1) a person commits the offence termed rape if-

(a)He or she intentionally and unlawfully commits an act which cause penetration with his or her genial organ.

(b)The other person does not consent to the penetration..."

From the forgoing, the *mens rea* for rape is "*intentionally and unlawalfully"* committing the act whilst the *actus reus* is penetration with his or her genital organs. "***Penetration***" is defined at section 2 of the Act to mean the partial or complete insertion of the genital organs of a person into the genital organs or another person. In order to establish the offence of rape, therefore, it is first and foremost necessary to prove penetration before proceeding to consider whether or not it was consensual, intentional and or unlawful. Other than the uncorroborated evidence of the complainant in this case, there is no other evidence or at all to proof beyond reasonable doubt that there was penetration of the complainant by the appellant. The P3 form produced and the treatment notes tendered in evidence did not reveal any evidence of penetration. Even after performing a high vaginal swab, the only fact PW6 was able to establish was that the complainant had an STI. Section 26(2) of the Sexual Offences Act permits the taking of samples from the accused person in an offence such as the one the appellant had been charged with for the purposes of ascertaining whether or not the accused is infected with HIV or any other life threatening STD. No samples were taken from the appellant. The STD that the complainant was found to be suffering from cannot therefore be in any way linked to the appellant.

PW6 sought to explain the reasons why he could not establish whether or not the complainant had been raped. He stated that;-

"we examined her and took a high vaginal swab of which we got pus cells and some bacterial (sic) but there was no spermatozoa… no injury was noted in the vagina. I cannot tell if there was penetration or not because the victim was an old woman who was not a virgin which means that during penetration there is likely to be no tear. Again if there was consent to have sex, then there is likely to be no tear…"

The trial magistrate appears to have placed much weight to this bit of evidence in his judgment stating that-

"PW6 convincingly explained why it was difficult to medically prove rape upon PW1 and contributed (sic) it to her old age…"

PW1 had stated in her testimony –

"when he finished first round of rape he slept on my bed".

A round of rape, or sexual intercourse, connotes perhaps climaxing in ejaculation leading to release of spermatozoa. If indeed there was a round of rape, it would be expected that there would be spermatozoa in the vagina of the complainant. Whereas PW6 sought to explain why the absence of injuries or tear on PW1's genitalia, he was silent on the absence of spermatozoa. There is no evidence recorded by the trial magistrate that could explain this absence. It was not stated for instance that the rapist was incapable of ejaculation or that he was using protection such as a condom. It is noteworthy that the complainant was

treated only hours after the alleged rape incident. At the very least, there should have been some spermatozoa to prove the act of penetration in the manner she alleged. In the absence, there is a cloud of doubt over the veracity of the allegation of penetration. In the absence of proof of penetration beyond reasonable doubt, the entire charge collapses and the appellant should have been given the benefit of doubt. Additionally, it is not clear why the appellant was not tested for the STD. As no tests were done, it must be presumed that the appellant did not suffer the same STD the complainant was ailing from.

The complainant is said to have had pains on her groins, that is, on either side of the waist. Such forceful and violet penetration as would result in pains on the groin would definitely result in some injury and the theory of advanced age is not plausible to explain the absence of injuries. The presence of pains on the groin is not compatible with non- violent penetration as suggested by PW1 when she stated that she did not resist as she feared for her life.

According to the trial magistrate;-

"***PW6 corroborated PW1's evidence that PW1 had injuries to her neck which the PW1had attributed to the strangulation of her by the accused".***

This statement by the trial magistrate does not flow from the evidence on record. PW5 in his testimony had stated that the complainant complained of neck pain due to strangulation. He however, did not talk of any visible injuries. The P3 form and the treatment notes produced as prosecutions' exhibits also do not talk of any injuries, they only talk of pains. Pain is subjective and cannot be medically proved. To conclude that the complainant had indeed been strangled, there ought to have been some physical evidence of violent force or pressure to her neck, for instance, bruises, redness of the skin or tenderness upon palpation. None of these were observed upon examination of the complainant and the allegation by the complainant remain just that a bold assertion.

Having concluded that there was insufficient evidence to prove the fact of rape or penetration, the trial magistrate went on to rely on an inapplicable section of the law to arrive at a wrong conclusion and thus further misdirected himself. The trial magistrate stated;-

"***Section 124 of Evidence Act provides that a court on reasons to be stated can convict based on the only evidence of the victim of a sexual offence"***.

The section relied on by the trial magistrate has no application in the appellant's case. The section and the proviso thereto relates to the evidence of minors admitted in evidence in accordance with section 19 of the Oaths and Statutory Declaration Act. The proviso permits the court to convict on the sole evidence of a child witness who is the victim of a sexual offence. For the section to apply, the complainant has to be a child and a victim of a sexual offence. In the instant case the complainant was not a child. In applying this section to the case, the trial magistrate once again grossly misdirected herself as to the law.

Supposing that the said section 124 of the evidence Act relied on by the trial magistrate in convicting was applicable to the case, which it was not, the reasons recorded by the trial magistrate were insufficient to convict on her sole evidence. The trial magistrate stated;-

"I had no reason to disbelieve the evidence of PW1. There was no evidence of bad blood between the accused on the one hand and any of the prosecution witnesses on the other hand. Prosecution witness had no motive to frame case against the accused".

This passage in the judgment shows that the trial magistrate did not consider the testimony of the appellant. The appellant in his sworn statement had raised a dispute between him and his sister on the one hand and the complainant and his family on the other hand. The appellant stated that the dispute revolved around some salary arrears owed by her sister to one **Waweu** which he appellant had been given to transmit to the said **Waweu.** The appellant stated that he had given the money to the complainant but the complainant later denied having received the money forcing the appellant to again pay the money. The dispute was taken to the elders who resolved that the complainant refund the money to the

appellant and this signaled the onset of bad blood between the appellant and the complainant. The appellant believed that he had been framed by the complainant pursuant to this disagreement and in particular stated-

"***Complainant had vowed to make a member of our family suffer and by framing case against me she had fulfilled her threats. The complainant despises me as she says I am a bad person. She is unhappy with me".***

This bit of the appellant's testimony appears to have received nil consideration by the trial magistrate. Otherwise the trial magistrate would have arrived at a different conclusion that he arrived at when she stated that there was no evidence of bad blood between the appellant and the complainant.

The trial magistrate had rightfully concluded that the complainant had lied about a continuous trail of footprints from her house to that of the appellant. The magistrate stated-

"I do not think that there is a continuous trail capable of being said that it was made by the accused. Besides, PW3 had stated that he had not seen this continuous footprints himself bit (sic) that it was PW1 herself who had insisted that she could see footprints…By following imaginary footprints to the accused's home, I think, the complainant simply wanted to reinforce in the minds of PW2 and PW3 that she had positively recognized the accused as the person who had raped her."

The trial magistrate went on to find that he complainant had lied about the footprints in good faith. It is difficult to figure out what the trial magistrate meant by this finding. A person who lies under oath cannot under any circumstances be said to lie in good faith. I am not aware of a lie that is made in good faith. The lack of truth in the statement about the footprints by the complainant highly discounts the credibility of her other statements and the alleged rape especially in the absence of any evidence to corroborate the same

Turning to her judgment that it was doubtful that the complainant could have positively identified the appellant using a matchstick light as it was in the dead of night. This finding by trial magistrate was accurate. But she went on however to conclude that there was recognition of the appellant by the complainant because the appellant had spoken to the complainant. The said conversation was no more than two or three sentences. It is doubtful that a person accosted at night by a stranger can positively identify the stranger's voice on the basis of just two or three sentences. As stated by the Court of Appeal in the case of - **Peter Oyugi & 2 others vs Republic (2011) eKLR, mistakes** can be made by an honest witness even in cases of recognition. The complainant was not altogether a honest witness and there was therefore need to corroborate her testimony before a conviction could be based on it. This is what the Court of Appeal had observed in **Andrew Piya Dunga vs Republic (2010) eKLR.**

"***Although the law is clear that a conviction can be based on the evidence of one witness, there is however, a rider. That rider is that in situations where conditions of identification are difficult, such as at night, a court of law would rely on such evidence of one identifying witness only after testing with greatest care that such evidence though of a single witness under difficult conditions, was nonetheless reliable".***

In the present case, there was the issue of the Muffin hat said to have been left at the scene of the crime by the appellant. The same is said to have been identified as belonging to the appellant by his father. The said accused's father was not called as a witness to shed on the issue. In the case of **Andrew Apiya Dunga vs Republic** (*supra),* the court, quoting from the earlier decision of **Bukenya** and **Others** vs **Uganga [1972] E.A 549** observed that although no particular number of witnesses is required to proof any fact, the prosecution is under a duty to avail all witnesses necessary to establish the truth even if their evidence may be inconsistent and where the evidence tendered is barely adequate, the court may infer that the evidence of the uncalled witness would tend to be adverse to the prosecution. The evidence of the appellant's father regarding the headgear was very necessary and failure to call him by the prosecution should lead to the inference that his evidence would have been adverse to the prosecution.

Finally, the complainant stated that when she ran out of the house, she left the door open. She went to her daughter in law's residence where they spent the night only to come in the morning and find the window dislodged. The conduct of the complainant is not consistent without seeking help. Secondly, it beats logics why the appellant would have escaped through the window after dislodging it if the door was open.

There were yawning gaps in the evidence of the prosecution and it fell short of the required standard of proof. Accordingly, the appellant ought not to have been convicted of the offence. The appeal is in the premises allowed, conviction quashed and sentence imposed set arise. The appellant shall be set at liberty at once unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** dayof **SEPTEMBER 2012.**

ASIKE MAKHANDIA
JUDGE