REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 108 of 2009

SILA MULINGE MUTUA…….....…….……APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

(Being an appeal against both conviction and sentence in Principal Magistrate Cr. Case No. 401 of 2007 in Judgement delivered on 13th day of August 2008 by Hon F.M Nyakundi Ag. Principal Magistrate at Makueni Law Courts)

JUDGMENT

The appellant, **Silas Mulinge Mutua** was charged with the offence of Rape contrary to section 3(1) (a) of the Sexual Offences Act and an alternative charge of indecent assault contrary to section 11 (6) of the same Act in Criminal Case No. 401 of 2007. The matter was heard and determined by the Principal Magistrate's Court at Makueni, where the appellant was convicted and sentenced to ten (10) years in prison.

In order to prove it's case, the prosecution called a total of seven (7) witnesses. The first witness to testify as PW1 was **SMK,** thecomplainant. She stated that on the 26th day of August 2007, she was asleep at home with her children. She heard a person shouting for her to open the door. She did not open. The person proceeded to bellow that they were ten (10) people in number outside her door and failure by her to open would result in them breaking the door. She recognized that this was the voice of the appellant. She lit a torch but he demanded that she switches it off. She switched it off apparently; this was after she had opened the door just after she had used it to establish that it was the appellant. He held her and a struggle ensued. In the process her curtain was torn. He held her neck and tore her pants whereupon he proceeded to rape her. He further told her that he will rape her the whole night but could not resist due to fear. Afterwards, he left threatening to kill her if she made any noise. She got out and screamed for help. She met her brother – in- law, K. and she told him that the appellant had raped her. She was later issued with a P3 and the police took her pants and the curtain.

It was the evidence of PW2 **NK**, a son of the complainant, that on the material day he was asleep in his bed when he heard someone demand that the door be opened. The person opened and held the complainant by the neck strangling her. He pushed her down and ordered PW2 to leave the house. Thereafter the complainant ran out and the man left. It was dark he was not able to identify him.

It was the evidence of PW4, **Kaloki Mwongela** that on the material day he was at home when he heard screams from the complaints home. He met her as she stepped out of her house. She told him that the appellant entered her house and raped her. He saw a person running away and she told him that it was the appellant. He chased after the appellant together with PW3 amogst other people. He followed him to his house where he locked himself inside. He called the appellant's mother and he questioned the appellant who denied having committed the crime.

On the other hand, PW6, **Michael Wambua,** the clinical Officer at Kalawa Health Centre testified that he treated the complainant on the 27th August 2007 having been raped on the night of 26th August 2007. She had injuries on her neck, bruises and swelling on the lower knees. He carried out general examination and established that she had mild swelling on one side labia minora but no tears. After the lab tests were done, she was found to have a sexual infection and HIV but the officer was not in a position to know whether the HIV was acquired during the rape. The injuries were a few hours old. He further added that no spermatozoa was seen from the tests and as such he could not confirm if sexual intercourse had taken place however, there was a mild swelling in the right labia but the swelling could not have been there had she willingly engaged in sex.

The final prosecution witness,PW7 **Charles Muthuri** stated that he was at Kalawa police post on the 27th day of August 2007at 2.00 a.m. when he received the appellant who had been brought by the complainant and members of public on allegations that he had raped the complainant. He issued the complainant with a P3 form and took the curtain and the pants.

The appellant was put on his defence after a prima facie case was established. He elected to give an unsworn statement without calling any witness.

In his defence the appellant stated that he did not know what happened in regard to the case. All he knows was that he was arrested on 26th day of August 2007 which day, he woke up in the morning and prepared himself to go to Kalawa polytechnic school. He stayed there until 5:00p.m when he left and went home. He got there and found the complainant arguing with his mother. She threatened to make his mother suffer since she was rich and could ensure she did what she wanted. She thereafter requested the appellant's mother to allow the appellant to escort her home. The appellant's mother declined her request. At around 2.00 a.m, he heard a door knock from people who demanded he opens the door or they burn down the house. He opened and was arrested.

The learned magistrate having considered and evaluated the evidence on record was satisfied that the prosecution had proved its case against the appellant to the required standard. Accordingly she convicted him and sentenced him to ten (10) years in prison.

The Appellant was aggrieved by the conviction and sentence aforesaid and hence preferred this appeal on the grounds that his recognition by both voice and the face were mistaken, that PW1 was not a credible witness, the prosecution case was not proved beyond reasonable doubt since no medical evidence linked him to the crime and that his defence was not given consideration.

When the appeal came before me for hearing on 26th June 2012, the appellant opted to canvass the same by way of written submissions.

On his part, **Mr. Mukofu,** learned State Counsel orally submitted that the core of the prosecution case turned on identification. The appellant's conviction turned on voice recognition as well as recognition generally. PW1 testified that the appellant came to her home on the night of 26th August 2007. He shouted demanding that she opens the door. She recognized the voice as that of the appellant whom she knew as Sila. She further recognized him as a person who lived 1km from her house, she confirmed the identification of the appellant in the ensuing struggle.

I have considered the evidence on record, the judgement of the learned Resident Magistrate, grounds of appeal, written and oral submissions of the appellant and the learned State Counsel respectively. This is a first appeal, as such the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come to its own independent conclusion. In the case of **Ajode –vs- Republic Criminal Appeal No. 87 of 2004** the Court of Appeal sitting at Kisumu held that:-

"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that."

It was the evidence of the complainant that the appellant came to her house at night demanding that she opens the door. He instilled fear in her when he intimated that there were ten people in number and failure to open the door would result in them breaking it down. She added that she proceeded to open the door and lit a torch which the appellant demanded that she puts it off and she did. He held her by the neck and pushed her to the ground and ensued to rape her. PW2 corroborated her evidence stating that, he was asleep with his brother and the complainant when he heard someone demand that the complainant opens the door. Their house was a one roomed house. When the person entered the house, he held the complainant by the neck threw her on the floor and commanded him to leave the room which he did. The evidence of PW1 and that of PW2 clearly illustrate that there was someone who compelled the complainant to open the door and once she did, he held her by the neck and threw her to the floor. According to the complainant a struggled ensued and thereafter the appellant raped her.

The complainant stated that she recognized the appellant's voice and on opening the door she used a torch to confirm it was him, he however commanded her to switch it off which she did. The sequence of events appears to be as follows:

Firstly, appellant appeared at the complainant's doorstep and engaged her in a conversation. Secondly, he repeatedly commanded her to open the door or else he breaks the door and forces his way in. Thirdly, after she opened the door, he demanded that she switches off the torch that she had lit. Fourthly, he went ahead and told the complainant that he would rape her throughout the night. There were at least four instances that the appellant engaged the complainant in conversation which necessitated her to recognize his voice. The complainant claimed to know the appellant as he lived approximately 1 km from her home. She was therefore able to distinguish his voice. However, voice recognition should be dealt with caution considering the circumstances surrounding the offence. In this the appellant allegedly engaged the complainant in conversation, the court notes that the incident took place at night. As such it is imperative to rule out possibility of mistaken identity. The foregoing shows that the magistrate was not alive to the fact that he was dealing with evidence of identification at night by a single witness. In **Mbelle vs R (1984)** the court of appeal laid down guidelines as regards the evidence of voice recognition as follows: in dealing with the evidence of voice the court should ensure that:

a) The voice was that of the accused

b) The witness was familiar with the voice and recognized it

c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who has said it

The complainant claimed to have known the appellant who lived 1 km away from her home. She did not expound to the court how well and how often she had interacted with the appellant so as to be able to easily recognize his voice. The fact of recognition of the voice due to familiarity of the said voice is questionable. I am not convinced that the complainant can without a doubt claim that the voice belonged to the appellant.

It was the complainants evidence that a struggled ensued between her and the appellant in her attempt to resist his advances. As a result the curtain was torn and he proceeded to tear her pants. Furthermore, the complainant lit her torch and was told to switch it off by the appellant. It is not clear from the complainant's evidence how long the torch was lit or whether or not she was able to direct it on his face before switching it off. When considering the evidence of using a torch light to identify the offender, it is paramount to ascertain the size of the torch and intensity of the light that it emitted. See **Maitany vs R (1986)** where the court held that:

"It is at least essential to ascertain the nature of light available. What sort of light its size and its position relevant to the suspect are all matters helping to test the evidence with greatest care."

I am not convinced considering the evidence tendered by the complainant that the torch light was enough to assist her in identifying and or recognizing the appellant. In any case, the length of time under which

she observed the alleged offender with the torch before she was told to switch it off, was not sufficient to enable her see the appellant sufficiently as to be able to recognize him. See **Wagombe vs R (1980)**

Having said that, it is also vital to consider the evidence adduced by PW4 who testified that on the material night, he heard screams coming from the complainant's home and he ran towards her home, on reaching there, he found the complainant who told him that the appellant had raped her. He saw a person running away and he and PW3 amongst others followed the said person to his house. He dashed in and locked the door. They demanded that he opens the door or they burn down the house. This alleged pursuit of the appellant took place at night. There is no clear cut evidence on record that there was some sort of light to aid the people chasing after the appellant in their pursuit or that they never lost sight of him. It is therefore inevitable to question whether there was possibility that the said public might have lost the alleged offender in the night and wrongly accused the appellant of the offence. The complainant testified that she informed PW4 that it was the appellant who raped her, this was confirmed by PW4. As such, PW4 and the rest of the public already knew whom they were chasing and could have easily lost him in the chase and since they had a name in mind, they would have still ended up at the appellants door step.

On the issue of medical evidence, PW6, who was the clinical Officer who examined the complainant, stated that he treated the complainant on the 27th day of August 2007 having been raped on the night of 26th day of August 2007. He verified that she had injuries on her neck, bruises and swelling on the lower knees, hence corroborating the evidence of PW2 that the complainant was thrown on the floor. He carried out general examination and established that she had mild swelling on one side labia minora but no tears. After the lab tests were done, he ascertained that the complainant had a sexual infection and HIV but he was not in a position to know whether the HIV was acquired during the rape ordeal. He further added that no spermatozoa were seen from the tests and as such he could not confirm if sexual intercourse had taken place however, there was a mild swelling in the right labia but the swelling could not have been there had she willingly engaged in sex. Rape according to **Section 3 (1) (a) of the Sexual Offences Act** provides interalia:

A person commits the offence termed as rape if -

***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital* organs.**

In assessing the evidence of the clinical officer, he states that there were no spermatozoa but there was an infection which he was not able to establish whether the complainant acquired it during the rape or not. He further stated that he was not sure whether or not there was rape only there was a mild swelling in the right labia which swelling could not have been there had the complainant willingly engaged in sex. It is therefore not a proven fact that there was rape since penetration was not proved. See, **Ben Maina Mwangi vs Republic (2006)**

As a result I find that the appeal has merit and I allow it. The appellants' conviction is quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS,** this **15TH** day of **OCTOBER 2012.**

ASIKE- MAKHANDIA

JUDGE