REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 619 of 2010

SIMON KARIUKI KIHIKA.....APPELLANT

VERSUS

ATTORNEY GENERAL.....REPUBLIC

(*From original conviction and sentencing in Criminal Case No. 371 of 2009 of Principal Magistrates Court*

at Githunguri, Hon. S. Ndegwa (S.R.M.) on 28th September 2010).

JUDGMENT

The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read together with Section 8(4) of the Sexual Offences Act, 2006. The particulars of the charges are that on 3rd March 2009, at [particulars withheld] village in Githunguri District within Central Province had unlawful carnal knowledge of a female child aged 17 years, namely MM. I note that the particulars of the charges were incorrectly framed but this does not affect the substance of the case against the Appellant. The Appellant also faced an alternative count of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

At the close of the trial, the trial magistrate convicted the Appellant of the main offence and sentenced him to 10 years' imprisonment. Aggrieved by the sentence and conviction, the Appellant filed an appeal in which he relies on the following grounds as contained in his grounds of appeal and amended supplementary grounds of appeal:

a) The trial court failed to find that the Appellant was not subjected to medical examination to clear to the court any nexus and the subject matter

b) The trial magistrate failed to find that the identification evidence was doubtful as PW1 did not lead to the appellant's arrest and appellant was not subjected to an identification parade, the case being of a single identification

c) The trial magistrate failed to find that essential witnesses were not called especially those who made the arrest.

d) The trial magistrate rejected the defence testimony without giving cogent reasons contrary to Section 169(1) CPC

e) The trial court failed to find that the person who implicated the appellant in the matter was never

called to give evidence

f) The trial magistrate failed to observe that the circumstances of appellant's arrest were out of implication by one Ngugi (deceased) where in law such evidence is inadmissible

g) The entire prosecution case was not proved to the required standard

h) The trial magistrate erred by shifting the burden of proof upon the appellant by holding the appellant never called his employer to rebut the prosecution's case failing to bear in mind that an accused person in law need not prove his alibi defence

During the hearing, learned state counsel for the respondent opposed the appeal. She stated that the trial magistrate established there was case to answer from the evidence. That the Appellant was correctly identified by the complainant in that the incident took place over a period between 6.00 p.m. and 10.00 pm, and there was moonlight. The complainant therefore was able to identify the applicant. She urged that the evidence presented confirmed that the complainant was indeed defiled and that the Appellant did not support his alibi defence. She urged the court to dismiss the appeal and uphold sentence.

This being a first appeal, I am under a duty to examine the evidence afresh and arrive at my own independent finding. From the evidence before me, it is clear that the complainant was defiled. The evidence of PW1 in this regard, is corroborated by that of PW2, her mother and PW3, the medical doctor. The occurrence of defilement was overwhelmingly established.

The main issue therefore, for determination for this court, is whether the Appellant is the one who committed the offence. This will essentially address the main grounds raised by the Appellant.

With regard to the identification of the Appellant, it was PW1's testimony the Appellant was arrested after he was mentioned as an accomplice by one Ngugi, deceased who had been arrested by members of the public as one of the two who had stolen a phone and attempted to rape a neighbour, by the name I. The said I. identified the man who admitted to attacking her. The complainant was also called and positively identified him. The deceased mentioned the appellant as his accomplice and this led to his arrest. The complainant positively identified the appellant as well as he was wearing a metal bangle with which he had repeatedly hit her. PW4 and PW5 confirmed that the Appellant was rescued and arrested while on the verge of being lynched by members of the public.

From the above, it is apparent that that the arrest of the Appellant resulted from being mentioned by the deceased. The Appellant in this regard submitted that in law such evidence is inadmissible and further that no evidence was called of any witness who heard the deceased mention the name of the Appellant. To support his submission the Appellant relied on the case of **Muiruri Njoroge versus Republic, Cr. Appeal No. 115 of 1982, Court of Appeal,** where it was held that, *"A court of law does not act on mere assertion, not unless such assertion is proved by way of evidence."*

The Appellant also submitted that the trial magistrate failed to bear in mind PW1 was acting on consistency of the belief that the person she found arrested was one of those who raped her, in that she was told that the deceased implicated the Appellant by mentioning his name and further, that is the same consistency the complainant believed that the appellant was one of the attackers. He referred this court to the case of **Joseph Odhiambo versus Republic Cr. Appeal No. 4 of 1980 Mombasa Court of Appeal** that *an exculpatory extra judicial statement by one accused cannot be used as evidence against a co-accused* thus making the identification unsafe.

The Appellant further contended that a confession by one accused cannot form the basis of the case against the co-accused as held in **Anyangu & Ors versus Republic Cr. Appeal No. 5 of 1968** and **Gopa S/O Gidamebanya and Ors versus Republic Cr. Appeal No. 106 of 1983 Kisumu** that the statement and evidence of a co-accused person is evidence of the weakest kind since an accused person can implicate another intending to save himself from blame.

PW1 testified that the Appellant admitted to be the one who had stolen the phone of I., and attempted to rape her. According to the testimony of PW1, the deceased identified the Appellant, as follows,

"He said he is usually with Simon Kariuki…people went for him and I was told to go there….I went there. He had a metal bangle…he was holding it when *I went to the cell and I identified him positively."*

The determination of this Appeal therefore largely lies on the determination of the issue of whether the Appellant was properly identified as the one who committed the offence against the complainant.

Evidence by an accused person against his co-accused may be taken into consideration as provided for by **Section 32** of the **Evidence Act**, that

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession."

The initial identification of the deceased and subsequently the Appellant was as a result of an attempted rape of one I. The deceased, who implicated the Appellant, had admitted to committing the offence against I. With regard to whether the deceased admitted to defiling the complainant, the testimony of PW1 is conflicting. During the examination in chief, PW1 did not make reference to the fact that the deceased admitted to defiling her, but this changed when she was re-examined following her recall when she said, *'He said that he had defiled me and Kariuki was his accomplice.'* Nevertheless the alleged statement by the deceased does not apply in this case as it was not a confession but an extra-judicial statement made by a suspect against another.

From the evidence adduced, it therefore follows that the identification of the complainant's assailants is solely by the complainant. The complainant testified that the two men accosted her at 6.30 pm and beat her, in her own words,

"On 3.3.09 at 6.30pm I was at Tinganga. On reaching a corner, I met with 2 young men-one tall and the other short. They attacked me and then….a knife on my neck. I tried to scream but they beat me up and held my neck. I lost consciousness….."

From this testimony, it was clear that the complainant was attacked at dusk, and further that there was a struggle between the complainant and her assailants and she lost consciousness.

Further to the identification that followed, the complainant testified that she positively identified the deceased and later the Appellant. *"I was called and asked if he was the one who raped me and I identified him, He said that he is usually with Simon Kariuki.*It is well settled that the Court should caution itself before relying on evidence of a single witness as the Court of Appeal in ***Maitanyi versus Republic, (1986) KLR 198*** followed the holding in ***Abdulla Bin Wendo &Another versus Republic (1953) 20 EACA 116***that

"Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge….can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

In this case, there was no other evidence that was produced, (circumstantial or direct) that could be relied upon to support the guilt of the Appellant. The trial court needed to further assure itself on the identity of the person who committed the offence. Thus, in absence of such supporting evidence, there was need for

testing with the greatest care the evidence of the Complainant regarding identification. As reiterated in ***Maitanyi versus Republic,***cited above,

"what is being tested, is primarily the impression received by the single witness at the time of the incident…it is at least essential to ascertain the nature of light available….It is not a careful test if none of these matters are known because they are not inquired into……The second line of inquiry which ought to be made…is whether the complainant was able to give some description or identification of his or her assailants...to the police."

The complainant had stated in her testimony that although she did not know the culprits before, she saw them clearly as they struggled with her. In cross-examination she stated that she identified him as he was wearing a bangle that he had on the day of the incident and further the she recognized his face. Despite this consistent assertion of the complainant, there was need in the circumstances of the case, for the trial court, to warn itself of the reliance on the sole evidence of the complainant, and subject this evidence to test, bearing in mind that there was no other supporting evidence pointing to the guilt of the Appellant.

In the chief examination, PW1 testified that one of the assailants was tall while the other was short. This identification feature was not used in her description of identifying the accused- she referred to a bangle that was worn by the Appellant. This reference to the bangle had not been made beforehand when the incident was reported to the police and only rose when identifying the accused thus cannot be an independent pointer to correct identification. The prevailing circumstances of identifying the appellant also do not rule out possibility of external influence on the complainant, as this was done before an irate crowd that was intent on lynching the suspects.

From the examination of the trial court's record, I also find that the trial Court did not address itself to the need for testing the evidence before safely convicting on the basis of the same. The Court in convicting reasoned thus,

"**Complainant went to the police station and positively identified the accused as one of those who had defiled her. She said that they were together for more than 4 hours -6.30-10.00p.m and that it was still light at 6pm when they first accosted her and since they were in close proximity to one another all through the ordeal, she did identify him positively. She also added that there was moonlight.**

The complainant said she did not know the accused before, so I don't see why she would frame him up. She had also positively identified the said Ngugi before he was lynched"

As learned judges in the above-cited case of ***Maitanyi versus Republic,***noted, failure to undertake careful testing of the evidence is an error of law and such evidence cannot safely support a conviction.

On the issue of alibi evidence, the Appellant submitted that the trial magistrate erred in shifting the burden of proof to the Appellant. The trial magistrate noted,

" Accused defence amounted to an alibi. That he wasn't there on that day and worked for one William until 8p.m. and spent the night there. He didn't deem it fit to call the said William to rebut the prosecution evidence.'

I respectfully disagree with the trial court's finding in this regard. The general principle is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused. The only prosecution evidence regarding identification of the Appellant is that of the PW1 which as analyzed hereinabove raises doubt as to possibility of error which in my opinion does not dislodge the accused person's defence.It was an error in law of the part of the trial magistrate to shift the burden of proof to the accused. In **Sekitoleko versus Uganda [1967] EA 531**, with regard to alibi evidence:

"(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond

reasonable doubt never shifts whether the defence set up is an alibi or something else (R.v. Johnson, [1961] 3 AllE.R. 969 applied; Leonard Aniseth v. Republic [1963] E.A 206 followed);

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself;"

Consequently, I find that the case against the Appellant was not proved beyond reasonable doubt. I therefore allow the appeal, quash the conviction and set aside the sentence. He shall be released forthwith unless otherwise lawfully held.

Orders accordingly.

SIGNED DATED and DELIVERED in open court this 29th day of November 2012.

MBOGHOLI MSAGHA
JUDGE