



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 39 of 2010

SILVESTER M MWARUGHA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Being an appeal from the conviction and sentence of the Resident Magistrate N.N. Njagi delivered on 24/11/2004 in Kangundo Principal Magistrate Criminal Case No. 865 of 2004)*

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*(Before George Dulu JJ)*

**J U D G M E N T**

The Appellant **Sylvester Mwawasi Mwalugha** was charged with **rape** contrary to **section 140** of the **Penal Code**. The particulars of offence were that on 26<sup>th</sup> July 2004 at Mukengesya village, **Komarock Sub location, Komarock Location in Machakos District** within the **Eastern Province** had **carnal knowledge** of **JNW** without her consent. In the **alternative**, he was charged with indecent assault of a female contrary to **section 144 (1)** of the **Penal Code**. The particulars of offence were that on the same day and place unlawfully and indecently assaulted **JNW** by touching her private parts namely vagina.

He denied the charges. After a full trial, he was convicted on the alternative count of indecent assault contrary to **section 144 (1)** of the **Penal Code** and sentenced to serve 21 years imprisonment with hard labour. Being dissatisfied with the decision of the subordinate court, he has appealed to this court against both conviction and sentence. The grounds of appeal are firstly that the evidence of identification or recognition was not sufficient to sustain a conviction; secondly, that essential witnesses did not testify; thirdly, that his defence was improperly rejected; and lastly, that the sentence was excessive. With the permission of the court the appellant tendered written submissions, which he relied upon. I have perused the said submissions.

Learned State Counsel **Mr Mwenda** opposed the appeal. Counsel submitted that **PW2**, the complainant, knew the appellant before the incident. The appellant was positively recognized by the complainant. The mother of **PW2**, who was **PW4**, was informed by **PW2** that it was the appellant who had sexually assaulted her. **PW4** also saw the appellant moving away shortly before being informed of the incident by the complainant.

This being a first appeal, I am duty bound to re-evaluate the evidence afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**. I have re-evaluated the evidence on record. The learned magistrate rightly found that there was no evidence of sexual penetration. Though the hymen was broken, it was already healed and therefore in my view, it cannot be said that the breaking of the hymen was as a result of sexual activity that day. There were also no visible injuries to the genitals

of the complainant. There was no trace of bleeding except for the menses, which was natural. The clothes of the complainant which were said by PW4 to be blood stained were not taken to the Government Analyst for examination. In fact PW6 **PC Elizabeth Bungei** stated that she received a washed underpant of the complainant. It cannot be stated with certainty therefore that there were blood stains on the clothes, nor that those blood stains had any connection with the appellant.

The evidence that connects the appellant to the offence was of recognition or identification by a single witness PW2 who was the complainant. In **Odhiambo –vs- Republic (2002) 1 KLR 241 at 247** the Court of Appeal stated:-

**“The court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial pointing to the guilt of the accused person from which, the court may reasonably conclude that the identification is accurate and free from possibility of error.”**

The incident occurred at night, after 7 p.m. No evidence of the conditions of light at the scene, which was in the bush, was given. I take judicial notice of the fact that in this tropical area near the equator, 7 p.m. is generally after dusk. It is dark. Therefore there was need for the prosecution to tender evidence to give a description of the type and source of light. The evidence given by the complainant PW2 and her mother PW4 that the appellant used to go to their home to ask for purchase of goats, does not assist the prosecution case. Looking for goats to purchase has nothing to do with an intention to commit a sexual offence. From the evidence on record, I find and hold that the evidence of identification or recognition falls far short of the standard required in criminal cases. It cannot be said with certainty that the appellant was anywhere near the scene of the alleged crime.

The other evidence against the appellant is suspicion of the commission of the crime because he disappeared from the locality of Komarock after he was confronted at his house and was traced some days afterwards at **Kwale**. Suspicion, however strong cannot be a basis for conviction in a criminal case. – See **Sawe –vs- Republic (2003) KLR at page 375** wherein the Court of Appeal stated:-

**“We have evaluated the evidence as we are entitled to at great length and there is really nothing to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt”.**

The suspicion arising from the movement of the appellant to **Kwale** when he was confronted on the allegations herein, cannot be used to justify the criminal conviction herein. Besides, it is highly probable that he became apprehensive and fearful following the allegations made against him, and that is why he moved to another place for psychological comfort of safety. I find that the conviction cannot stand.

In the result I find that the conviction of the appellant is not safe. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty, unless otherwise lawfully held.

Dated and delivered at Machakos this **20<sup>th</sup>** day of **November** 2012.

**George Dulu**  
**Judge**

**In presence of:-**  
N/A for State  
Nyalo – Court clerk