



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 170 OF 2010

LESIIT J.

FRANKLINE MURANGIRI

KAMWALA.....APPELLANT

V E R S U S

**REPUBLIC.....
.RESPONDENT**

(From the original conviction and sentence in Chuka PM'S Case No. 392 of 2010 – P. Ngare (P. M.)

J U D G M E N T

The Appellant was convicted of attempted rape contrary to section 4 of the Sexual Offences Act No.3 of 2006. He was sentenced to seven years imprisonment. He was aggrieved by the conviction and sentence and therefore filed this appeal.

There are five grounds of appeal in the Petition filed by L. Kimathi Kiara Advocate. These grounds are:-

- 1. The learned Magistrate erred in law and in facts in convicting the appellant on contradictory and insufficient evidence.**
- 2. The learned Magistrate erred in law and in facts in failing to consider the appellants defence thus arriving on the wrong finding.**
- 3. The learned Magistrate erred in law and in facts in deciding the whole case against the weight of evidence.**
- 4. The learned Magistrate erred in law in convicting the appellant on defective charge.**

5. The learned Magistrate erred in law and in facts in sentencing the appellant excessively in the circumstances of this case.

The appeal is opposed by the state.

The facts of the case are that the complainant went outside her house to fetch water at 11 pm on 28th March 2010. She successfully fetched water the first round. On going out the second time a person held her by the neck and declared that he was going to have carnal knowledge of her. The complainant said she recognized the voice of the attacker as appellant. They struggled for an hour or so before the complainant was able to escape to her neighbors place, PW2. The appellant was eventually arrested.

The appellant in his defence denied the charges as a frame up. He called his wife of six months who without stating the date claimed she was with her husband the whole night.

I have subjected the evidence adduced before the lower court to a fresh analyses and evaluation while bearing in mind that I neither saw nor heard any of the witnesses. I have given due allowance for the said disadvantage.

In Okeno vs Republic 1972 EA 32, the Court of Appeal held:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)

Mr. Kiara urged the appeal on behalf of the appellant. The learned counsel for the appellant raised issue of the sufficiency of the evidence adduced by the sole eye witness, the complainant in this case. Mr. Kiara urged that the complainant’s evidence was insufficient to sustain a conviction as it did not support the charge. Counsel urged further that the complainant’s evidence was not corroborated. Mr. Kiara submitted that the words used by the complainant as the ones uttered by the appellant were misinterpreted by the court as the trial magistrate was not a Mumeru. Counsel urged that words allegedly uttered by the appellant should have been interpreted **“ I want to eat you”** not **“I want to fuck you”**.

Mr. Kimathi for the State urged that the complaint’s evidence was clear that she had struggled with the appellant for one and half hours. Counsel urged that that time was sufficient for the complaint to visualize and recognize the appellant. Mr. Kimathi urged that the complainant’s evidence was corroborated by the evidence of PW2, and also by the recovery of the appellant’s T-shirt in the complainant’s house and of his shoes in the mud outside her house.

Mr. Kimathi commenting on the interpretation of words uttered by the appellant according to the complainant said that they were suggestive of fact the appellant wanted to have carnal knowledge of the complainant.

Section 4 of the Sexual Offences Act states:-

“Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to

imprisonment for life.”

The two counsels in this case have put the issues in this appeal quite clearly. The law does not require that the evidence of a complainant of a sexual offence must be corroborated by other evidence. The complainant's evidence was that a man held her by the neck and told her that he wanted to have carnal knowledge of her. She said that she knew and recognized the voice of the attacker as the appellant. The complainant struggled with him for 1 ½ hours. She ran to her neighbours, PW2 and her husband, half naked. PW2 who took the complainant back to her house the same night accompanied by another neighbour, PW3. Both witnesses confirmed that the complainant was half naked. They also confirmed that there was evidence of struggle inside the complainant's house with things scattered inside her house and a torch broken. PW3 also identified a T-shirt inside the complainant's house as one they had seen the appellant wearing before that day.

The learned trial magistrate while analyzing the evidence of the complainant observed thus:-

“I have carefully considered the evidence on record together with the exhibits produced herein. I wish to note at the outset that the prosecution has demonstrated and proved that the complainant was attacked, assaulted and there was even an attempt by the attacker to have carnal knowledge of her. Her testimony on this was non-controverted. She also took quick action by alerting her neighbor who responded by going to the scene of attack as observed that there were signs of struggle inside the house with household goods littered all over.

The learned trial magistrate formed an opinion that the complainant was worthy of belief and that her evidence was not controverted. The learned trial magistrate's finding on the complainant's evidence cannot be faulted. The learned trial magistrate also considered the issue of identification and observed as follows:

“From the evidence on record, it emerged that the incident herein occurred in the night and it was raining heavily and naturally the issue of identification must be addressed. Who was the attacker? To properly address ourselves on this issue it is important to revisit the events of the night as stated by the witnesses. It is also important to note that the complainant named accused herein a neighbor in the locality as having committed the offence. No other witness talked of having seen accused at the scene. It is therefore imperative that when analyzing the complainant's testimony the court bears in mind that this is the testimony of a single identifying witness and must therefore warn itself which I hereby do on convicting while relying on her testimony.

The incident took about one hour and it involved pushing and shoving one another and also talking. The complainant did state the words uttered by the accused. I also note that they were at close range and it afforded the complainant ample time to hear and identify the voice of the attacker. As held in the court of Appeal judgment in the case of Njeri vs Republic (1981) KLR raise identification can offer proper identification just as visual identification especially where the voice is heard in the night and also the person was known to the complainant there before. I therefore hold that accused was positively identified considering the defence put up by accused and his witness who happens to be his wife. They merely denied the commission of the offence by him but failed to give particulars of the same thereby weakening the same”.

The learned trial magistrate properly directed his mind to the issue of identification and correctly concluded that there were sufficient words spoken by the appellant, and ample time spent with him for the complainant to correctly identify him.

The evidence of a single identifying witness made in difficult conditions does cause a degree of uneasiness in the mind of the court. In the celebrated case of Abdalla bin Wendo vs Republic (1953) 20 EACA 166 the court held

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for 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 guilt, from which a judge or jury 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.

However in this case, there was other evidence supporting identification. The T-shirt left behind in the complainant’s house and recognized as the appellants property by both the complainant and PW3. The appellant did not challenge the evidence on the T-shirt during cross examination of the two witnesses, PW1 and 3. That lack of resistance to that evidence was quite telling. In my considered view the T-shirt belonged to the appellant. The complainant’s evidence that he left it in her house during the struggle must be true.

Regarding the words the complainant alleged the appellant uttered, Mr. Kiara felt there was misinterpretation. I noted that the words uttered in Kimeru language **“nikwenda Kuruma”** in their ordinary sense are translated, **“I want to bite or eat”**. The complainant translated them for the trial magistrate as **“I want to fuck you”**. The complaint was not challenged about her interpretation.

I do not think there was a misinterpretation of the words as the appellant made his intentions very clear. By struggling with the complainant for over an hour immediately upon uttering those words was clear proof that his intentions of the appellant was to have carnal knowledge of the complainant.

Mr. Kiara raised issue with the evidence of the doctor who produced the P3 form on the complainant. Mr. Kiara felt that it was wrong for the doctor to produce it as he was not the one who examined the complainant.

PW4 produced the P3 form on the complainant on behalf of a colleague. It was produced under s.33 and s.77 of the Evidence Act. PW4 said that he worked with the maker of the document and that he could identify his handwriting. It was quite proper for PW4 to produce the P3 form. Nothing therefore turns on this ground.

The evidence of Medical Examination as contained in the P3 form provides further corroboration to the complainant’s evidence. She was found to have bruises on her right ring finger and right leg, swellings on left hand and right thigh. The injuries were caused at the time the complainant alleged to have struggled with the appellant and are consistent with a struggle.

Mr. Kiara urged that the appellant gave an alibi defence and same should have been considered. Mr. Kimathi correctly submitted that the appellant himself did not raise such defence. It is the wife who did without being specific as to the date.

An alibi defence is said to be put forward if an accused alleges in his defence that he was not present at the time and the place the offence was committed.

In the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

I find that the appellants defence did not shake or create doubt in the prosecution’s case against him. The Evidence against the appellant was that of a single identifying witness.

I find that the appellants defence did not shake or create doubt in the prosecution’s case against him.

The appellants defence was as follows:-

“My names are Flankline Murangiri. I hail from Ndayani and I am a casual labourer. This is a frame-up and I am stranger to the charges. The prosecution witnesses gave false evidence. That is all”.

There is no alibi defence put forward in the appellants defence. His wife did allege they were together the whole night. Which night she meant is still unknown. That notwithstanding I tested entire prosecution case as against the appellants defence that the case was a fabrication. I am satisfied that this was not a case of fabrication.

I have warned myself of the danger of convicting on the basis of the evidence of a single identifying witness. Having cautioned myself of same, I find that the complainants evidence was strong her credibility beyond reproach and that the evidence was sufficient to sustain conviction.

In the circumstances I find no merit in the appellants appeal against conviction and so dismiss it. The conviction is upheld.

In regard to the sentence. The appellant was sentenced to seven years imprisonment. A person convicted of the offence under S. 4 of the Act is liable to imprisonment for a period not less than five years imprisonment. The circumstances of the case were serious. I do not think that the sentence of seven years imprisonment was harsh or excessive. I find no ground upon which to disturb the sentence and I therefore uphold it. In the circumstances the appellant’s appeal fails and is dismissed.

Dated, signed and delivered this 22nd day of September 2011

J. LESIIT

JUDGE