



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO.179 OF 2009

NICHOLAS MUEMA NDUNDAAPPELLANT
VERSUS

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case No.999/2007 in the Senior Resident Magistrate's Court at Kajiado)

JUDGMENT

Nicholas Muema Ndunda, hereinafter "*the Appellant*" was arraigned before the Senior Resident Magistrates Court at Kajiado, on one count of rape contrary to **Section 3(1) (b) of the Sexual Offences Act**. It was alleged that on the night of 3rd and 4th August, 2007 in Kajiado District within Rift Valley province, the appellant had canal knowledge of **S.M** without her consent. The appellant denied the offence and he was tried in earnest.

The Prosecution called a total of 4 witnesses. In summary, the prosecution case was that on 3rd August, 2007, **S.M**, "*the complainant*" came to visit her husband. She could not trace his house. She sought assistance from the appellant who been introduced to her by a maize roaster at the former bus stage and who claimed to know her husband's residence in neighbours' plot. However, the appellant took her in circles until about 9 p.m. and then tricked her into going to his house on the pretext that he would introduce her to female neighbours who could accommodate her for the night. She went along. However, the appellant did not introduce her to any female companions. Instead he took her to his house and forcefully had sexual intercourse with her. The following day, the appellant escorted her to where her husband (PW.2) worked. He was called out and they met. Later in the evening the complainant spilled out the beans as to how she had been raped by the appellant. PW.2 took immediate action by reporting the matter to the Police Station. The police issued the complainant with a P3 form and referred her to a Health Centre. PW.3, **Erick Cheruiyot**, a clinical officer based at Kajiado District Hospital examined the complainant on 7th August, 2007 and noted tenderness on both thighs. She had bruises on both labia majora with redness. She sent her for high vaginal swab. The results showed that there were spermatozoa in her system. He therefore formed the opinion that she had been raped. On 8th August, 2007 at about 10.30 p.m., PW.2 caused the arrest of the appellant by **P.C. Martin Mungai** (PW.4). He was subsequently charged for the offence.

In his unsworn statement of defence, the appellant denied knowing neither the complainant nor her husband. He denied therefore raping the complainant.

In a reserved judgment delivered on 13th March, 2009, the learned Magistrate found the appellant guilty as charged, convicted him and sentenced him to the minimum sentence prescribed in the Act, being 10 years imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal claiming that the case for the prosecution was not proved beyond reasonable doubt, that the charge was defective due to the omission of the statutory word "*unlawful*" in the particulars of the charge sheet, the trial was a nullity since his fundamental rights enshrined in Section 72(3) of the then Constitution had been violated and finally, essential witnesses were not summoned to testify.

At the hearing of the appeal, the appellant elected to tender written submissions in support of his appeal. I have carefully read and considered the same.

Mr. Mukofu, learned State counsel, opposed the appeal. He orally submitted that the appellant was positively identified by the complainant. She had been with the appellant right from 4.30 p.m. on 3rd August, 2007 to the morning of 4th August, 2007. That PW.3 examined the complainant on 7th August, 2007. His opinion was that the complainant had been raped. The trial court observed the

demeanour of the complainant and found her to be a truthful witness. The appellant's defence was considered and was found to be incredible. Counsel therefore urged me to dismiss the appeal.

It is now my onerous duty as a first appellate court to reconsider and evaluate the evidence afresh with a view to reaching my own decision on the case. The appellant expects me to give an exhaustive and substantive examination of the evidence on record remembering as I do that I did not have the benefit of hearing and seeing the witnesses who appeared before the trial court. It is only after I have carried out the above duty that I can confidently decide whether the findings of the trial court should stand or not. For guidance on the issue, see **Pandya –vs- Republic (1957) E.A. 336, Okeno –vs- Republic (1972) E.A.32, and Kariuki Karanja –vs- Republic (1986) KLR 190**

I have now reconsidered and evaluated the evidence afresh. There is no doubt at all that the complainant came to Kitengela from Kitui on 3rd August, 2007 at about 4.30 p.m. in search of her husband. It was her testimony which was not challenged at all that upon arrival she discovered that the bus stage had been moved to a new site. She was disoriented and could not trace the way to her husband's house at neighbour's plot. It was then that the appellant came in handy. He offered to show her the house. However, the appellant took her around purportedly looking for the house but all in vain. The appellant then told her that there were ladies in his plot who could accommodate her for the night. He then took her to his house but did not show her the ladies' houses. Instead he put off the light in the house and then raped her.

The appellant has countered the foregoing by claiming that he never knew the complainant or her husband. Therefore, he could not have raped her. One wonders why the complainant of all the people, picked on the appellant as the rapist. There is no evidence of any grudge prevailing between the appellant and the complainant that would have fueled the complainant to falsely accuse the appellant. Indeed, it is common ground that the appellant and complainant never knew each other until the material day. There was therefore no reason or cause for the complainant to frame the appellant with the case. Given the detailed evidence as to how the incident happened tendered by the complainant, it is difficult to imagine that the complainant imagined or constructed the story. The evidence is so detailed as to be true and not a make up a story as the appellant wanted the trial court to believe.

The court observed the demeanour of the complainant and was satisfied that she was a truthful witness. It is trite law that an appellate court has loyalty to accept the findings of fact of the trial court with particular regard to the demeanour of witnesses. It should not interfere with the decisions of such court on such matters unless it is apparent that, on the evidence, no reasonable court or tribunal could have reached such conclusion. I discern no such misgivings in the circumstances of this case. Having observed the witness testify the trial Magistrate was perfectly entitled to reach the above conclusion on her demeanour. This court has to accept such finding.

The complainant had been with the appellant from 4.30 p.m. to the morning of the following day. Much as they were strangers, this was sufficient time for the complainant to see the appellant sufficiently to be able to identify him. The appellant was arrested from his house by the police who were accompanied by the complainant's husband. Apparently, the appellant's house was about 400 metres from PW.2's house. It is the complainant who pointed out the appellant's house to her husband. According to the evidence of PW.4, the police tried to conduct an identification parade but the appellant refused alleging, that the complainant had seen him. Everything considered, I think that the complainant's identification of the appellant could not be faulted. The complainant was with him in broad daylight on 3rd August, 2007 as well as in the morning of 4th August, 2007 when he escorted her to ***[particulars withheld]*** where her husband worked. There can therefore be no question of mistaken identity.

The evidence of the Clinical Officer who examined the complainant after the incident and which remained largely unchallenged connects the appellant to the offence charged. Having examined the complainant, he was convinced and persuaded that the complainant had actually been raped. The complainant fingered the appellant as the perpetrator of the crime. I have no reason to doubt her just like the trial court.

PW.2, the husband of the complainant was expecting her on 3rd August, 2007. She failed to appear until the following day. In the meantime, PW.2 had contacted her aunt, P at home and established that the complainant had left home for ***[particulars withheld]*** there is no doubt therefore, that on the material day, the complainant was in ***[particulars withheld]***. She could not make it to her husband's house for reasons that she could not trace the house. She ended up with the appellant who initially pretended to be a Good Samaritan only to turn out to be a wolf in a sheep skin. To my mind therefore, the learned Magistrate was right in convicting the appellant for the offence charged.

In his written submissions, the appellant has raised the issue that the charge as laid was defective in that the statutory word "unlawful" was omitted in the particulars of the charge sheet. To the appellant that failure rendered the charge sheet defective. In support of this submission, the appellant relied on the case of **David Odhiambo & another –vs- Republic, Cr. App. No.5 of 2005 (UR)** where the Court of Appeal stated:

“We would draw the attention of those whose duty it is to draw up charges and to trial Magistrates that rape as defined in Section 139 of the Penal Code is that “Any person who has unlawful carnal knowledge of a woman or girl without her consent”. There can be no reason for not giving the statutory definition of rape in the particulars of the charge.”

It should be appreciated that the above authority related to rape as then understood under the Penal Code. In this case, the appellant was charged under the Sexual Offence Act. Under that act, rape is committed if a person intentionally and unlawfully commits an act which causes penetration into genital organs of the complainant. The emphasis here is not so much about the unlawfulness but an act which causes penetration with his or her genital organ and that the other person does not consent or that the consent is obtained by force or by means of threats or intimidation of any kind. In any event rape, perse is unlawful act. The charge sheet cannot therefore be rendered defective merely because the word "unlawful" is omitted in the particulars. Further, intentional and unlawful acts are specifically, defined in Section 43 of the Sexual Offences Act and caters for the situation that obtained in the circumstances of this case.

Of course, it is not lost on me that the charge as drawn is reminiscent of those that used to be laid under the Penal Code. It should have been drawn differently considering the particulars required under Section 3(1) of the Sexual Offences Act. The charge should perhaps have stated that:

***“the appellant intentionally and unlawfully committed an act which caused penetration of the complainant’s genital organ with his genital organ by*”**

Again failure to state so did not at all prejudice the appellant in his defence. Nor did such omission occasion a failure of justice. It is indeed curable pursuant to section 382 of the Criminal Procedure Code. The appellant knew that he was facing a charge of rape. It cannot be the reason that since the charge as framed was not in tandem with section 3(1) of the Sexual Offences Act, and then it was defective.

With regard to the alleged violation of his constitutional rights, the appellant submits that he was arrested on 8th August, 2007 and taken to court on 15th August, 2007. In law he was supposed not to be detained for more than 24 hours. No explanation was offered as to why he was not arraigned in court as soon as was reasonably practicable. He was thus unlawfully detained for 7 days which was a violation of his Constitutional rights as enshrined in Section 72(3) of the then Constitution of Kenya. For this submission, the appellant relied on the case of **Gerald M. Githuki –vs – Republic - Cr Case No.119 of 2004 (UR)**.

My answer to this submission is that the Court of Appeal has since moved away from the rigid position it espoused in the above decision. The position now is that violation of Constitutional right will not normally result in an acquittal irrespective of the nature and strength of Evidence which may be adduced in support of the charge. It is also for the appellant to raise the issue of violation of his rights at the earliest possible opportunity and preferably in the trial court. Failure to do so will be taken to mean that the appellant had waived and or abandoned the complaint. Secondly, the remedy for such violation now lies in a suit for damages by the accused and not an acquittal.

With regard to failure to call essential witnesses, I do not see the essential witnesses which were not called. What matters in criminal cases is not the quantity of witnesses, but the quality. The appellant claims that the young man selling roast maize and who requested the appellant to take the complainant to her husband’s house should have been called as a witness. I do not think that such witness was essential.

All he could have said is that he told the appellant to take the complainant to her husband’s house. Such evidence would only have been in proof of the complainant’s consistency. The learned trial Magistrate having found the complainant a truthful witness, the evidence of the maize roaster would not have added any value to the testimony of the complainant.

Again the appellant complains that the supervisor who told PW.2 that he had a visitor at the gate, was not summoned nor the guard at the gate. I do not see the importance of the evidence of these witnesses either. Their evidence was not essential for the just determination of the case. He also claims that the other man allegedly found sleeping in his house should have been called as a witness. I do not see the relevance of his testimony as well. In any event, having been found in his house, the appellant was best placed to call him as a witness in his defence.

In the end, I have come to the conclusion that the appellant was convicted on sound evidence. This appeal lacks merit and is accordingly dismissed in its entirety.

Dated, signed and delivered at Machakos this 15th day of November, 2011.

**ASIKE-MAKHANDIA
JUDGE**