



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 215 of 2008

JAMES BARI MUNYORO APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

James Bari Munyoro, the appellant herein, was tried on a charge of attempted rape contrary to S. 141 of the Penal code. He also faced an alternative charge of indecent assault on a female contrary to S. 144(1) of the Penal code. At the end of the trial the appellant was convicted on the main count and sentenced to ten (10) years imprisonment. He has now filed this appeal to challenge both the conviction and the sentence.

On appeal the appellant put forward the following grounds in his petition:

1. *That the learned trial magistrate erred in both points of law and facts in accepting the evidence of sister and a brother as truthful which lacked corroboration from an independent witness thus the entire testimony remaining as a single testimony.*
2. *That the learned trial magistrate erred in both points of law and facts in accepting and analyzing the evidence adduced as satisfactory to satisfy the charge of attempting to rape ignoring the facts that the evidence adduced hardly reflected the charge of attempting rape but of an actual commission of rape.*
3. *That the learned trial magistrate erred in both points of law and facts in finding the 10 years imprisonment upon a contradictory and doubtful evidence.*
4. *That the learned trial magistrate erred in both points of law and fact in holding the scale partially upon the prosecution and thus failed to observe that I was attacked by P.W.2 the brother of the complainant. I raise my complain at K police station, he was arrest, convicted and sentenced and thus my subsequently arrest was a revenge.*
5. *That the learned trial magistrate erred in both points of law and facts in finding a conviction without analyzing that my defence reflected and shown light that the complainant could have raised her claim on 20.6.2003 and thus the subsequent charge remains an after thought.*
6. *That the learned trial magistrate erred in shifting the burden of prove and thus maintained I had to prove my innocence.*

When the appeal came up for hearing the appellant was granted leave to file and rely on written submissions. Mr. Orinda , learned Senior Principal State Counsel conceded the appeal on two grounds. First, that the medical report was not properly adduced in evidence. Secondly, that the appellant is a victim of double jeopardy in that the prosecution preferred two cases against the appellant.

Before delving deeper into the appeal, let me set out in brief the case that was before the trial court. The prosecution tendered the evidence of 5 witnesses in support of the charge. The complainant, AMK(P.W.1) told the trial court that on 20.6.2003 she went to cut grass when at about 6.00 p.m. the appellant met her. She claimed the appellant forced her to lie down on the grass, removed her pants and had carnal knowledge of her without her consent. P.W.1 screamed attracting the attention of STK(P.W.2) who came to her rescue. The appellant is said to have fled but was closely pursued by P.W.2. The appellant is alleged to have bit P.W.2's finger to discharge himself. Mary Wangare Njuguna (P.W.3) rushed to the scene when she heard screams. At the scene she met the appellant, her brother-in-law struggling with P.W.2 She saw the appellant disengage himself before fleeing. The incident was reported to K Police Station - P.W.1 was issued with a P3 Form which she took to M District Hospital the next day when she went for examination and treatment. Paul Babunya (P.W.4) arrested the appellant on 1st September 2003. The P3 form was filled by Dr. Mburu was produced by

one Pius Kipkemoi Kibusia. The doctor did not state in the P3 form that there was penetration.

The appellant stated in his defence that he was attacked by P.W.2 while he was on his way back home from K on 20th June 2003. He claimed he was rescued by his nephew David Gatungu and one Mutembei. The appellant said that P.W.2 reported the assault case at K Police Station where he was issued with a P3 form. He said he was prosecuted vide K S.R.M. Cr. Case No. [...] where in the end he was convicted. He denied having committed the offence he was charged with.

Having set out in brief the case that was before the trial court, let me now consider the appeal. There is no doubt that the complainant was examined by Doctor Mburu who filled the P3 form. The aforesaid medical report was produced by Pius Kibusia (P.W.5) a clinical Officer on behalf of Dr. Mburu. The evidence on record show that P.W.5 had stated that he was acquainted with Dr. Mburu's handwriting and signature. It is the submission of Mr. Orinda that the basis was not properly laid before P.W.5 could be allowed to produce the medical report. With respect, I agree with the submissions of Mr. Orinda. It is not enough for a witness to state that he was familiar with the handwriting of a particular witness. The prosecution must show that it took due diligence on their part to secure the attendance of the maker of the document. It must be shown that the witness was absent for reasons beyond the prosecution's control. The record shows that Dr. Mburu had been transferred to Kenyatta National Hospital. There was no evidence to show that the police attempted and failed to secure doctor Mburu attendance in court. For the above reason I am convinced the provisions of S. 77(1) of the Evidence Act were not complied with before the reception of P.W.5's evidence. In any case the evidence of the complainant (P.W.1) was not corroborated by the medical report. The medical report appeared inconclusive. The defence was denied an opportunity to cross-examine the maker of the P3 form to test its veracity. The other ground which Mr. Orinda conceded the appeal, is that the appellant is a victim of double jeopardy. I have carefully perused the record and it is clear that the appellant was tried and convicted for assault in K S.R.M. Cr. C. [...] It is shown that the complainant was ST K(P.W.2). It would appear that the assault case arose out of the same evidence. It is admitted by P.W.2 that the appellant was charged and convicted for assault which occurred on 20/6/2003. The learned Senior Resident Magistrate should have taken those facts into account and find that the appellant would have been subjected to two trials on the basis of the same evidence. Though the offences would appear to be separate, still the principle of double jeopardy would apply if the prosecution relied on the same evidence in separate trials. Again I agree with the submissions of Mr. Orinda that the appellant was prejudiced by the separate trials.

In the end I allow the appeal. The conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

In open court in the presence of the appellant and Mr. Makura Learned State Counsel.

J.K. SERGON
JUDGE