



JAPHET CHAROAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Japhet Charo (the appellant) was convicted on a charge of Rape contrary to section 3(1) of the Sexual Offences Act and sentenced to serve ten (10) years imprisonment.

The prosecution's case was that on 30th January 2008 in Malindi, the appellant intentionally and unlawfully committed an act which caused penetration of his genital organ with the genital organs of J.K. Appellant had denied the charge. Prosecution called a total of five witnesses whilst appellant was the only defence witness.

J (PW1) is a 30 year old married lady who recounted to the trial court that she had gone to the river to fetch water on 30-01-08 at about 8.00 am, when she met appellant along the path. They exchanged greetings with handshakes, then appellant told her "lets go". Appellant then pulled her into the bush and when she screamed, he produced a knife and ordered her to keep quiet. He then ordered her to lie down, removed his trousers, removed her underpants, and penetrated her with his penis and begun having sexual intercourse with her. As a result of her screams, Japheth Mwendo and Kingi arrived, and upon seeing the two men appellant started running away. The two men took his trousers and appellant returned to demand for the trouser. The two men grabbed him and ordered him to wear his trousers, then he was taken to the chief and eventually police were called and he was taken to Malindi Police Station. She identified the knife appellant had used to threaten her as exhibit before the trial court. PW1 sought medical attention at M dispensary. On cross-examination she said "if you were my lover, I would not have screamed." Julius M.K (PW2) was at his shamba on 30-01-08 at about 8.00am, when he heard screams from Kikadini area (which was about 200 meters from where he was farming). He rushed to the place and found a water jerrican on the path and begun wondering where the owner could be, and on searching a bit, he saw the appellant lying on top of a woman whom PW2 recognized as J.K (PW1) - his sister-in-law. PW2 knew the appellant as Joseph Kalama. It was PW2's evidence that appellant was holding a knife and both he and PW1 lay on the ground about 5 metres from the path. He asked PW1 whether she had consented to the act but she denied and said appellant had forced her.

On cross-examination PW2 said:-

"We started to search for the person screaming. I found you on the thighs of PW1..."

F K (PW3) was working in the shamba with PW2 and he gave evidence corroborating what PW2 had stated and that:-

"Shortly we saw CJ (PW1), they were having sex...the accused then started running away, we gave chase...he was armed with a knife..."

Pc Sitenei (PW4) of Malindi Police Station was at the office when two Administration Police from the M APC Camp

came to the police station accompanied by the complainant and appellant – he recorded statements and charged appellant.

(PW5) Dr. Ali Hassan who examined the complainant and filled the P3 form, told the trial court that she had a whitish discharge from her private parts which were also injured.

In his unsworn defence, appellant said that he had agreed to meet with PW1 on 30th January 2008 at 8.00am within K area, between B. They met and went into the bush where they indulged after Pw1 had spread out her lesso. Incidentally when proceeding to their chosen spot, they had passed two men who noticed them, and unknown to them, followed and caught them in the act. PW1 told him to run, which he did but he was caught and even as he tried to explain the situation, he was beaten by the men who said PW1 was their brother's wife. He lost consciousness but heard them saying that they would plant a weapon on him. He maintained that PW1 had been his lover since December 2007 and had even bought him a pair of shoes as a gift.

In her judgment, the trial magistrate noted that when appellant begun dragging PW1 into the bush, she panicked and screamed, and it was these screams which attracted PW2 and PW3 who rushed to the scene and found the pair engaged in sexual intercourse – the appellant was on top of PW1 and was holding a knife and she concluded this:-

“From the prosecution evidence, it is clear that accused and complainant engaged in an act that caused penetration of the accused person's genital organs ...the accused himself confirmed this”

The trial magistrate then considered whether the event was consensual (as claimed by appellant) or forced (as alleged by complainant).

The trial magistrate observed that if the act was consensual, then there would have been no reason for appellant to hold the knife, which PW1 referred to and which PW2 confirmed seeing appellant holding, even as he penetrated PW1.

She also noted that PW1's conduct was inconsistent with consent, as she had screamed for help – meaning she was in danger.

The trial magistrate rejected the appellant's version about them being lovers, and accepted the evidence by prosecution witnesses whom she considered consistent and truthful.

Appellant filed amended grounds of appeal stating that;

- 1) He was detained at the police station beyond the recognized period and thus his rights under the Constitution were violated.
- 2) The arresting officers did not testify
- 3) There was no corroboration in the evidence of prosecution witnesses
- 4) The medical evidence was insincere
- 5) Some of the key witnesses did not testify
- 6) The judgment was based on unproved assertions

The appellant relied on his written submissions saying he was detained at the police station for many more days than is allowed.

In response to his, Miss Waigera pointed out that appellant was arrested on 30-01-08 which was a Thursday and

he was taken to court on 04-02-08 - which was a Monday - so there was a lapse of only one day being a Friday, and that cannot be termed as inordinate delay.

Indeed it is not lost to this court that upon his arrest, appellant was subjected to beatings, and from his own testimony, he lost consciousness and came to, in hospital - given that the subsequent days fell on Saturday and Sunday when courts in Kenya do not sit, then I do not consider that one day's lapse as inordinate delay as to declare it a violation of his rights, nor the trial a nullity and thus order for his acquittal - so that limb of his appeal fails.

As regards failure to call vital witnesses, appellant submits that the two APs who were mentioned were not called as witnesses. It is true that reference was made to the two APs as the ones who received appellant from PW2 and PW3 among other persons and escorted him to Malindi Police Station. What other role did they play, and how did the failure to call them prejudice the appellant? It is not demonstrated and I detect no prejudice.

Appellant also submitted that there was lack of corroboration by prosecution witnesses and that prosecution witnesses were inconsistent. To this Miss Waigera submitted that all the prosecution witnesses were consistent and corroborated each other, drawing the court's attention to the evidence of PW2 and PW3, which confirmed what PW1 had stated. The inconsistency appellant alludes to relates to the distance that witnesses referred to in relation to the footpath and the place they were caught - whereas PW2 said it was 5 metres away PW3 said it was 6 metres away - to my mind, that is an inconsistency which is not fatal to the material facts - which is that appellant was found on top of PW1 having sex with her while holding a knife and on that scene all prosecution witnesses corroborated each other.

Appellant also submitted that his defence was not considered - to which Miss Waigera drew this court's attention to the trial magistrate's judgment that she in fact considered his claim of it being consensual as they had been lovers and about the knife being planted on him vis a vis PW1's conduct. Indeed the trial magistrate analysed the scenario as suggested by appellant and carefully weighed it against the events that took place, at the time, and properly concluded that what appellant claimed was not true - that limb too fails. My finding is that conviction was safe.

Was the sentence harsh and excessive? Miss Waigera submitted that the offence attracts a maximum life sentence and so the ten year sentence was no harsh. Given the circumstances and manner in which the offence was committed, I am in agreement with Miss Waigera that the sentence was justified. The upshot is that the appeal is rejected and stands dismissed. The conviction is upheld and sentence confirmed.

Delivered and dated this **29th June 2010** at Malindi.

H. A. Omondi
JUDGE