



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Appeal 22 of 2009

SHIDA KATANA THOYAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Shida Katana Thoya (the appellant) was convicted on a charge of rape contrary to section 3(1) of the Sexual Offences Act on particulars which stated that on the 26th of August 2006 at about 7.00pm, in Tana River District, he intentionally and unlawfully committed an act which caused penetration of his genital organs with the genital organs of G.J.

He had faced an alternative charge of compelled or induced indecent act contrary to section 6(1) of the Sexual Offences Act – but he was convicted on the main charge.

Appellant had denied the charge, and after due trial in which prosecution called a total of nine witnesses, and appellant was the only defence witness, he was convicted and sentenced to serve 25 years imprisonment.

The complainant W.C told the trial court that on 26-08-06 at 7.00pm, she was at home in G (T) with her children. She left her home to go and ask for an item from a neighbour but before getting to the neighbour's house, someone whom she says was the appellant, grabbed her and said *“If you speak, I will kill you”*

Although it was dark, she saw appellant whom she named as Shida and even recognized his voice. He blocked her breath and lifted her shoulder high while running across the road into a bush. He then laid her, face up on the ground and begun to strangle her while sitting on her. PW1 could not make any sound and became very weak. He then lifted her up and took her further ahead, then laid her on the ground and ordered her to undress. He removed her underpants, then removed his clothes and inserted his penis into her vagina forcefully while holding her jaw and forcing her head to twist. When PW1 screamed, the appellant boxed her on the chest until she coughed. He then raped her again – repeating his coital act thrice then he released her. PW1 put on her clothes and went away. Appellant also wore his clothes and went away. It was her evidence that appellant was someone whom she knew, as his wife is a sister to PW1's husband.

On arrival home at 9.00pm, PW1 told her husband what had happened – the matter was reported to the police the next day, and PW1 was taken to Ngao Hospital for treatment and examination. Information got out that appellant had packed his belongings and was inside a motor vehicle fleeing from the area – he was found inside the motor vehicle and arrested.

She told the trial court she knew the appellant even before, as they were related by marriage and she recognized his face

and voice as it was not a very dark night because she could even see where her clothes were, get them and wear them. Further that appellant even called her “*shemeji*” and told her he would rape her overnight.

On cross-examination PW1 stated that although her home is next to the road, no one passed by at the time and that the rape took about 15 minutes. She also stated that earlier on appellant had been to her home looking for her husband, then he left.

J.B (PW5) – the complainant’s husband testified that he returned home on 26-8-06 at about 8.00pm and found that his wife was not at home. When she returned, she was crying, saying appellant had raped her. He confirmed that appellant has married his sister – so he reported the matter to the village elder and the next day he reported to police and was advised to take his wife to Odha clinic. On the way, he passed through the sub-chief’s office and made a similar report. His wife could not be examined on that day as the doctor does not work on Sundays, so they had to wait until Monday to have her examined and the P3 form filled.

PW6 S.J (PW6) a daughter of PW1 and PW5 aged 14 years told the trial court that appellant who is her uncle, went to their home on 26-8-06 and found her mother. He asked for her father who was not present, then he left. This was repeated by PW7 (D.B) also a child of the same couple.

The assistant chief Salome Malowa (PW3) confirmed that PW1 and her husband went to her office on 27-8-06 to report about the incident. She observed that PW1 had bruises on both sides of the neck and her voice was not audible. PW1 told her appellant had raped her in the “*Mathenge*” bushes.

Pc Jeremiah Muthini (PW2) received the report about the incident, on 27-8-06 at 9.00am and PW1 led him to the scene of the incident. She was not able to pinpoint the exact spot but showed him the general place where she had been raped at night. He also confirmed that when complainant went to report, she spoke in a very low tone as her voice had been interfered with and her neck had bruises. He learnt that the assailant was a sort of in-law to the complainant, having married into their family.

Pc Stephen Chege Ngugi (PW3) of Odha Police Patrol Base, received information that appellant was planning to flee to an unknown destination. So he teamed up with administration police officers and they arrested the appellant inside a matatu which he had boarded, along with his belongings.

On cross-examination PW8 stated:

“I found you inside a Nissan matatu. I did not keep its registration number....You were moving with all your luggage, mattresses, bicycle, toolbox, etc. You limped....”

Jillo Mohamed (PW9) is the clinical officer at Ngao district Hospital who examined PW1. His findings which were contained in the P3 form produced as Ex.1, were that she had red scratch marks on the right side of her neck, bruises and scratch marks on the backside and fingers – the examination was done on 27-8-06 and the age of injury was less than 72 hours.

He noted that the labia majora and minora had injuries and his conclusion was that she must have been raped.

On cross-examination the witness stated that the scratches may have been caused when PW1 was being dragged into the bush.

In his sworn testimony, appellant confirmed to the court that he lived in Odha within Tana River District with his wife on a piece of land he had purchased from his late father-in-law. He had disagreements with his wife's male cousins who wanted the land appellant had purchased and the matter was referred to the chief and police. Eventually after six months, he was arrested and kept in cells, when his wife visited him and informed him that he was being accused of raping his sister –in-law on 26-06-06 at 7.00pm. His testimony was that on the said date he was at home watching 7.00pm news in the company of his wife and his father-in-law.

Anyway upon his arrest, he was kept at O Police station, then taken to Garsen Police Station and eventually to Malindi Police Station and taken to court on 09-09-06 and that he was held at the police station for 14 days thus violating his constitutional rights.

Although appellant claimed there was a land dispute in 2004 between him and his wife's cousins, he told the trial court that he had no evidence to show existence of such a dispute, only saying that the area chief was aware, but that he (chief) was a relative of the complainant.

In her judgment, the trial magistrate Miss Nyambu (SRM) noted that appellant and complainant knew each other and that although no one witnessed the incident which was committed in the bush, PW1 recognized the appellant's voice as he warned her not to speak or she would get killed. Further that PW1 was able to recognize his face because it was not a dark night – justifying this by her ability to even see where her clothes were, and he even mocked her calling her "shemeji".

The trial magistrate considered appellant's defence and held that it was an afterthought as witnesses denied existence of any land dispute and the investigating officer also denied knowledge of any such dispute.

The trial magistrate found that the medical evidence tendered corroborated PW1's testimony about her rough encounter and sexual intercourse.

She warned herself of the danger of convicting on the evidence of a single witness but was persuaded that appellant was properly identified by his face and voice – which identification was by recognition.

Appellant challenged the findings both on conviction and sentence – the appeal was opposed by the State.

In his amended grounds of appeal the appellant has listed eight grounds:

- (1) Violation of his constitutional rights under section 72(3) (b) of the Constitution.
- (2) The charge was defective.
- (3) The complainant's evidence was contradictory and doubtful – therefore unreliable.
- (4) His arrest was not well established as having any connection with the present case.
- (5) Essential witnesses were not summoned
- (6) The medical evidence clearly ruled out rape

- (7) Prosecution witnesses contradicted each other
- (8) His defence was not given due consideration by the trial magistrate

Appellant filed written submission saying that he was arrested on 29-08-06 and taken to court on 8-9-06 which violated the provisions of section 72(3) (b) of the Constitution as he ought to have been taken to court within 24 hours of his arrest.

Mr. Kemo for the State drew to this court's attention that even though there was no explanation by prosecution on the matter, the appellant in his own defence described how he moved from O Police Station to Garsen police station then to Malindi police station and that upon arrest he was told he was booked for investigation in relation to three different offences and the circumstances of his arrest required him to investigate.

Mr. Kemo also urged this court to take into consideration the circumstances under which police work – pointing out that Garsen police station has no vehicle and the distances between the stations is long, thus leading to delay. I note that the charge sheet confirms that appellant was arrested on 28-8-06 and taken to court on 8-9-06 – there was a lapse of about Ten days. It is correct that he ought to have been presented to court within 24 hours. The explanation offered by prosecution is the distance between the police stations and the fact that those stations do not have vehicles. I take judicial notice that from Garsen to Malindi is 112km away, and from O to Garsen is also same distance, and that the means of communication are wanting. However it is not shown what efforts police made to get transport at the earliest opportunity to bring appellant to Malindi. My finding is that to that extent his rights were violated and I so declare.

What is the remedy under the circumstances? Section 72(6) of the Constitution provides that he may pursue compensation – I find no provision for an acquittal.

Appellant submits that the charge is defective because evidence adduced by some of the witnesses is at variance with the charge – he points out that whereas the evidence clearly points out that the incident took place at G Village, the charge sheet refers to O village and that was to this contradiction then the conviction was wrong.

Mr. Kemo's response is that it is too late in the day or appellant to raise such an issue as he ought to have raised it at the trial stage, rather that the error complained of is curable by provisions of section 382 Criminal Procedure Code.

It is true that witnesses refer to G village whereas the charge sheet refers to O village. Section 382 Criminal Procedure Code provides as follows;

“.....no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal...on account of an error, omission or irregularity in the complaint...charge...before or during the trial....unless the omission or irregularity has occasioned a failure of justice.”

Was there any injustice caused by reference to the place as O instead of G? I don't think so, it did not touch on the material particulars which to my mind was the act of sexual engagement without the consent of the complainant on the date stated and the error does indeed find a cure under section 382 Criminal Procedure Code.

Appellant also submits that there is a contradiction in PW1's evidence because in one portion she says appellant raped her until 9.00pm, and on another she says the rape lasted 15 minutes. And that she describes him as married to a sister to her husband, and PW5 as saying he is married to her sister and as the trial magistrate should not have regarded her as a

credible witness.

Actually on the issue of how the relationship between appellant and complainant arises, he is the one who is mixed up – PW1 at Page 9 line 11 clearly stated:

“His wife is a sister to my husband.” While PW5, who is PW1’s husband said **“He has married my sister”**

- which simply confirms what PW1 stated. As regards duration of the incident – whether it lasted 15 minutes or was for one hour must be considered in the lights of the subsequent events.

PW1 left her house at 7.00pm – met her assailant, who strangled her and warned her not to talk, carried her on his shoulder, ran across the road into the bush, put her down on the ground, strangled her some more, then lifted her up and took her further ahead then put her on the ground, ordered her to undress, then undressed, then raped her, boxed her, repeating the act thrice.

What that evidence discloses is that

- (a) Time did not stand still, and
- (b) In between the actual physical invasion, the assailant would take pauses to assault her some more. That time estimation is not significantly fatal, and if anything, demonstrates that this was not just a fleeting moment spent, the parties were together for at least more than ten minutes.

There was no fatal error in the trial magistrate not reconciling this purported defence – in any event it was an estimation by PW1 who even said **“I was released around 9.00pm”**

Appellant argues that his arrest was not connected to the incident in question. Mr. Kemo points out that the evidence clearly shows appellant was being sought by police for several offences and any charge could be prepared against him.

Pc Jeremiah Mutuli (PW2) of O police patrol base received the report about the incident on 27-8-09 – he investigated this matter BUT DID NOT participate in appellant’s arrest – indeed he said as much in his evidence in chief:

“I investigated, after that accused was arrested. I was not present when he was arrested...”

CIP Joseph Arasa (PW4) also did not arrest the appellant. He merely referred to the record of appellant’s movements between the various police stations as recorded in the OB.

It is Pc Chege Ngugi (PW8) who arrested the appellant after receiving information that appellant was fleeing to unknown destination and he arrested him in a matatu which he had boarded with his belongings, and although he was not the one who received the report about the incident, the same was entered in the OB, and he helped the investigating officer record the complainant’s statement. I fail to comprehend what appellant is contesting about his arrest – the chain of events is well linked by the evidence of the three police officers.

Appellant submits that the medical evidence did not support rape because there was no injury to the complainant’s genitals which ought to have been examined. Mr. Kemo on behalf of the State submits that page 2 of the P3 form clearly revealed that complainant suffered several bruises and scratches on her thighs and genital area, which points to a situation where force was being used and bearing in mind that the victim was being examined after 72 hours then it cannot be said that the P3 form exonerated appellant from commission of the offence.

The P3 form at page 2 paragraph (d) refers to several bruises and scratchmarks on the thighs and gluteal area (i.e the buttocks)

The examination was after more than lapse of 72 hours and page 3 indicates there was discharge from the cervix, although the cause of the discharge was not disclosed. Apart from injuries on the lower limbs, the medical officer also noted injuries around PW1's neck – those injuries were consistent with PW1's description of the violence meted out on her by the assailant and confirmed observations by witnesses that PW1 had injuries around her neck and was hardly audible.

Of course it was desirable that appellant be subjected to medical examination; but it is not lost to me that appellant was arrested three days after the event, and logically with that passage of time, a medical examination on him would not have achieved much.

Appellant argued that prosecution failed to call key witnesses to which Mr. Kemo replied that there is no set number of witnesses which the prosecution should call, and the ones who testified were enough. It is not very clear which witness appellant had in mind, but if he means Pc Kinoti, then there is no demonstration as to how failure to call that witness caused him prejudice or would have adversely affected prosecution's case – Pc Kinoti is referred to as simply having accompanied Pc Ngugi on the arrest of appellant.

Appellant's defence was duly considered by the trial court, the trial court took into consideration the circumstances surrounding identification and the fact that that evidence of identification was of a single witness, but she examined the opportunity available for identification and was satisfied that the identification by recognition was proper. It was demonstrated that threats and force were used in order to invade the complainant sexually. I find that the trial magistrate addressed her mind to what is anticipated by the decision in **Charles O. Maitanyi v R (1986) KLR** regarding identification by a single witness under difficult circumstances. This was buttressed by the voice recognition as appellant was someone well known to Pw 1 and had even spoken to her earlier that day – refer to **Choge v R 1985** on voice identification and **Karani v R (1985)KLR at pg 290**.

My finding is that the conviction was safe and I uphold the same. The sentence provided is that of not less than ten years – given the terror that PW1 underwent, I find the sentence meted justified and there is no reason to interfere with it. I confirm the sentence.

The upshot then is that the appeal is dismissed.

Delivered and dated this 5th day of July 2010 at Malindi.

H. A. Omondi

JUDGE