



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL 142 OF 2008

MUTISO MUSILA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The Appellant herein, Mutiso Musila was charged with the offence of rape contrary to section 140 of the Penal Code. It was alleged that on 2.5.2005 at around 18.00 hours in Mbiuni Location, Machakos District he had carnal knowledge of Syombua Kyalo without her consent. In the alternative, that he indecently assaulted the said Syombua Kyalo by touching her private parts in the same place and time, contrary to section 144(1) of the Penal Code. He denied the charges but was eventually convicted on the main count and sentenced to serve 7 years imprisonment.

2. The evidence placed before the trial court was as follows:-

PW1 Syombua Kyalo, a 17 year old Form 1 student at St Mark's School had gone to fetch firewood in a forest near her parent's home at 6 p.m and armed with a panga she carried on with her business and the accused, whom she had known before, cycled past her but after a few minutes left his bicycle by a river and returned to where the complainant was. He asked her whether this time round she would run away as she had previously done. He snatched the panga away from her and as she started to scream, he covered her mouth using his coat, dragged her near the river, threatened to kill her if she made a sound and struggled to remove her garments. She had a pant, shorts and a skirt and in the course of removing them, he tore the shorts (P. exhibit 3). He then penetrated her vagina and forcefully had carnal knowledge with her for an hour. Having finished, he left her and she picked her clothing including a hat and limped home. She told her father what had happened to her and who had raped her. Her father, PW3, Thomas Kyalo Katiku made a report to the village Headman and without PW1's clothes or body being washed, the next day a report was made at Mumbuni Police Station and she was treated at Mwala Hospital and a P3 form issued to her.

3. PW2, Alexander Kioko Kiambaa, 15 year old was herding cattle on the material date and was 15-20 metres away from where PW1 was getting firewood. He saw the Appellant whom he knew very well. The Appellant walked to PW1 and dragged her towards the river. He pointed a panga at PW2 and told him to go home. PW2 went home and told no one what he had seen. He described PW1's clothing – a white blouse and brown skirt. Later he recorded his statement after the Appellant had been arrested.

4. PW4, P.C. Anthony Maina of Kithimani Police Station received the initial report on 3.5.2005 at 6.30 am at Mumbuni Police Post and having booked the same, referred PW1 to hospital and later received

the complainant's clothing, re-arrested the Appellant and investigated the matter before charging him with the offence of rape and the alternative to it.

5. PW5, Dr. Ludwing Muinde examined PW1 and noted that she had a tear in the lower vulva and whitish discharge was found in her vagina. A vaginal swipe revealed the presence of spermatozoa in her and he produced the P3 form – exhibit 1.

6. When put to his defence, the Appellant admitted that he knew PW1 and PW3 and that they are related and also live 100 metres from each other. That the two families had a land dispute and PW3 had been charged with assaulting the Appellant's mother.

7. He denied raping PW1 and stated that on the material date, he had gone to work as a matatu conductor and returned to Mbiuni market in the evening. He then picked his bicycle and cycled home. He met PW1 at 7p.m near her home and he greeted her and went on to his home. He slept and the next day he went to work and he was arrested on 12.5.2005 and also told that he had committed an offence and later charged.

8. The appellant added that on the material day, he saw a boy who "***passed by with his cattle***" and that PW1 at the time had no panga. He also denied that the clothes produced in court were the ones she was wearing on that date.

9. DW2, John Akuta, Executive Officer at Yatta Law Courts produced the record in Criminal Case No. 1486/2005 Republic Thomas Katiku and 2 others. They were acquitted under section 210 of the Penal Code.

10. DW3, Sabina Mwongeli Musila mother of the Appellant in Criminal Case No. 1486/2005 aforesaid gave evidence that the families had a long standing land dispute and that on the material day the Appellant came home in the evening.

11. The Court in Pandya vs Republic [1957] E.A. pg 336 stated as follows:-

“(i) ...

(ii) (adopting defence counsel's second and third propositions) the first appellate court erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect, and, as a result of its error, affirmed a conviction resting on evidence which, had it been duly reviewed, must have been seen to be so defective as to render the conviction manifestly unsafe.”

12. That being the law, the evidence of PW1 and PW5 would show without any doubt, that PW1 was involved in sexual activity prior to her examination by PW5. The fact that her vagina had certain features including the presence of spermatozoa made that fact unchallengeable. That she had a tear in her lower vulva also showed that the sexual activity may have been less than gentle. As to whether the sexual activity was forced and without her consent, before me is her evidence that the Appellant was the one, who, on the material day dragged her away from her chore of fetching firewood and then proceeded to forcefully penetrate her without her consent. Should she be believed? PW2 did not see her being sexually assaulted but saw her being dragged away by the Appellant. Both PW1 and PW2 confirmed and corroborated each other's evidence in that regard. The evidence of forceful entry in her vagina was corroborated by PW5 who examined PW1 less than 24 hours after the incident and the torn lower vulva is further corroboration of the incident of rape. PW2 added a crucial piece of evidence – that when the Appellant turned and saw him, he waved him away with a panga which PW1 confirmed had been snatched from her by the Appellant.

13. Another important piece of evidence is that both PW1 and PW2 knew the Appellant prior to the incident and the time of the alleged offence was 6 p.m and therefore there could not have been a case of mistaken identify. The issue is in any event beyond doubt because the Appellant in his defence stated that

he knew PW1 and that on a certain date which he failed to mention, he saw her near her home, greeted her and walked away and he also noted that a small boy was herding cattle nearby. Can it be a coincidence that on the date of the alleged incident, PW1 had contact with him and a young boy (PW2) was herding cattle nearby? I do not think so.

14. As regards his defence that he was not with PW1 on the material day, his mother DW3 confirmed that he was at home near PW1's home and in any event, his attempt at placing himself away from the scene cannot dislodge the strong and credible evidence against him.

15. Lastly, there was clear evidence of a grudge between the family of the Appellant and PW1's family. However, although PW3 was arrested and charged with allegedly assaulting DW3 (the Appellant's mother) the charges were laid after the Appellant had been arrested and charged with raping PW1 and was not at all an issue during his own incident. As for the on-going land dispute between the families again the issue has no clear relevance when the evidence against him is so stark and credible.

16. Before me is an Appeal which must and is hereby dismissed on all grounds.

17. Orders accordingly.

Dated and delivered at Machakos this **16th** day of **June 2009**

Isaac Lenaola

Judge

In the presence of; Appellant present

Isaac Lenaola

Judge