



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 6 of 2009

PETER KARANJA KINYANJUI APPELLANT

- Versus -

REPUBLIC..... RESPONDENT

J U D G M E N T

Peter Karanja Kinyanjui (the appellant) was convicted on a charge of rape contrary to section 140 Penal Code and sentenced to serve fourteen (14) years imprisonment with hard labour.

The prosecution case was based on particulars that on the 23rd day of May 2006 at about 10.00pm at in Lamu District, had carnal knowledge of J.M.G without her consent.

J.M (PW1) told the trial court that on 23-4-06 while herding goats in the company of her younger brother T, at P.K's field, one Kariuki came and told her to go to his house – she obliged. They were to discuss how PW1 would reconcile with her ex-husband N.K who is the son of appellant – she refused and thus annoyed appellant who sent for a panga which he used to hit PW1. He then removed her petticoat and underpants and forced her onto his bed. He held her throat tightly so she could not scream. He then removed his trousers and raped her. She went to Kariuki and reported the incident. She slept at Kariuki's house, and the next morning she reported to her mother and eventually a report was made to police.

On cross-examination PW1 stated that Kariuki was her boyfriend and his house was about 100 metres from appellants. She told the trial court that there were no people at the scene.

PW2 Joseph Kariuki Kanyi told the trial court that while with appellant who was his pillion rider on 23-4-06, they met PW1 (who is his girlfriend) and they told her to accompany them home. They arrived at PW2's home, PW2's brothers were present. The appellant was then served some food, then he sent his son John to fetch a panga, and ordered PW1 to accompany him to his home. PW2 followed behind. Appellant served them some food then locked PW1 inside his house. PW2 left – appellant said he would talk to pW1's mother in the morning. Later PW2 heard the appellant shout saying "she has run away" and at 10.00pm, PW1 reported to PW2 that appellant, had raped her. She slept in PW2's house. PW2 says he tried to resist the appellant's move of taking PW1 away, but appellant threatened him. On cross-examination he stated:

"You were armed with a panga so I got scared. Next morning you brought me her clothes..."

PW3 PC James Maina of M Police Station confirmed receiving a report on 24-4-06 at about 9.00am from PW1 who said that she had been raped the previous day after having been forced into the suspect's house and threatened with a panga.

He referred both PW1 and appellant for medical examination.

PW4 John Gikonyo, a clinical officer at M Sub-district Hospital examined PW1 and detected a whitish discharge from the vagina and she had contracted a bacterial infection. His conclusion was that she had been carnally known. Her P3 form as produced as exhibit. On 8-5-06, he examined the appellant, analysed his urine and detected a bacterial infection. He concluded that appellant had a sexually transmitted disease. On cross-examination he stated:-

“Both you and the complainant had a similar bacteria which was sexually transmitted”

In his defence, the appellant confirmed having met PW1 on the material date but said she was in the company of her boyfriend. He also confirmed picking her from her boyfriend’s house to his house and that he ordered her to sleep in his house until the next day when elders would decide who was her husband. She slept, then he heard a door open and he was told that PW1 had gone to the toilet – yet she had gone to PW2’s house here she slept. The next day he heard that PW1 had complained against him. On being cross-examined by the court, appellant denied having sent for a panga.

Upon considering the evidence presented, the trial magistrate found that PW1’s claim of being intimidated by the appellant using a panga was corroborated by the evidence PW2 who was too scared to intervene in the matter owing to the fact that appellant was armed with a panga. The trial magistrate then posed the question that if PW1 had voluntarily gone to the appellant’s house, then why would she pretend to go to the toilet then escape and go back to PW2’s house. He concluded that PW2’s evidence corroborated that of PW1 in all aspects.

As to whether appellant had carnal knowledge of the complainant, the trial magistrate noted that medical examination on both of them revealed a similar bacterial sexually transmitted infection, that he observed PW1’s demeanor and found her to be very consistent and truthful in her testimony and her testimony was largely corroborated by the medical evidence. His conclusion was that appellant had carnal knowledge without her consent.

Appellant filed amended grounds of appeal stating that:-

- (1) He was detained at the police station for many days before being taken to court, and no explanation has been given.
- (2) He challenges the validity of the two P3 forms.
- (3) The charge was based on assertions, conspiracy and malice
- (4) Independent persons mentioned in the case were not summoned to give evidence.
- (5) The case was based on fabricated pieces of information without any proof or investigation.
- (6) The sentence was based on a false charge and is ruining his family.

In his written submissions, the appellant stated that his rights under section 72(3) (b) of the Constitution were violated and that the trial magistrate failed to address this issue. It is his contention that the delay in taking her to court was without any reasonable explanation and seeks to rely on the case of Albanus Mwasia Mutua Cr. Appl. No. 120 of 2006 and urges this court to apply the same principles and acquit him as he was held from 4th to 19th May 2006 at the police station.

He also argues that the charge sheet is defective because it shows he was arrested on 4th May 2006, yet the incident took place on 23-5-06 and was reported on 24-5-06 which means he was arrested before the incident ever took place and this shows malice and conspiracy by the OCS M Police Station.

He submits that due to these discrepancies he should be acquitted and cites the case of Alexander Nyachiro Marune v R Cr. App. No. 1590 of 1984 which held that:

“There should be no material discrepancies between the evidence given to police and evidence given to court.”

He challenges the production of the P3 form saying he was never taken to any hospital for examination and there was no spermatozoa detected in the complainant to support the claim that PW1 had been carnally known. Further that whereas PW1 says she was raped at 10.00pm, the P3 form says it was at 6.00pm.

He pokes holes at prosecution witness evidence, wondering how PW2 could escort his girlfriend to another man's house and leave her there without reporting the bad intentions of appellant to anyone; not even his own brothers. He also wonders how possible it is for him as PW1's father-in-law to rape her in his house in the presence of his children and his wife. It is his contention that PW1 was not consistent in her evidence. He suggests that whatever sexual activity that may have been carried out on PW1 was by her boyfriend – opportunity presenting itself when she escaped at night to go and spend the rest of the night at PW2's house and that the trial magistrate ought to have paid due consideration to this and seen that this case was based on conspiracy by PW1 and PW2 (who was her lover).

He wonders why PW2's other brothers did not testify and urges court to consider the case of Johanna Mutisya Munyao v R cr. Appl No. 13 of 2007 where the court held that failure to summon some of the prime witnesses was fatal to the prosecution case.

The appeal both on conviction and sentence is opposed, and Mr. Ogoti, the Assistant Deputy Public Prosecutor submits on behalf of the State, that with regard to the defect in the charge sheet referring to the date of arrest at 4-5-06, he urges his court to consider the evidence which is to the effect that the offence took place on 23-5-06 and arrest was on 24-5-06, so the OCS when preparing the charge sheet made an error and the case of Alexander Nyachiro does not apply. Actually upon consideration of the evidence on record, I find that the date of arrest entered as 4-5-06 must be a typing error probably a failure to press the key for 2 to record 24-5-06 and instead only the 4 on the date was pressed – I don't think that variation is so significant when weighed against all the total evidence on record, as to warrant the appellant being acquitted, I believe it was a genuine typing error and indeed the report given to the police and the evidence of the arresting officer confirm this observation.

With regard to the P3 form, it is Mr. Ogoti's submission that the evidence led observed that appellant had opportunity to take advantage of the complainant and commit the offence and that even appellant admitted that complainant slept at his house. Mr. Ogoti submits that the evidence places the appellant at the scene and the medical evidence connects him to the offence.

Indeed from the evidence, appellant had the opportunity to be with the complainant, the learned trial magistrate found as a fact that he intimidated both PW1 and PW2 as he was armed with a panga. The learned trial magistrate had the chance to observe the demeanour of the complainant and noted that she was consistent in her evidence and appeared truthful.

Appellant cannot now raise the issue of never having been taken to hospital for examination, when in his evidence on cross-examination by prosecution he clearly stated

“I still do not know how I contracted the STD”

Did appellant use the opportunity of being alone with PW1 to sexually molest her?

Then comes the question, did the medical evidence establish that complainant had been subjected to forced sexual intercourse?

A high vaginal swab found no presence of spermatozoa, yet the clinical officer noted that there was a possibility of carnal knowledge even in the absence of spermatozoa. Indeed what is of essence is proof of penetration as one may easily penetrate the victim without necessarily ejaculating, in which case, there would be no traces of spermatozoa. Was penetration established by the medical examination.

From the P3 form, all systems of the complainant were normal, even the purported tight squeezing of her throat left no tell-tale marks, there were no tears or injuries to the genitalia. Does the mere fact that both PW1 and appellant were found to be suffering from a similar bacterial infection, prove that it was appellant who had infected her? Was the boyfriend examined to rule out possibility of him suffering a similar strain of bacterial?

I respect the fact that the trial court had the advantage of observing the complainant and drawing his conclusions, but a nagging concern in my mind, which seems to defy logic is this – another man, father to a rival, takes away your lover in the presence of your brothers, under

circumstances which are not friendly, locks her up in his house with the intimidating presence of a panga, and the male lover just trots back to his house, does not mention anything to his brothers - or if he does then why weren't his brothers called to testify and confirm this?

Is it possible that appellant merely detained PW1 against her will intending to call elders the next day to try her since she was: according to him, still his daughter-in-law, yet she seemed to be involved with another man?

Could it be that PW1 having rejected the idea of reconciliation, then got an opportunity later at night, to run back to her lover, and that actually nothing in the form of sex took place between her and the appellant?

I think this is a possibility especially bearing in mind that the medical officer offered no basis whatsoever to support his findings that there was a possibility of carnal knowledge of the complainant by the appellant – just how did he establish this. Which strain of bacteria was found – since the P3 form in relation to PW1 simply notes epithelial cells, whilst in respect of appellant they are described as pus cells – really what evidence is there that the bacterial infection were of the same strain. The clinical officer seems to have dealt very casually with the examination of the complainant and appellant and just expected the court to accept his word about the possibility of sexual intercourse without laying a given basis. This medical evidence left a lacuna in the prosecution case which then did not prove the case to the required criminal standard which is higher than just a mere probability of events.

My finding is that the conviction was unsafe in so far as the medical evidence did not establish any penetration and the circumstances purportedly surrounding the incident raised some doubts as to what actually transpired. Consequently I quash the conviction and set aside the sentence. The appeal is allowed.

The appellant shall be set at liberty forthwith, unless otherwise lawfully held.

Delivered and dated this 8th day of December 2009 at Malindi.

H. A. OMONDI
JUDGE