



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 349 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 2241 of 2003 of the

Senior Principal Magistrate's Court at Kiambu (G.M. Njuguna - SRM)

MARTIN MUNYUA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

MARTIN MUNYUA KAMAU was convicted for the offence of RAPE contrary to Section 140 of the Penal Code. He was sentenced to 7 years imprisonment. He now appeals to this court against both the conviction and sentence.

There are three grounds of appeal in the Appellant's amended grounds.

One, that the learned trial magistrate erred in both law and facts by basing the conviction on the evidence of the complainant, which left a lot to be desired;

Two, the learned trial magistrate erred in both law and fact for convicting and sentencing the Appellant without any iota of evidence and;

Three the learned trial magistrate misdirected herself by rejecting the Appellants defence and submission.

The facts of the prosecution case were that the complainant was a school girl aged 17 years of age. On the material day she left her grandmother whom she had visited at K on Sunday to return to her Aunt where she lived during the school term at 5.30 p.m. at Kiambu where she was to board a vehicle to travel to her Aunt's place in N. Someone called her. When she looked she saw that it was the Appellant who was acting as the conductor of the Matatu she boarded. The Complainant knew the Appellant before because they were in the same primary school where the Appellant was in Standard 8 when she was in standard 4. The Appellant was also a neighbour to the Appellant's grandmother. The Complainant boarded the vehicle and told the Appellant where she wanted to alight. When they reached her stage, the Appellant declined to ask the driver to stop the vehicle and instead promised to let her off on the return trip from Nairobi city. On the return, the Appellant still did not stop the vehicle. The vehicle was driven past N to Kiambu and finally to K. The Complainant alighted at final stage. She was afraid to go to her grandmother's alone. The Appellant promised that after getting a jacket at his house which was 500 metres or so before her grandmother's house, he would escort the Complainant to her grandmother. It did not happen. Instead, after the Complainant entered the Appellant's house, the Appellant bolted the house. He then beat her up until she stopped screaming which she had done the moment the house door was locked. The Appellant's brother who was present tried to intervene to stop the Appellant from

beating the Complainant and even told him to escort her home before he withdrew and left them. The Complainant was then raped by the Appellant for 2 continuous hours that night and the following morning at 5.00 a.m. During the two incidents, the Complainant told court that the Appellant used a condom. After the ordeal, the Appellant released the Complainant. The Complainant went to her grandmother's house at 5.40 a.m. and reported the matter to her.

PW3 was the grandmother. She told court that at 5.40 a.m. when the Complainant knocked at her door, she was in a state of shock and was crying. She confirmed that the Complainant had left her home at 5.30 p.m. the day before to go back to her Aunt's place. She also confirmed the Complainant's evidence that the Complainant informed her of the rape ordeal and had implicated the Appellant who was a neighbour. PW3 said that she directed the Complainant to go to her uncle E, PW4 to report for action.

PW4 confirmed receiving the Complainant at his house at 7.00 a.m. PW4 described her state as shaken and crying. PW4 said that they had to calm her down. He also saw a bruise on the Complainant's hand. He took the Complainant to the Police where they reported before going to a doctor for examination and later for treatment.

The Doctor was PW2 who confirmed bruises on the left eye, right forearm and elbow which he said was caused by a blunt object. On examination, he found that the Complainant had mature and normal genitalia. He found no injuries. PW2 said he could not rule out rape since in 90% of cases, hymen disappeared on its own.

The Appellant denied the offence and said that the Complainant was his girlfriend and that they had been relating for sometime. He said that they had mutual sex that night and that he left the Complainant at his house at 8.00 a.m. but did not get her in the evening.

DW2 was the Appellant's younger brother whom the Complainant said was home when she arrived with the Appellant. DW2 confirmed that the Complainant arrived with the Appellant on the evening in question. DW2 said that the two joined him to watch the news before he left them for the night.

DW3 was the Appellant's mother. She told the Court that she knew both the Complainant and her mother. She said that the Complainant's mother sent for her and that they held a discussion which she, DW3 was asked to pay for the Complainant's torn clothes, medical expenses to terminate the case against the Appellant. She had no money and therefore, she claimed, the case proceeded.

The Appellant was unrepresented during this appeal. He gave written submission in support thereof. Learned state counsel **Mrs. Kagiri** appeared for the State.

I have analyzed and evaluated afresh and in details all the evidence adduced before the trial court while bearing in mind that I neither saw nor heard any of the witnesses who testified and therefore, I cannot comment on their demeanour. See **NGUGI vs. REPUBLIC 1984 KLR 729**.

The Appellant has challenged the learned trial magistrate's findings that he raped the Complainant. It is the Appellant's contention that the trial court took a wrong approach to the case. The Appellant in his written submissions maintained that the Complainant fooled the court that she had been raped when actually they had "genuine" sex. The Appellant submitted that the Complainant ought not to be believed because her evidence left a lot to be desired. For instance, Appellant contended, why did the Complainant not protest when the matatu passed the stage where she wanted to alight. The Appellant submitted that the Complainant's evidence needed corroboration and that the same was lacking. He relied on **ABEL MONARI NYANAMBA & OTHERS vs. REPUBLIC CA No. 86 of 1994**.

The authority only states a legal principle that evidence which requires corroboration cannot provide corroboration to other evidence also requiring corroboration. I agree with the court ruling in the cited matter but note that clearly it has no application to the case at hand. The evidence of an adult complainant in a charge of rape does not require corroboration in law. All the court has to do is assess the evidence and find whether the Complainant would be believed.

The learned State Counsel in her submissions in opposition to this appeal stated that the Complainant's evidence was clear that she was assaulted then raped by the Appellant whom she knew very well before. Learned counsel submitted that the Doctor's findings in the P3 form corroborated the Complainant's evidence that she had been assaulted. The learned Counsel submitted that the trial magistrate found the Complainant a truthful witness and believed her evidence. Counsel submitted that PW3 and PW4 who were the first to see the Complainant after the attack described her as being in a state of shock and crying soon after the attack. Counsel submitted that the Complainant was consistent throughout concerning the incident.

The learned trial magistrate had this to say in her analyses of the evidence at page J3 of the Judgment: -

“The essential element to be proved by the prosecution in a case of this nature is the lack of consent. The Complainant herein is firm that she did not consent to sex. Moreover, in her evidence in chief she gave a vivid description of the tricks used by the accused to prevent her from alighting from the motor vehicle until he eventually got her into his house and firmly locked her in. His conduct shows his mental element was to have sex with her without her consent.

It is not in doubt that the Complainant physically resisted sex with the accused. She testified that the accused beat her to the point of subduing her to have sex. The doctor's evidence is clear that she suffered injuries classified as harm, in resisting rape....” The Complainant reported the rape immediately after she was let go by the accused...”

The learned trial magistrate carefully weighed the evidence adduced before her. As for the assessment of the Complainant's evidence, I agree with the learned trial magistrate's finding that there was evidence of resistance on the Complainant's part and of force having been used by the Appellant due to the injuries found on her by PW3 the next day after the attack. PW3's evidence corroborated the Complainant's evidence that she had been injured with a blunt object. The Complainant's evidence that she was beaten with a wooden stick was therefore in tandem with the doctor's find. PW4 the Complainant's uncle also testified that he saw bruises on the Complainant's hand on the morning after the attack. There is no other explanation for the bruises found on the Complainant except that she was attacked with a blunt object. The Complainant's evidence concerning the beating before the Appellant had sex with her is therefore well corroborated.

The Appellant contends that the sex he had with the Complainant was mutually agreed. While the Appellant does not deny having had sex with the Complainant on the night in question, the fact that the Complainant had injuries on her eye and hand, are not proof of mutual consent but more proof of forceful sex.

The Appellant has raised issue with the reliability of the Complainant's evidence as shown herein above. I have considered each of these issues. I do not believe that failure to protest when the Appellant failed to ask the driver to stop for the Complainant to alight proof of consent to sexual intercourse or of doubtful credibility. There was nothing wrong with the Complainant deciding to go back to her grandmother's place after the ride in the Appellant's vehicle. Neither could it be a defence for rape for the Appellant to say that the Complainant was his girlfriend. The mere fact that they may have been 'friends', a matter the Complainant contested, was no license to have sexual intercourse with the Complainant.

Having analyzed the evidence afresh, the evidence of PW3 who was the first to see the Complainant after the incident and that of PW4, to whom the Complainant went soon thereafter, both these witnesses describe the Complainant as a person that was shaken, in a state of shock and crying uncontrollably. That is not the state of a person "fooling" others, as the Appellant claimed, or of one who had just had consensual sex', as the Appellant claimed. The Complainant's state, as described by PW3 and PW4 was that of a traumatized person. There was no claim that PW3 or PW4 had any grudge with the Appellant or his family. Neither was there such a claim against the Complainant. The Complainant's state as seen by PW3 and later by PW4 was evidence of one who had a fearful and unwelcome experience. The evidence of the two witnesses went along way in corroborating the Complainant's story that she had been raped.

I did consider other factors in this appeal. The negative result of the vaginal swab was in tandem with the Complainant's evidence that the Appellant used a condom.

The evidence of DW2, the Appellant's brother is proof that the Complainant walked into the Appellant's home innocently and is in tandem with the Complainant's evidence that she believed that the Appellant would escort her home.

The evidence of DW3, the Appellant's mother that the Complainant's mother asked for money for torn clothes and the Complainant's medical treatment does not negate in any way the Complainant's evidence of her experience at the hands of the Appellant.

Having re-analyzed and re-evaluated the evidence before the trial court, I am in agreement with the learned trial magistrate's findings that the prosecution proved its case against the Appellant as required in the law. I agree with the learned trial magistrate's rejection of the Appellant's defence. The appeal against conviction has no merit and it fails accordingly.

On the sentence, Appellant was awarded 7 years imprisonment. The offence calls for life imprisonment. The Appellant said that the sentence was undeserved since he was innocent. I have found that the Appellant was not innocent of the offence. In fact, I find that the offence was aggravated because the Appellant assaulted the Complainant before raping her. Consequently, I find the sentence of 7 years imprisonment lenient. I set aside the sentence of 7 years imprisonment and in substitution thereof sentence the Appellant to 15 years imprisonment with hard labour.

Right of appeal explained.

Dated at Nairobi this 23rd day of January 2007.

.....

LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

No appearance for the State

Tabitha: CC

.....

LESIT, J.

JUDGE