



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL 671 OF 2002

JOSEPH KIARIE KAMAU..APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction (s) and Sentence(s) in Criminal Case No. 3007 of 2001 of the Senior Principal Magistrate's Court at Limuru (Ezra O. Awino – SRM)

J U D G M E N T

JOSEPH KIARIE KAMAU was convicted for **ATTEMPTED RAPE** contrary to **Section 141** of the **Penal Code** and sentenced to 3 years imprisonment and 2 strokes of the cane in count 1. In count 2, the Appellant was convicted for **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to **Section 251** of the **Penal Code** and was sentenced to 6 months imprisonment. He now challenges the conviction and sentence in this appeal.

He raises several grounds of appeal as follows: -

- (1) The evidence of the Complainant was uncorroborated and could not sustain a conviction.
- (2) The evidence of PW2 was hearsay.
- (3) The evidence of the Complainant that she reported to PW3 on the 21st was contradicted by the P3 form which indicated that the report was made on 20/8/01 one day before the Complaint was made.

The Appellant prosecuted the appeal in person while the State was unrepresented despite service of the petition of appeal and the hearing notice.

In brief the facts of the case were that the Complainant was going home at 8.30 p.m. on 19th August 2001 when she met the Appellant. That the Appellant caught her by the shoulder prompting the Complainant to demand to know what he wanted. That the Appellant said he wanted to have sex with her which she refused saying she was like a mother to him due to her old age. That is when the Appellant fell her down and started pulling her underwear and in the process bit her on the shoulder, hands and the wrist. She was also strangled before she tore free from him and ran away. The Complainant's torn dress, petticoat and underwear were exhibit 1 (a) and (b).

The Doctor confirmed bite wounds on the Complainant's left shoulder, dome shaped swelling on the left hand and abrasions on the left thigh, pain and tenderness of the chest wall abdomen and back. The Doctor was PW4 and the P3 form exhibit 3. The Doctor saw the Complainant 2 days after the attack.

The Appellant denied the offence in his evidence under oath. He stated that he treated the Complainant as his mother. He stated that on the material day he had been with the Complainant in the bar drinking. That he bought her 6 bottles of beer but she drunk only five. She was drunk when she left the bar alone around 10.30 p.m. The Appellant said that he left an hour later. He denied meeting the Complainant thereafter or injuring her. The Appellant also called the bar owner as his witness who materially corroborated his evidence.

The Appellant first ground was that the Complainant's evidence was uncorroborated and could not sustain a conviction. The learned trial magistrate found as follows: -

“I am not prepared to entertain doubt that the Complainant was mistaken in the identity of the person they struggled with. The Complainant stated that there was moonlight and that she addressed the accused by his name.”

The evidence before the court ought to have been considered in totality and not selectively. It was one of the Appellant's ground of appeal that the learned trial magistrate did not weigh both the prosecution and defence evidence before arriving at the conclusion.

The learned trial magistrate discredited the defence witness for having been reluctant to come to court until he issued a warrant for her arrest which the learned trial magistrate found was proof that he was not driven *“by the belief to tell court the truth for ends of justice, but one who must have been driven by other forces and I am not prepared to believe her evidence.”*

Before dismissing the evidence by the Appellant's witnesses, the court had a duty to consider it. The Appellant's defence was that he had been with the Complainant at a bar and had bought her 6 beers. That she took five beers and left the bar alone at about 10.30 p.m. The Appellant continued to say he left the bar at 11.30 p.m. with the bar owner, DW1, and that they parted at their respective gates.

DW1's evidence corroborated the Appellant's evidence as to the fact that the Complainant was in the bar at the time alleged by the Appellant and that he had bought her 6 beers but that she drunk only 5. DW1 corroborated the Appellant's evidence that the Complainant left alone an hour or more before the Appellant and herself.

The effect of the Appellant's defence was a denial that he was at the scene at the time and place where the Complainant was attacked. It was an alibi defence. The learned trial magistrate misdirected himself on two aspects. One that he could selectively reject the evidence of the alibi defence by the Appellant's witness. Two and consequent to the misdirection, the learned trial magistrate shifted the burden of proof against the Appellant. Having rejected the Appellant's alibi defence, the learned trial magistrate was by implication requiring that the Appellant should have proved his alibi defence. The law is clear that an accused person has no duty to prove his alibi defence but that the prosecution has a duty wherever possible to disapprove it. See **Wangombe vs. Republic CA No. 56 of 1980 KLR 149** .

The evidence before the court was unshaken that the Appellant was not at the scene of attack at the time of the alleged attack on the Complainant. In addition the evidence of the appellant and DW2 was that the Complainant was 'drunk' when she left the bar at 10.30 p.m. The Complainant on the other hand, in her evidence in chief, made no reference of having been at the bar or of having taken any beer. It was only during cross-examination that she admitted going to the bar and being served by DW1 before leaving for home. The learned trial magistrate ought to have considered the Complainant's motive of avoiding to talk of the bar visit in her evidence in-chief. There was also another unexplained factor. The Complainant says she was attacked on 19th October 2001. She did not report to PW3 until 21st, two days after the alleged attack yet her injuries could not have incapacitated her. The Complainant did not also seek any treatment by 21st when the Clinical Officer, PW4 examined her. Why the delay in reporting to police and

also in seeking treatment? The delay is curious and one which the learned trial magistrate should have taken into account before concluding his judgment.

In my own evaluation and analysis of the evidence adduced before the trial court, the Appellant's alibi defence remained unchallenged even at the time of the conclusion of the case. The learned trial magistrate was wrong to dismiss the evidence of DW1 and selectively consider the Appellant's own evidence which he then dismissed because: -

“So far there is no reason on record as to why the Complainant would frame up the accused.”

That conclusion was arrived after a serious misdirection. The learned trial magistrate thereby fell into error and in the result occasioned a serious miscarriage of justice.

I find the Complainant's evidence left a lot to be desired, was discredited and full of unresolved and unexplained lapses. Clearly, the learned trial magistrate ought to have found there was doubt in the prosecution evidence and should have given its benefit to the Appellant. I find no merit in the appeal and allow it. The conviction is therefore quashed and the sentence set aside.

The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 7th day of February 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

No appearance for the State

Tabitha: CC

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LESIIT, J.

JUDGE