



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 132 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 8978 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwai – SRM)

OFEN CHESARA MAHAGAYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

OFEN CHESARA MAHAGAYU was convicted for the offence of **RAPE** contrary to **Section 140** of the **Penal Code** and sentenced to 15 years imprisonment. He was aggrieved with the conviction and sentence and therefore, lodged this appeal.

The Appellant has raised four grounds of appeal in his Supplementary grounds thus: -

One, that the learned trial magistrate erred in finding that the Complainant had not consented to sexual intercourse with the Appellant while ignoring the fact that the agreement was between the Complainant and her father;

Two, that the learned trial magistrate erred in failing to find the Complainant's evidence unbelievable where she claimed that the Appellant held her mouth with one hand and removed his clothes and hers with the other;

Three, that the learned trial magistrate erred in failing to consider the contradictions between the evidence of PW4 the Government analyst and Dr. Kamau, and;

Four, that the learned trial magistrate erred in rejecting the Appellant's defence without considering that the prosecution did not rebut it as required under Section 212 of Criminal procedure Code.

The facts of the case were that the Complainant was 16 years old on the day in question, 26th December 2003. The Appellant went to the Complainant's home and took away the Complainant's father PW3, **A**. They went back much later and stood outside whereupon the Appellant stated that his wife wanted the Complainant to go get some things from her. That the Complainant's mother, PW2, **L**, insisted that the Complainant be accompanied by her brother which the father **A** and the Appellant declined insisting that he, the father, would be there. It was then that the Complainant followed the Appellant and her father **A** to the Appellant's house. The Complainant saw the Appellant give her father liquor which he drank

and became very drunk. The Appellant then locked **A** in the house and asked the Complainant to follow him to where his wife was. That the Complainant walked behind the Appellant into a corridor where the Appellant knocked her down and forcefully had sex with her. The Complainant said that she had not consented to having sex with the Appellant. That she went straight home and reported to her mother **L**. Both the Complainant and **L** went to the police where the Complainant's panty was taken and she was taken to hospital. **L** told the court that by the time Police went to arrest the Appellant, they found her husband **A** 'dead' drunk.

The Appellant's defence was that **L** asked him for a soda and he told her that he had juice in his house instead. That **L** sent the Complainant to go with him to pick the juice. That after he wrapped the juice and gave it to the Complainant, the Complainant called him outside, held his hand and led him to the back of the house where they had sex. He said he never forced her.

I have carefully analyzed and evaluated the evidence adduced in this case while bearing in mind that I neither saw nor heard any of the witness and giving due allowance as expected of a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32**.

The Appellant was unrepresented in this appeal while **Miss Nyamosi** represented the Republic and opposed the appeal.

The Appellant gave written submission which I have considered in detail. In them the Appellant argued grounds one and two of his appeal together and submitted that the sexual intercourse he had with the Complainant was an agreement 'agenda'. He stated that he had spoken with the Complainant's father, **A** outside the house before the Complainant was called to accompany them. The Appellant submits that the learned trial magistrate should have cautioned herself what the conversation was about. He further submits that the father's involvement in it was evident when he refused to allow any of his sons to accompany the Complainant to his house.

It is a wrong notion to state that if the Appellant and **A** had a negotiation to have the Appellant have sexual intercourse with the Complainant, that it constitutes consent on the Complainant's part and therefore a good defence to the Appellant for the offence charged. **Section 140** of the **Penal Code** provides: -

"140. Any person who commits the offence of rape is liable to be punished with imprisonment with hard labour for life."

Section 139 of the definition for rape thus;

"139. Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape."

The operative words are "**has unlawful carnal knowledge of a woman or girl without her consent**". The law is very clear that consent is personal to the person complaining of having been raped and cannot be obtained through proxy. It is no defence therefore, that the Appellant and **A**, the Complainant's father "negotiated" or "conspired" together to have the former have sex with the latter's daughter.

I have evaluated again the evidence of the Complainant. Her evidence is clear that she did not consent to the sexual act and that all along, she followed the Appellant, not for sex, but to get certain 'items' the Appellant said that his wife wanted to give the Complainant. Indeed after raping the Complainant the Appellant gave the Complainant soap, lotion and other things. In cross-examination the Complainant stated: -

"I came with my father to your house. It seems that you and my father were acting together".

The Complainant's evidence that Appellant and her father were acting together was a speculation. The father denied it in his evidence.

I also analyzed A's evidence. It was his evidence that he and the Appellant never discussed any issue to do with sex. He stated in evidence in chief: -

"I have not given the accused permission to have sexual intercourse with my daughter. When the accused came back to the house he just told me to get out that he was tired."

Indeed the Appellant even cross-examined the Complainant's father on the same issue and he responded thus: -

"It is not true that I have planned for you do to what you did to my daughter. It is not true that we agreed that you assist me in paying school fees for my son."

The Complainant's father denied having entered into any arrangement or agreement with the Appellant to have sex with his daughter. That is possibly true considering that the Appellant chased him out of his house after he raped the Complainant. Even if there was such an agreement, that would not change the legal requirement that consent should be direct from the person complaining of being raped and not through proxy. I find that there is no possibility that the Appellant and A had agreed over the matter due to the fact that the Appellant locked A from outside after ensuring he was very drunk and before he went out to rape his daughter and then chased away A when he had accomplished his mission.

I also analyzed the Appellant's defence. Nowhere did he suggest that he had agreed with A to take his daughter for sex. Nowhere did he suggest that there had been an agreement between him and A for this to happen. His defence blamed the Complainant of having led him by the hand to the back of the house to have sex with him.

The Appellant's defence that the Complainant lured him to have sex with her was an afterthought. I also considered it along the evidence of the Complainant. The Complainant's conduct after the sexual attack shows she had been taken by surprise, that she was not agreeable to it and had been forced. The evidence of the Complainant was that she went home straight and told her mother L. L corroborates her evidence and described her as crying at the time she reported to her. The Complainant also explained why she did not go to her father saying he was too drunk by that time.

PW5, the Police Officer who received the report stated: -

"It is this accused who we charged. The girl was 16 years old. She said that she had not consented to the intercourse. She was even crying when they came to the police station. The father of the girl did not know what was happening... he was extremely drunk."

I am fully satisfied that the Complainant did not consent to have sex with the Appellant. I find that the Appellant had sexual intercourse with the Complainant without her consent and therefore committed the offence of rape.

The Appellant's other ground was that the Government Analyst contradicted Dr. Kamau's evidence. These were PW4 and PW6 in the case. In the written submission, the Appellant did not disclose what the contradictions were but instead stated that he did not place much reliance on that ground since he was not contesting that the Complainant and him had sexual intercourse. I see no contradictions in the findings of these two experts.

The Appellant's last ground that his defence should be rebutted under **Section 212** of the **Criminal Procedure Code** was not elaborated. **Section 212** of the **Criminal Procedure Code** comes into play when new evidence is adduced at the defence stage which requires rebuttal. There was no new evidence adduced and the provisions of that section did not arise.

Having considered this appeal, I find that it lacks in merit on the grounds I have given. I find that the prosecution proved its case on the required standard. I also find that the learned trial magistrate evaluated the entire evidence quite ably and came to the right conclusion. I therefore uphold the conviction.

The Appellant did not challenge the sentence. I agree with **Miss Nyamosi** that the same was legal and also fair in the circumstances. I will not disturb the sentence.

The upshot of this appeal is that the same is dismissed in its entirety.

Dated at Nairobi this 8th day of March 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Miss Gateru holding brief for Miss Nyamosi for the State

Tabitha: CC

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LESIIT, J.

JUDGE