



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 38 of 2005

(From Original Conviction and Sentence in Criminal Case No. 2728 of the Chief

Magistrate’s Court at Mombasa P.N. Ngigi – SRM)

MATESO JUMA APPELLANT

- Versus -

REPUBLIC RESPONDENT

Coram: Before Hon. Mr. Justice L. Njagi

Mrs. Mwangi for Republic

Appellant in person

Court clerk – Kinyua

J U D G M E N T

The appellant in this case was charged with rape contrary to section 140 of the Penal Code. The learned trial magistrate found him guilty as charged and sentenced him to fourteen years imprisonment. He now appeals against conviction and sentence.

The appellant was convicted on the evidence of the complainant, P.W.1, who said that she was raped by the appellant and a second person who was not before the court. As the appellant was the second one to rape her, she chased him, while screaming and asking for assistance, saying that she had been raped. P.W.2 and P.W.3 answered her distress call. They asked for assistance, arrested the appellant and took him to Changamwe Police Station.

The complainant, P.W.1, was then sent for medical examination. According to the P3 Form which the doctor produced in court as exhibit 2, the vagina was intact, labia intact, and no bruises were noted. He remarked that the complainant was most likely raped.

A few issues arise from this medical examination report. It shows that the date of the alleged offence was 25th September, 2003; that it was reported to the police on the same date; and that the complainant was referred to the Coast General Hospital for examination on the same date. However, according to the charge sheet, the particulars of the offence read that the offence was committed on the 26th day of

September, 2003, one day after the complainant had been examined. Was the complainant raped twice, once on 25th September, 2003, and then again on 26th September, 2003?

Secondly, although the offence is alleged to have been committed on 25th September, 2003, the complainant was not examined until 14th November, 2003. This was a good seven weeks after the date of the alleged offence. Consequently, upon examination of the complainant, the doctor found that the vagina was intact; the labia was also intact; and that no bruises were noted. And yet, his additional remarks in the report are that the complainant was “most likely raped.” If everything was intact, then how did he arrive at the conclusion that the complainant was most likely raped? The factual findings do not justify this conclusion.

And, finally, by saying that the complainant was most likely raped, the doctor does not seem to be certain. Criminal matters, such as this one, do not accord any room for speculation, possibilities or probabilities. They call only for certainties. By remarking that the complainant was most likely raped, the doctor’s report is uncertain and inconclusive and cannot be relied upon to convict. If the learned trial magistrate had given the medical report its due accord, he was bound to come to a different conclusion.

In his evidence in chief, the doctor also said that the appellant was to be examined and investigated. We are not told whether he was actually examined and investigated and, if so, the outcome of such examination and investigation. In these circumstances, I agree with Mrs. Mwangi for the Republic that it would be unsafe to uphold the conviction. The appeal is accordingly allowed, the conviction quashed and the sentence set aside. The appellant is also set free unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 10th day of July, 2006.

L. NJAGI

JUDGE