REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
Criminal Appeal 286 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal Case No 260 of 2002 of the Senior Resident Magistrate's Court at Mwingi Ondabu D.O (Esq.) on 14/8/03)

DAVID SYOKI ……..: APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G E M E N T

The appellant faced two counts in Criminal Case 260 of 2002 before the Senior Resident Magistrate's Court, Mwingi. The first count was one of Rape Contrary to Section 140 of the Penal Code whereas the second count was Assault Contrary to Section 251 of the Penal Code. The appellant was convicted on a lesser charge of Attempted Rape Contrary to Section 141 of the Penal Code in count I and was also convicted of count two. He was sentenced to count one, 5 years imprisonment with hard labour and on count II, one year imprisonment and sentences were to run concurrently. The appellant is aggrieved by both convictions and sentences. The complainant told the court that she was working in her shamba on 13/2/02 at about midday when she felt thirsty and went to drink water in the river. She found the appellant seated on a stone at the river. The three women she found at the river left. The appellant then attacked her, dragged her for a while, fell her down, ripped off her underpants and had carnal knowledge of her.

She bit him twice and pushed him off her forcing him to sperm out of her and he got annoyed, slapped her and pushed her injuring her back. PW 1 screamed during the ordeal which attracted the attention of PW 2 who was going to water his cattle. PW 2 said he found the appellant running off whereas the complainant was still lying down on her back with her pants in the hands crying. PW3 on getting the report of rape reported to the police but the appellant could not be found immediately.

PW 5 who examined the complainant found some bruises on the back and the right leg.

He found no evidence of rape.

In his unsworn defence, the appellant recalled that he had earlier borrowed a bicycle belonging to PW 3 which got damaged and he wanted compensation for it. On 12/2/02 the complainant told him to pay her husband PW3 and on the next day he was arrested.

He denied committing the offence but that he was implicated because he had not paid for the bicycle.

In the supplementary petition of appeal, the appellant raises 3 grounds of appeal. They are that there was no sufficient evidence adduced to find a conviction on offence of rape; that there was no evidence in

support of the second charge of assault causing actual bodily harm and lastly that the sentences were harsh in the circumstances. The appeal on both conviction and sentence were opposed.

Mr Masika counsel for the appellant argued the first two grounds together. Counsel argued that PW1 and 2 said that the rape took place on 13/2/02 but PW 4 said that the report he received was that it happened on 14/2/02 and that the magistrate should have resolved the contradiction as to the date on which the offence was committed. On the same issue, it was argued that there was no evidence to support the charges, as there was no medical evidence was adduced to support the hearsay evidence of the clinical officer who saw the complainant on 12/3/02 a month after the alleged offence.

Counsel also submitted that PW1's evidence regarding the assault contradicted that of PW 5 in that PW 1 claimed to have been slapped on the face whereas PW 5 found bruises on the leg and back. It was also submitted that only PW 1 told court that her underpants were torn.

Lastly, it was submitted that the court did not take into account the alleged grudge over PW 3's bicycle allegedly damaged by the appellant.

In regard to the submission that medical evidence was lacking to support the evidence of PW 5, Mr O'Mirera for the state submitted that it is not a mandatory requirement that medical evidence be called. He relied on the case of FRED WANJALA versus **REPUBLIC Criminal Appeal 51/84** where the Court of Appeal held that a sexual offence can be proved without medical evidence, if the evidence is sufficiently cogent. In the present case we had the evidence of PW1. The alleged offence took place in the day time. PW1's screams attracted PW 2 who saw the appellant ran off. PW2 knew the appellant very well. He knew him as a friend and it is not possible that he could have mistaken him for another. PW2 saw the appellant about 50 metres away. Though the appellant alleged that there was a grudge over a bicycle he never actually raised this issue of grudge during cross-examination so that the witnesses could respond to it. Save that PW1 did admit that appellant once took away PW3's bicycle by force and returned it when broken down. If the grudge was between the appellant and PW3, then there would have been no reason for PW2 to make up a story of seeing appellant run away from the scene of crime. Even though the magistrate did not consider the allegation of a grudge, this court can, as an appellant court consider that evidence and come to its own conclusion and the conclusion of this court is that the allegation of a grudge was baseless bearing in mind the totality of the evidence on record.

PW1, 2 and 3 all told court that the offence was committed on 13/2/02. PW4 the police officer said that he received a report that the offence occurred on 14/2/02. PW5 also said that the P3 indicated that the offence took place on 13/2/02.

PW4 told court the report he received. At this stage, it cannot be ascertained whether that was contained in his statement or not. Even though the court did not consider that contradiction, I believe it was a minor contradiction in that the key witnesses PW1, 2 and 3 all say that the offence took place on 13/2/02 and even the record of the police which is the P3 form confirms date given to police as 13/2/02. That contradiction cannot be said to go to the root of the charge. The court accepts the evidence of PW1, 2 and 3 as the truth and it goes to support the charge as to when offence occurred.

It is only PW1 who said that her pants were torn by the appellant. I find that failure by other witnesses to refer to torn pants does not weaken the evidence. PW2 said he found the complainant holding the pants in her hands. He did not say she displayed them out for him to see. It is possible that they did not see the pants when torn.

In her evidence, PW1 said that she was injured on the face and her back and she still has headaches and backache. PW5 did find an injury on the back which is consistent with PW1's evidence. It is only the bruise on the leg that she did not mention. Even if she was not injured on the leg, she was injured on the back and that is evidence of assault. Of course the slap on the face could not be seen.

The magistrate in his judgment found that there was indeed penetration of PW1. He believed PW1. However, he went ahead to reduce the offence to one of attempted rape because no spermatozoa were

found in PW1. That was a misdiscretion on the part of the magistrate. For an offence of rape to be proved, one of the ingredients to be proved is penetration but not the presence of spermatozoa in the victim. The magistrate erred and on the totality of the evidence before the court, the offence committed was one of rape and the appellant should have been convicted of the same. Accordingly, I quash the convictions for the offence of attempted rape, set aside the sentence thereof and I convict the appellant of the offence of rape Contrary to Section 140 of the Penal Code as charged.

The conviction on count II is also confirmed.

Under Section 354 of the Criminal Procedure Code this court has the discretion to increase or reduce the sentence since the appellant is now convicted of a more serious offence. He is hereby sentenced to 7 years imprisonment to run from the date of the earlier conviction on count one. On count two, I found a sentence of one year to have been fair and it is hereby confirmed. Sentences will run concurrently as ordered by lower court. The appeal is hereby dismissed.

Dated at Machakos this 26th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE