



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.56 OF 2001
**(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL
CASE NO.7001 OF 1999 OF THE CHIEF MAGISTRATE COURT AT
MAKADARA)**

VICTOR OMONDI OKUMU APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

VICTOR OMONDI OKUMU (the appellant) was convicted of Rape contrary to Section 140 of the Penal Code on 9th January, 2001 by the Resident Magistrate, Makadara, in Criminal Case No.07001 of 1999. He was sentenced to serve three years and to receive three strokes of the cane. He has now appealed against conviction and sentence.

The particulars of the offence of rape the appellant was convicted of were that on the 29th April, 1999 at Kimathi Estate Nairobi within Nairobi Area had carnal knowledge of Phyllis Nzioka without her consent.

It was the evidence of Phyllis Nzisa on the 29th April, 1999 at about 2.00 p.m. she met the appellant as she was living her parents' residence within Kimathi Estate. The Appellant was at the gate of his residence. She said that the Appellant snatched her sun glasses and she followed him up to his house to retrieve them. When she reached his house he stood by the door but the Appellant pulled her forcefully inside and closed the door. The Appellant then pushed her to a sofa- set and began touching the front part of her body. She said she resisted and a struggle ensued but he pulled her up to the bedroom and held her by the throat making it difficult for her to scream.

While on his bed the appellant started removing her clothes forcefully; a black long sleeved top' blue jeans trouser and her pants. He then raped her but she did not know whether he ejaculated into her. She said the appellant was only able to release her when she scratched him till he bled. She said she then escaped.

While under cross-examination she claimed to have put on the jeans trouser when she was still in the bedroom and to have put on the long sleeved top when she was getting out of the house. She said that, as she was getting out it was the appellant who informed her that she had put on the long sleeved top in the wrong way. Thereupon she adjusted it when she was reaching the gate.

The complainant also told the trial magistrate that she walked up to her parents' house and cleaned herself. She then called her sister KANINI but Kanini was not there. She then went to her friend's house, Sheilla's house and found Sheilla at home whereupon she informed Sheilla about this rape ordeal. She went to town with Sheilla and returned to her parents' home at 6 p.m. when she made a report to her mother. She and her mother then reported to Jogoo Police Station.

Sheilla Rubia (PW 2) was called to testify. It is her evidence that she met the complainant at the appellant's gate when she, the complainant was coming out of the appellant's house. According to Sheilla Rubia she saw the complainant with blood on her face and she was crying. On being asked what the problem was the complainant claimed that the appellant had raped her. Sheilla Rubia said she accompanied the complainant to her house where she washed her face and then they went to town, stayed until 5.30 p.m. Upon their return home the complainant then made a report to her mother.

PC Tarus (PW 3) went to the appellant's house on 29th April, 99 to effect arrest. He and the other police officer were led to the appellant's house by the complainant. Upon arrival PC Tarus said they were told that the appellant was not present in the house. But when they carried a search, he climbed into the ceiling and found the appellant hiding inside. When P.C. Tarus (PW 3) was questioned about this ceiling, he said it was three feet high from the floor.

Medical evidence from Dr Kamau (PW 5) and the Government analyst was adduced. While that evidence established that sexual intercourse had taken place between the complainant and the appellant, Dr. Kamau found that the sexual or genital organs of both of them were normal with no injuries. He notably found no scratches on the body of the appellant.

The appellant, in his defence, told the court that he had sexual intercourse with the complainant's consent.

The essential ingredients of the offence of rape are that (a) sexual intercourse between a man and a woman took place and (b) without the woman's consent. In this appeal the issue is whether the prosecution proved these two ingredients beyond reasonable doubt.

The appellant has admitted to have had carnal knowledge of the complainant. The said complainant stated so in her evidence. Therefore sexual intercourse took place between the complainant and the appellant.

As for the second ingredient, I find that the prosecution failed to prove that the sexual act was committed without the complainant's consent. Medical evidence did not corroborate the complainant's evidence of forceful sexual intercourse. The only evidence which could have corroborated the complainant's evidence would have been Sheilla Rubia's (PW 2). Her evidence is in direct conflict with that of the complainant claimed to have ran out of the appellant's house, gone to her parents' house, washed and cleaned herself, then gone to Sheilla's house, Sheilla on the other hand told the court that she met the complainant at the gate of the appellant's house and immediately she had come out of the appellant's house, and that the complainant had blood on her face and was crying. The trial magistrate did not resolve these conflicting versions.

P.C. Tarus (PW 3) informed the trial magistrate that he arrested the appellant from the ceiling of the house. However P.C. Tarus was discredited when he told the court the ceiling was only three feet high. The trial magistrate did not also resolve this conflict.

For the above reasons I find that the conviction of the appellant for Rape was unsafe. Miss Nyamosi, state counsel, properly conceded this appeal.

I do hereby allow this appeal, quash the conviction for Rape and set aside the sentence imposed.

It is so ordered.

Date This 8th June 2001.

A.G.A. ETYANG'

JUDGE

