REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 42 OF 2019

GORDON OMONDI OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence by Hon. E Mulochi, (RM) delivered on 12th September 2018 in Criminal Case No. 24 of 2018 at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The appellant was initially charged with the offence of attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 8th day of September, 2017 at about 11 a.m at Safaricom 2 Area within Kitengela area of Kajiado County, he intentionally and unlawfully attempted to cause his private organ to penetrate the private organ of EN without her consent.

2. He faced an alternative count of committing an indecent act contrary to section 11A of the Act. Particulars being that on the same day, 8 th September, 2017 at 11 a.m. at Safaricom 2 area within Kitengela Sub-county of Kajiado County, he intentionally and unlawfully touched the private organ of EN without her consent. The charge was later amended to rape.

3. The appellant denied both the charge of rape and the alternative count and after a trial in which the prosecution called 3 witnesses and the appellant's unsworn testimony, he was convicted for rape and sentenced to ten years imprisonment.

4. He was aggrieved with both conviction and sentence and lodged a petition of appeal filed on 24th July, 2019 and raised the following grounds of appeal, that:

> ***1. The learned trial magistrate erred in law and fact by convicting him on evidence that did not meet the required standard of proof beyond reasonable doubt.***
>
> ***2. The learned trial magistrate failed to observe that the prosecution failed to organize for the examination of the appellant so as to establish whether he was perpetrator of the alleged offence.***
>
> ***3. The learned trial magistrate failed to adequately consider his defence.***
>
> ***4. The learned trial magistrate erred in law and fact by shifting the burden of proof to him contrary to the laid down rule that the burden of proof is on the prosecution throughout the trial.***

5. He later filed amended grounds of appeal on 31st August, 2020, stating that;

> ***1. The learned trial magistrate erred in both law and fact by convicting him on evidence which did not meet the requisite standard of proof of beyond reasonable doubt.***
>
> ***2. The learned trial magistrate failed to appreciate that the key ingredients of rape were not well established.***
>
> ***3. The learned trial magistrate failed to observe that the evidence adduced could not support the charge, thus the prosecution resorted to building up their case on trial.***
>
> ***4. The trial magistrate erred both in law and fact by shifting the burden of proof to him contrary to the general rules of practice in a criminal trial.***

5. The learned trial magistrate relied heavily on circumstantial evidence and tilted section 124 of the Evidence Act in favour of the complainant while blatantly dismissing the his defence thus rendering an opinionated judgment.

6. That the learned trial magistrate failed to consider the period that he had spent in remand prison while awaiting the final determination of his case pursuant to the provisions of section 333(2) of the Criminal Procedure Code

6. During the hearing of the appeal, the appellant relied on his amended grounds of appeal and written submissions. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

7. In the written submissions, he argued that the prosecution's evidence did not prove the case beyond reasonable doubt. He faulted the trial court for relying on the evidence of a single witness. According to the appellant, it was not possible for him to commit the offence while still struggling with the complainant. He argued that the whole ordeal could not take 5 minutes as the complainant suggested.

8. On the ingredient of the offence, particularly penetration, the appellant argued that the evidence of PW2 was not conclusive that there was rape. There were no lacerations; the hymen had been broken long time ago and the presence of pus cells meant there was infection given that everything else was normal. PW2 stated that the complainant had injuries on the face, hands and neck and, in his view, there was no proof of rape.

9. The appellant also argued that the issue of rape was the complaint's making. He relied on ***Philip Nzaka Watu v Republic*** [2006] eKLR, to argue that to find conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt.

10. The appellant submitted that the trial court was influenced by PW1's claim that she knew him as a fellow employee. He submitted that even an honest witness can still be mistaken. He relied on ***Roria v Republic*** [1967] EA 583 for the position that a witness may be honest but still mistaken.

11. The appellant faulted the trial court for relying in the evidence of a single identifying witness, and cited ***Abdallah Bin Wendo & Another v Republic*** 20 EACA 168, that a fact may be proved by a single witness but that does not lessen the need for testing that evidence. According to the appellant, there was no evidence from any other witness except the complainant.

12. The appellant again faulted the trial court for allowing amendment of the charge twice. He submitted that he was first charged with attempted rape which was later amended to rape but in his view, the amendment raised eyebrows. He argued that there was no way a victim could not confirm from the first instance that she was raped or not. He relied on ***Charles Nega v Republic*** CRA No. 38 of 2015, for the argument that the evidence must be led which goes beyond preparatory stages.

13. On ground 4 and 5, the appellant argued that section 111 of the Evidence Act places the burden of proof on the prosecution. He submitted that though the complainant and him were coworkers, that did not mean complicity in the commission of the offence.

14. Regarding section 124 of the Evidence Act, the appellant argued that evidence of a single witness ought to be under strict scrutiny. He relied on ***Mdoe Gwende v Republic*** [2004] eKLR for the argument that circumstantial evidence is evidence that should be subjected to thorough scrutiny since it is evidence which can easily be fabricated. He also relied on ***Abanga alias Onayngo v Republic*** CRA No. 32 of 1990 on circumstantial evidence.

15. The appellant further argued that the prosecution did not call important witness who were said to have first arrested him. He argued that this was detrimental to the prosecution's case. He relied on ***Nganga v Republic*** [1981] KLR 483, for the preposition that where the prosecution fails to call material witness, they fail to do so at their own risk.

16. According to the appellant, the PW3 did not do much to get the truth in the case, including gathering relevant evidence such as forensic evidence. He relied on many other decisions to support his case. He also faulted the trial court for failing to take into account the period he had spent in remand during sentencing.

17. The prosecution counsel also relied on their written submissions dated 13th October, 2020 and filed on 1st December, 2020. According to the prosecution counsel, the prosecution proved its case beyond reasonable doubt. It was submitted that the ingredients of the offence were proved namely: penetration, lack of consent and identity of the appellant as the perpetrator.

18. On penetration, the prosecution counsel relied on the evidence of PW1, the complainant and PW2, the clinical officer who examined her to argue that penetration was proved. On consent, it was submitted that there was evidence of use of force which proved lack of consent. The prosecution counsel further relied on the evidence of PW1 that the appellant forced her to have sexual encounter with him. Regarding identity, of the perpetrator, it was argued that PW1 and the appellant were known to one another; worked together and, therefore, there was no likelihood of mistaken identity. She urged the court to dismiss the appeal.

19. I have considered this appeal, submissions and the decisions relied on. I have also read the record of the trial court and the impugned judgment. This being the first appeal, it is by way of a retrial and parties are entitled to this court's reevaluation, reanalysis and reconsideration of the evidence and its own decision on that evidence. The court should however bear in mind that it did not see the witness testify and give due allowance for that. (See ***Okeno v Republic*** [1972] EA 32).

20. In ***Kiilu & Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting

evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

21. The complainant, testified that on 8th September, 2017 she reported at work at 8 in the morning and continued with her usual chores. She was later joined by the appellant who also worked in the homestead. As she was going about her duties, the appellant held her from the behind. She asked him what he wanted but he did not respond. They struggled, fell down and she injured her left eye. The appellant overpowered her, undressed her and proceeded to raped her. After he was done, he ran out of the house. She followed him crying. She saw Kenya Power and Lighting Company employees working nearby and she told them what had happened. One of the employees asked for her employer's phone number and called the employer. Meanwhile, they stopped the appellant from escaping. The employer came and called the police who came and arrested the appellant. The officers asked the employer to take the complainant to hospital. He took her to Kitengela Medical and later to Nairobi Women Hospital Kitengela where she was treated. She later went to Kitengela police station and recorded her statement.

22. PW2 Ruth Lengete, a clinical officer working at Kitengela Sub County Hospital, testified that on 10th December, 2017 she was working at Nairobi Women's Hospital. She attended to complainant who was taken to the facility with a history of rape. She had injuries on the face, neck and hands. There were no lacerations in her private parts. The hymen had been broken a long time ago. There was abnormal white discharge from the private parts. Swabs and urine tests showed pus cells which was an indication of infection. Everything else was normal. She concluded that the complainant had been raped. She produced the PRC as PEX 1. She filled the P3 form which she produced as PEX 2. The complainant was put on anti-pregnancy and STI treatment since she had bacterial infection.

23. PW3 No. 54804 Sgt. Joshua Magai of Kitengela police station and the investigating officer in the case, testified that on 8th September, 2017 at 11 a.m. he received a call notifying him that a rape suspect had been arrested. He rushed to the scene where he found the appellant who had been arrested by members of the public. He also found the complainant crying. The complainant pointed out to the appellant as the person who had raped her. They took the appellant to the station while the complaint to was taken to hospital by her employer. They took the appellant to hospital after complaining that he had been assaulted by members of the public. In cross examination, he admitted that the complainant's employer was not a witness in the case.

24. When put on his defence, the appellant elected to give unsworn testimony. He testified that on 8th September, 2017 he went to work as usual. He heard the complainant calling him. She told him that she wanted to send him to the shop, but he told her he was busy. She went to where he was and again told him that she wanted to send him to the shop but he declined and told her he was busy. She returned to the house telling him that she will see if he would continue working in the homestead. She later came back calling his name and when he asked her what the problem was, she called employees of Kenya Power and Lighting Company workers who were working nearby and told them that she had raped her. The men came and surrounded him and started assaulting him. When he told them that he was an employee in the homestead, they asked him their employer's phone number. They called the employer and when he came, they told him what the complainant had told them. The complainant also told the employer that he had raped her. He was taken to the police station and charged with the offence. He however denied raping the complainant.

25. From the above evidence the trial court was satisfied that the prosecution proved its case, convicted the appellant and sentenced him prompting this appeal. The appellant has faulted the trial court on many grounds. However, from the grounds of appeal and submissions, the critical issue that arises for determination in this appeal, is whether the prosecution proved the case of rape case beyond reasonable doubt.

26. The law places the burden of proof on the prosecution and that proof must be beyond any reasonable doubt. In a charge of rape, the prosecution must prove penetration, lack of consent and identity of the perpetrator. The appellant worked with the complainant in the same homestead. There would therefore be no likelihood of mistaken identity.

27. The prosecution was also to prove penetration. Penetration is defined by section 2 of the Act as partial or complete insertion of one's private organ into the other's private organ. To prove penetration, the prosecution had to show that there was either partial or complete insertion of the appellant's male organ into the complainant's private organ.

28. The prosecution relied on the evidence of the complainant and that of PW2, the clinical officer to prove penetration which must have been through force or deceit to amount to rape. The complainant testified that the appellant went to where she was working, wrestled her to the ground and raped her. PW2 on her part testified that the complainant went to hospital with a history of rape. On examination, she had injuries on the face, neck and hands. There were however, no lacerations in her private parts. The hymen had long been broken. There was abnormal white discharge from the complainant's private parts. Swabs and urine tests showed pus cells, an indication of infection. Everything else was however normal. She concluded that there was rape. According to the witness, the complainant was put on treatment because of "**bacterial infection."**

29. In ***Philip Nzaka Watu v Republic*** [2006] eKLR, it was held that that to find conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in ***Stephen Nguli Mulili v Republic*** [2014] eKLR:

"[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR."

30. In the famous case of ***Miller v Ministry of Pensions,*** [1947] 2 All E R 372, ***Lord Denning*** stated with regard to the degree of proof beyond reasonable doubt:

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

31. And in ***Bakare v State*** **(**1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."*** (emphasis)

32. Applying the above principles to this appeal, was there proof beyond reasonable doubt that there was penetration so as amount to rape? As the trial court appreciated, this was a case of the testimony of the complainant as the sole witness. The court also appreciated the import of the proviso to section 124 of the Evidence Act which permits a court to convict on the basis the evidence of a victim of a sexual offence only if the evidence is believable.

33. This appeal therefore, turns on the evidence of PW1 and PW2. PW1 stated how the appellant went and wrestled her to the ground and raped her. She was alone. PW2 on the other hand, is the clinical officer who examined the complainant when she went to hospital. I have anxiously evaluated the evidence of PW2 which is critical in this appeal as it was material to the prosecution case before the trial court. The question that arises is; did PW2 conclude that there was penetration? I think not and a critical assessment of that evidence supports this view.

34. Even though PW2 stated in her conclusion that there was rape, that conclusion was not backed by her own testimony. According to this witness, there was abnormal discharge in the complainant's private parts. Swab and lab tests showed pus cells which was evidence of an infection. **"Everything else was normal."** The complainant was put on treatment because of the bacterial infection due to the presence of pus cells.

35. According to the investigating officer, PW4, the appellant was taken to hospital the same day after he complained that he had been assaulted by members of the public. There was no evidence that the appellant was examined to ascertain whether the discharge found in PW1 was from him and what that discharge was so as to form the basis of PW5's conclusion that there had been penetration to prove a charge of rape. This is because discharge alone cannot be conclusive evidence of penetration or rape.

36. I have perused both the record of appeal and the trial court file. I could not trace original or copies of the PRC and P3 forms that were said to have been produced as exhibits before the trial court. There was also no list of exhibits to show what exhibits were produced before that court. This court could therefore not independently review those reports to satisfy itself that what PW5 told the court was correct and the conclusions she arrived at following the complainant's examination. This would have enabled this court make independent conclusion on those documents that the medical evidence proved that indeed there was penetration.

37. As the Court of Appeal stated in ***Pius Arap Maina v Republic*** [2013] eKLR, the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts, must be in favour of the accused. In the present appeal, I agree with the appellant that there was no conclusive evidence that there was penetration. The trial court was therefore in error when it failed to critically examine and consider the medical evidence in the testimony of PW2 thereby arrived at an erroneous conclusion that the prosecution had proved penetration beyond reasonable doubt to amount to rape.

38. It is true that the court can convict on the basis of a single witness testimony in sexual offences, if it believes that the victim is telling the truth. That cannot, however, be the case where there is no conclusive medical or other evidence that there had been penetration. The trial court stated that it believed the complainant as a truthful witness. That may be so, but the medical evidence was not helpful in this respect. This was clearly a case of either poor investigation or lack of interest on the part of the police to ensure that justice is served.

39. The appellant also argued that the prosecution did not call material witnesses including the employer to both the complainant and the appellant. He urged the court to make an adverse inference that failure to call those witnesses was fatal to the prosecution case. As already stated, given the evidence on record, particularly that of PW2, those witnesses would not have been helpful. They would have simply told the court what they had been told by the complainant which could not in itself have proved rape.

40. Having considered the appeal, submissions and the law, and from my own reassessment and reevaluation of the evidence, I am satisfied that there was doubt that the appellant raped the complainant, which doubt should be to the benefit of the appellant.

41. Consequently, this appeal is allowed, conviction quashed and sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Kajiado this 5th day of February, 2021.

E. C MWITA

JUDGE