



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 50 OF 2020

BETWEEN

JOSPHAT MUTWIRI ANAMPIU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tigania Criminal Case No. 2354 of 2015 by Hon. P.M. Wechuli (RM) on 28th May, 2020)

JUDGMENT

Background

1. **JOSPHAT MUTWIRI ANAMPIU** (*Appellant*) has filed this appeal against his conviction and sentence on the first charge of rape contrary to section 3(1)(a) and (b) as read with subsection 3 of the Sexual Offences Act (*the Act*) and the second charge of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The offences were allegedly committed against **CK** on 11th October, 2015.

2. At the conclusion of the trial, the Appellant was found guilty and convicted of both counts. He was subsequently sentenced to serve ten (10) years' imprisonment for the offence of rape and two (2) years' imprisonment for the offence of assault causing actual bodily harm.

The Appeal

3. The conviction and sentences provoked this appeal which was argued by way of submission.

Analysis and Determination

4. This being a court of first appeal, I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 OF 2005** which held as follows: -

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.

5. I have considered the appeal. The record of the trial court reveals as follows:

i. The Appellant was arraigned before the court on 28th October, 2015

ii. He pleaded not guilty to both counts and was released on bond

iii. Appellant jumped bail and case was withdrawn under section 87(a) of the Criminal Procedure Code on 26th November, 2018

iv. Almost a year later, Appellant was arrested and was presented before the court on 03rd June, 2019, and charged afresh

v. The complainant was not recalled to testify on the new charge and only the doctor testified

vi. On the basis of complainant's evidence on the withdrawn charge, the Appellant was convicted and sentenced

6. From the foregoing summary of the trial, I have come to the conclusion that the trial court erred when it failed to call the complainant to testify on the new charge.

7. The trial is therefore declared a mistrial. The state urged the court to order a retrial which the Appellant is not opposed to.

8. There is no doubt that the crimes committed against the complainant are grave.

9. Consequently, it is hereby ordered:

1. Appellant's appeal is allowed, the conviction quashed and the sentence set aside

2. The file is sent back to Tigania Magistrate's Court for retrial before any other magistrate other than Hon. P.M.Wechuli

3. Mention 03.03.2021 at Tigania Magistrate's Court for directions as to the retrial

DELIVERED AT MERU THIS 04th DAY OF February 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Accused - Present in person

For the State - Ms. Mbithe