



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CRIMINAL APPEAL NO 12 OF 2018**

**SIMON MUNYUA MUCHEKE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original Conviction and Sentence in Nanyuki CM Sexual Offence Case No 46 of 2016 – L Mutai, CM)**

**J U D G M E N T**

1. The Appellant herein, **SIMON MUNYUA MUCHEKE**, was convicted after trial of **attempted rape** contrary to **section 4** of the **Sexual Offences, Act, No 3 of 2006**. On 27/02/2018 he was sentenced to serve five (5) years imprisonment. He has appealed against both conviction and sentence.

2. The Appellant's main grounds of appeal are –

(i) That he was not positively identified.

(ii) That the trial court failed to consider that the complainant never reported the alleged attempted rape to the authorities.

(iii) That the trial court did not consider the Appellant's defence and rejected it out of hand.

3. Learned prosecution counsel supported the conviction. He submitted that the offence was proved against the Appellant beyond reasonable doubt.

4. I have read through the record of the trial court in order to appraise the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I did not see and hear the witnesses testify, and I have given due allowance for that fact. I have also considered the Appellant's written submissions and learned counsel's oral ones.

5. The prosecution case was that the complainant (PW1) was walking home at about 9.00 pm in the night of 15/10/2016 on a public road. She found the Appellant sitting on the road-side smoking bhang. The Appellant joined her in walking and started a conversation with. PW1 stated that she recognized the Appellant by his voice and also by sight as there was "plenty of moonlight." She had known him before for about 2 years and had worked with him. He was also a neighbour.

6. PW1 further testified that as they walked along the Appellant tripped her and she fell down. He then got on top of her and struggled with her as he tried to remove her clothes. In the process he bit her ear, and she bit his fingers. She put up a fight, and when he removed his penis and tried to penetrate her she grabbed his testicles and also bit him on the lips, upon which he stood up. All the while PW1 was screaming.

7. Upon the Appellant standing up PW1 grabbed a stone and hit him with it on the forehead. At that time some 2 men, whom she named as N and WN, responded to her screams by coming to the scene, upon which the Appellant escaped.

8. The following day, 16/10/2016, further testified PW1, she went to **Kalalu Administration Police Post** and later to **Umande Police Station** where she recorded her statement.

9. In cross-examination by the Appellant PW1 stated that the scar caused by her hitting him with the stone on the forehead was still there, and that when he was arrested his forehead had a fresh wound. She further stated that she did not go to hospital because she had no money.

10. The trial court subsequently allowed PW1 to be recalled for further cross-examination by the Appellant. In his second round of cross-examination PW1 stated that SN and P, came to her rescue with others.
11. The testimonies of PW2 (PKK) and PW3 (SN) were that on 15/10/2016 at about 9:00 pm they were watching television in the home of PW3 when they heard screams. They responded by going to the scene, which was on a public road, where they found PW1. She told them that somebody had attempted to rape her and that in the struggle she had hit her assailant on the forehead with a stone and had also bitten him on the lips. She gave them the name of the assailant as SM.
12. PW2 and PW3 further testified that on the following day they arrested the Appellant whom they knew. He had a fresh injury on his forehead. His right middle finger appeared to have a human bite. They escorted him to the local Administration Office. The complainant was called there and she identified the Appellant as the person who had tried to rape her the previous evening.
13. In cross-examination they denied that they or others assaulted the Appellant when arresting him. They also stated that they had not found the Appellant at his home but found him in the home of one K.
14. PW4 (JG) stated that he was the local Administration officer ("Sub-area"). He too had heard screams on 15/10/2016 at about 9.00 pm but ignored them. The following day the Appellant was brought to him by members of the public upon allegation that he had tried to rape the complainant. The complainant then came "*and identified the accused among many other young men*". The Appellant had fresh wounds on his forehead and lips.
15. PW4 further stated that the Appellant was then escorted to **Umande Police Station**. In cross-examination PW4 stated that the Appellant never complained to him that he had been assaulted by any mob when he was arrested. He also stated that the Appellant was the only suspect brought to him.
16. PW5 (CPL GABRIEL LEIPEI) was the investigating officer of the case. On 16/10/2016 at 5.30 pm he was instructed by his superior to proceed to **Kalalu Administration Police Post** where he re-arrested the Appellant and brought him back to **Umande Police Station**. He observed that the Appellant had fresh wounds on his forehead and on a finger of the left hand. The wound on the finger appeared to be a human bite. He recorded witness statements and charged the Appellant.
17. In cross-examination PW5 stated that the Appellant never complained to him that he had been beaten by members of the public.
18. The prosecution closed its case after the testimony of PW5 on 05/10/2017. On 12/10/2017 the trial court ruled that the Appellant had a case to answer. The Appellant then applied that PW5 be recalled for further cross-examination. The court allowed this application, and PW5 was recalled on 23/01/2018. His further cross-examination by the Appellant did not elicit anything significant. The prosecution then closed its case a second time.
19. Another ruling was delivered on 06/02/2018 and the Appellant was found to have a case to answer the second time around. In his defence he testified under oath and called one witness (his wife).
20. The Appellant testified that on 15/10/2016 he went to work at his usual place. He later returned home. At about 7.00 pm his wife called him and asked him to meet her at **Maili Nane** to help her carry some goods. He did so and they arrived home at 8.00 pm. He watched television, ate supper and slept at 10.30 pm. The next day he took his animals out to graze and returned home about 9.00 am. He was then met by four men whom he knew well. They told him that the "Sub-area" needed him. PW3 then hit him and he fell down. He then realized that PW3 had injured him on the face with a ring he had on his finger. The other 3 men also joined in beating him while accusing him of sleeping with other people's wives. PW3 then demanded KShs 10,000/00 from him, or he would suffer consequences. They then escorted him to the "Sub-area". There he was confronted with an allegation of attempted rape.
21. The complainant then arrived and the men present told her that he was the suspect. Upon seeing the injury on his forehead she confirmed that indeed he was the one who had attempted to rape her. He was then escorted to the police station and later was charged.
22. In cross-examination the Appellant stated that he knew the complainant, had worked with her and was her neighbour. He also stated that she was not present when he was assaulted by the persons who arrested him.
23. DW2's (Appellant's wife) testimony was the same as that of the Appellant concerning how she had called him and asked him to meet him at **Maili Nane** to assist her carry some stuff, etc. In cross-examination she stated she would not mind "helping (him) out."
24. That then was the totality of the evidence placed before the trial court. At first glance the prosecution did appear to have a very strong case against the Appellant. However, a close scrutiny reveals a number of short-comings.
25. To begin with, the complainant (PW1) never formally reported the attempted rape to the authorities before the Appellant's arrest. This may not be a big deal as the Appellant appears to have been arrested early on 16/10/2016, probably before the complainant had a chance to go and report the attempted rape.
26. Much more serious is the fact that PW1, in her testimony as recorded by the trial court, did not once state that she had given her assailant's name to "N and WN" when they came to the scene in response to her screams. Why was this?
27. Thirdly, the injuries allegedly inflicted upon the Appellant by the complainant were obviously crucial to the prosecution case, as it was the prosecution case that they directly tied him to the attempted rape. Why then was the Appellant not presented for a medical examination and the report thereof presented to court? Although it was not the Appellant's case that he had no injuries as stated, those injuries were the

crux of the prosecution case, and it was important that they be medically verified for completeness of evidence. The complainant also alleged that she was bitten on the ear by her assailant. She too should have been medically examined and that evidence presented to court.

28. Finally, there is the curious statement by PW4 (the Administration officer to whom the Appellant was presented by members of the public who arrested him), that

***“The complainant came and identified the accused among many other young men.”***

This is a very loaded statement. It means that PW4 conducted some informal identification parade. Apart from the obvious risk that such parade could not have been conducted with the necessary scrupulous fairness, why would the parade have been necessary if the complainant had told all and sundry that she recognized her attacker, a person she knew very well by name, having worked with him for two years? And a neighbour to boot!

29. It can only mean that, at least to PW4, the first person in authority to whom the complainant “reported” the assault, was not quite sure as to the identity of the person who had assaulted her, hence the need for the informal identification parade.

30. Upon my own evaluation of the evidence placed before the trial court, I am not satisfied that the Appellant’s conviction is safe. His defence as presented is entirely plausible. It is likely that the complainant did not recognize her attacker who may have been a total stranger.

31. In the event I will allow this appeal in its entirety. The Appellant’s conviction is hereby quashed and sentence imposed upon him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 3<sup>RD</sup> DAY OF MARCH 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 4<sup>TH</sup> DAY OF MARCH 2021**