



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 126 OF 2019

KJB.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. T.A Sitati PM

on 29.8.19 in Kwale CMC S.O No. 113 of 2018)

JUDGMENT

Introduction.

1. KJB was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.
2. After trial, the trial court found the Appellant guilty of the offence of gang rape and deliberate transmission of HIV to the complainant and he was convicted and sentenced to serve life imprisonment.
3. Being aggrieved by the conviction and sentence, the Appellant filed his Appeal on the following amended grounds:
 - a) **That the learned trial magistrate erred in law and fact in convicting me the appellant without considering that identification being an essential element in a case of defilement was not proved beyond reasonable doubt.**
 - b) **That the learned trial court magistrate erred in law and fact in convicting me the appellant without considering that no DNA was conducted to establish the real perpetrator of the heinous act.**
 - c) **That the learned trial court magistrate erred in law and fact in convicting me the appellant without considering the medical evidence adduced in court did not support the charge at hand.**
 - d) **That the learned trial court magistrate erred in law and fact in convicting me the appellant without considering that the present case was poorly investigated.**
 - e) **That the learned trial court magistrate erred in law and fact in convicting me the appellant without considering that the source of arrest was not really established.**
 - f) **That the learned trial court magistrate erred in law and fact in convicting me the appellant without considering my reasonable defence.**

SUBMISSIONS

4. The Appellant filed his written submissions and relied on the same. The appellant submitted that he was arrested on mere suspicion after he was found on the vicinity where the complainant was raped. That it was not clear why he was arrested and he was not subjected to any identification parade. He relied on the case of **Donald Atiema Sipendi .vs. R (2019) eKLR** where the court stated that **“the positive identification of an accused is an essential element of any offence. It is a fundamental part of a criminal process eye witness testimony directly linking the accused to the commission of the offence is likely the most significant evidence of the prosecution.**

5. The appellant testified that he was not subjected to a DNA test to ascertain if it was him who committed the offence.

6. He submitted that the sentence meted out on him was harsh and offensive for it was a minimum mandatory sentence. The appellant submitted that he had a strong defence which was not considered by the trial court.

DETERMINATION.

7. This being a first appeal this court as held in the case of **Okeno vs Republic** has an obligation to re-evaluate and re-look at the evidence in the trial court a fresh and consider whether the trial magistrate's decision was based on the principles of law and on evidence.

8. The prosecution case was that on the 5th day of September, 2018 at [Particulars Withheld] village in Msambweni Sub-County within Kwale County, in association with others not before the court intentionally and unlawfully caused his penis to penetrate the vagina of MW a child aged 16 years old.

9. That PW1 testified that on 5/9/2018 at 11:30 am she left Madrassa for home and when she reached the oad between [Particulars Withheld] and [Particulars Withheld] she saw three men in Boshori masks following her. The men carried her into the forest where they assaulted her till she lost consciousness. she testified that when she regained consciousness she noticed her dress was dirty, her underpants was missing and she had pains on her body parts including her vagina. She told court that she did not recognize any of the men. That she was not rescued by anyone and she walked home on her own.

10. PW1 testified that when she got home she told her mother who took her to Msambweni Hospital. She later reported the matter to the police. She told court that she did not know the accused. He was arrested because he was at a shamba near where she was defiled and people knew it was him and his friends.

11. PW2 MAK recalled on 5/9/2018 he was going to his farm. He passed a few bushes and saw three men hiding in the bush, wearing boshori hats, he recognized one of them. When he reached home he heard people talking about a girl who was raped by three men in their farm. He at once figured out the three me he saw must have been the ones who raped the girl. He testified that he saw the face of the appellant and recognized him since his hat was on his head.

12. PW2 testified that he knew the appellant and even his family members. He recorded his statement at Msambweni Police station.

13. PW3 Philip Kibet Chebii of Msambweni County Referral Hospital testified that complainant was in good general health, she had pains on her left side on the lower tummy, her private organ was swollen and she had so much pain, her hymen was also broken and she had a whitish discharge. It showed that she had been raped. He produced the P3 form Pexh-1, treatment notes Pexh-2.

14. PW4 was No. 1990089206 Senior Sergeant Mohamed Bakari attached to kambani quick response team. He recalled 5/9/2018 while on duty ad had released the Madrassa students to go for lunch break, after 45 minutes he got a report that one his students had been gang raped by known people. With help of villagers he arrested the suspects and took them to Msambweni police station and were charged in court.He testified that the appellant was the main suspect.

15. PW5 FHM, the mother of the complainant told court that on 5/9/2018 at around 1230 pm her daughter came in looking ill, her buibui was muddy. On enquiry PW1 said she had been beaten up by boys at [Particulars Withheld] and she was also raped. PW5 called the brother inlaw and his wife and they took her to hospital and later on reported the matter to Msambweni Police Station.

16. PW6 Dr. Hassan Ahmed Alhamdi a dentist at Msambweni County Referral hospital told court that on 15/10/2018 he examined the complainant to determine her age. He checked her dental pattern, checking the sequence of the eruption and found her to be 16 years old. He produced the age assessment report dated 15/10/2018 as Pexh-3.

17. PW7 No. 89356 Sergeant Simon Ekenee attached to Msambweni Police station, the investigation officer testified that on 12/10/2018 the appellant was presented to their station. He had been arrested at [Particulars Withheld] Village where he had escaped to after committing this offence. He visited the scene of crime and charged the appellant.

18. At the close of the prosecution's case, the Appellant was placed on defence and he opted to give unsworn statement with no witness. The Appellant testified that on 12/10/2018 he was ashore after fishing when the police arrested him. He testified that he was never medically examined.

Issues arising

a) Whether DNA was necessary

b) Whether the appellant was properly and clearly identified as the perpetrator

c) Whether the medical evidence supported the charge

d) Whether the Defence was considered

e) Whether the source of his arrest was established

f) Whether the sentence was harsh and excessive

19. Section 10 of the Sexual Offences Act provides that: -

“Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life”

20. On the issue of whether DNA test was necessary, It was PW3’s testimony that there was no presence of spermatozoa when the complainant was examined, he said it is possible for one to be raped and still there be an absence of spermatozoa due to many reasons. The presence of spermatozoa is not a strict requirement for purposes of penetration. Therefore a DNA test is not a requirement in proving penetration. In **Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR** the court held that:

“As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.”

21. On the issue of his identification, the offence was committed during the day by men who wore boshori hats to conceal their identity. The complainant testified that she did not recognize any of them. The three men had carried her to a farm with bushes where they beat her up until she was unconscious. When she regained consciousness she was in so much pain and she discovered that she had been raped. In court she said she did not recognize the appellant. PW2 testified that when he was walking to his farm, he saw three men concealing their faces with boshori hats, one of the men had not concealed his face completely hence PW2 recognized him. PW2 did not see the men commit the offence but when he heard of the circumstances surrounding the rape, he related to what he had encountered and put the pieces together and reported of having seen the appellant in the description of what the complainant had explained.

22. PW2 saw the appellant and recognized him. It could not have been for no reason that the appellant tried his best to hide himself from PW2. in **Peter Musau Mwanzia V R (2008) eKLR**, the Court of Appeal held that, “we do agree that for the evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstance that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself.” I am convinced that the identification of the appellant is not in doubt since PW2 saw him and recognized him, he even knew his family members.

23. On whether the medical evidence supported the charge, PW3 when giving his medical evidence testified that indeed there was penetration on the complainant. He confirmed that on examination of the complainant’s genitalia, it was swollen and painful, the hymen had been ruptured and there was a whitish discharge. The only medical evidence needed to prove this offence was penetration which was proved by PW1 and PW3.

24. On whether the defence was considered, the appellant gave an unsworn defence, he denied all the charges. The trial court magistrate considered his defence and said that it did not shake the prosecution’s evidence.

25. On whether the source of his arrest had been established, the appellant was arrested by PW4 who was a Madrassa teacher to the victim. PW4 was also a police officer, he then took the appellant to the police station where he was rearrested by PW7, a police officer and the investigation officer in this matter.

26. On whether the sentence was harsh and excessive, Section 10 of the Sexual Offences Act provides that a person found guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life. This carries a mandatory sentence of fifteen years. The trial court jailed the appellant to life imprisonment taking into consideration the circumstances of severity of the offence and that the appellant infected the complainant with HIV. I have had the opportunity to review the evidence before the trial court, I have not come across any document revealing the HIV status of the appellant or any evidence showing that the complainant was infected with HIV. In that case and in the absence of reason for enhancing the sentence and also in consideration of the **Muruatetu Case** that declared all mandatory sentences unconstitutional, I reduce the sentence to 15 years with effect from his date of arrest 16.10.2018.

27. From the foregoing, the appeal fails on all the grounds apart from the ground of sentence as discussed above.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF JUNE, 2021

HON. LADY JUSTICE A. ONG’INJO

JUDGE