



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E036 OF 2020

ELIAS MUNUATHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by P.M Wechuli SRM

in Tigania SO No. 45 of 2018 on 22/4/2020)

JUDGMENT

1. On 27/12/2018, **Elias Munuathi (“the appellant”)** was arraigned before the Principal Magistrate’s Court at Tigania and charged with the offence of rape contrary to **section 3(1)(a)** as read with **section 3 of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 7/12/2018 at around 01.00 hours, at [Particulars Withheld] Village, Anjuki Location in Tigania Central sub county within Meru County, he intentionally and unlawfully caused his male genital(penis) to penetrate into the female genital organ(vagina) of **SK (the complainant)**.

2. He also faced an alternative charge being committing an indecent act with an adult contrary to **section 11(A) of the Sexual Offences Act**. It was alleged that on the same day, place and time, he intentionally touched the female genital organ(vagina) of SK.

3. He faced a second count of assault causing actual bodily harm contrary to Section 251 of the Penal Code pursuant to which it was alleged that on the same day, place and time, he wilfully and unlawfully assaulted Sabina Kainda by cutting her on the two fingers of the left hand and one finger on the right hand using a knife, thereby occasioning her actual bodily harm.

4. The appellant denied all the charges but after trial, in which the prosecution called four witnesses with the defence being supported by the unsworn statement of the appellant and the evidence of his mother called as DW2, the court found the prosecution’s case to have been proved its case beyond reasonable doubt, found guilty, convicted him on the first count of rape then sentenced him to 10 year’s imprisonment.

5. Aggrieved and dissatisfied by that decision, the appellant has now appealed to this court against both the conviction and sentence. He has raised 5 grounds which in reality amount to into 4 grounds, as follows: -

- a) The trial court erred in convicting and sentencing the him to 10 years’ imprisonment, despite the complainant stating that she did not recognize the person who raped her, as it was dark.**
- b) The trial court erred by failing to note that the report of the clinician did not prove the offence of rape.**
- c) The trial court erred by failing to factor in the pre-trial detention period as provided for under section 333(2) of the CPC.**
- d) The trial court erred in failing to consider his defence.**

6. In his submissions, the appellant contends that the prosecution did not prove its case to the required standard. He faults the trial court for heavily relying on inconsistent evidence of PW3 as the basis for convicting him. He further faults the trial court for dismissing his defence and failing to take into account the time he had already spent in custody. He relied on **Roria v R (1967) EA, Abdallah Bin Wendo & anor v R 20 EACA 168 and Philip Nzaka Watu v R (2006) eKLR** in support of his submissions.

7. The prosecution submitted that it had proved beyond reasonable doubt all the ingredients of rape and the evidence adduced was solid. The case of **Daniel Kimani v R [2018] eKLR** was relied on to support those submissions.

8. This being a first appeal, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own independent findings and conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Daniel Njuguna Wairimu v R (2010) eKLR**

9. **PW1 Martha Njeri**, a Clinician at Mikinduri Sub-County Hospital, examined the complainant on the material day. She had tenderness on her upper and lower lips, injuries on anterior chest, left and right fingers. She also had a whitish discharge and the lab report showed pus cell, red blood cells and few epithelial cells. Based on the above revelation, PW1 concluded that the complainant had been raped.

10. **PW2** was the complainant. She testified that on the material day and time, it was raining when she suddenly heard a bang and somebody, who had a knife, came and held her by the neck. He struggled with her, while holding her by force till his knife cut her fingers, and then raped her. There was electricity but when he entered the room, he switched it off. When asked by the appellant whether she knew him, she denied. She saw him when he was on top of her because he shone a torch in her face. She identified him but when she wrote her statement, she did not say so because she was very sick. M, who was in the next room, came to rescue her after the rain had stopped. He found the appellant standing outside and told her it was the appellant. She went to the hospital then to the police to report. During cross examination, she stated that she wished to adopt what she had recorded in her statement. The statement read that she could not identify him since it was dark in the room but she could feel it was a huge person. Her son came and said he had seen two people but he could not identify them. She nonetheless maintained that it was the appellant who had raped her because when he was arrested, he offered her Kshs 50,000 so that she could forgive him. At the police station, she stated that it was the appellant who committed the offence. She fell sick for 3 months after the incident hence her statement at the police. She was firm that she saw the appellant.

11. **PW3 AM**, son to **PW2**, recalled hearing her mother making throttling noises on the material day. He called her but she did not answer. He found one person, near the house, with a leather jacket who he knew. There was also another person whom he did not know. The appellant was in the house while the other person was outside. He screamed but there was a lot of rain. After identifying the appellant, he saw her mother unable to talk. His mother told him that one of those people had raped her. There was electricity so he saw the appellant and the other person. He even asked the appellant, whom, he knew well, why he had done that to his mother. The appellant, who was armed with a knife, ran away but was arrested later. During cross examination, he stated that there was electricity light where he was standing. He followed the appellant for around 100m but he could not recognize the other person because he had hidden his face. He denied owing the appellant any money. He told the police that he had seen the appellant commit the offence.

12. **PW4 PC (W) Naomi Ateya** of Mikinduri Police Station, testified on behalf of the initial investigating officer who had since proceeded on maternity leave. On the material day, a report was made by the complainant, that she was assaulted and raped by an unknown person as she slept. The complainant called her son who saw two people outside the house. He chased them and recognized the appellant. During cross examination, she stated that it was PW3 who saw and chased the appellant. She concluded that the appellant was not taken for examination.

13. In his defence, the appellant, **DW1** gave unsworn testimony. He maintained that the charges had been brought against him because of a debt of Kshs 2,000 owed to him by PW3. **DW2, Jane Syagwe**, the appellant's mother denied knowledge of the charges. She stated that on the material day, her son went to the store where he worked and returned home at 6 p.m.

Determination

14. I will combine all the grounds and consider them together in trying to determine if the evidence led before the trial court support a finding that the offence charged had been proved beyond reasonable doubt.

15. Section 3 of the Sexual Offences Act defines rape to mean the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent. It also includes a situation where the consent is obtained by force.

16. The ingredients of the offence of rape therefore include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent.

17. In **Republic v Oyier (1985) KLR pg 353**, the Court of Appeal held as follows:-

“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”

18. The first issue for determination therefore, is whether there was an intentional and unlawful penetration of the genital organ of PW2 by the appellant. In her evidence, she narrated how she was violently assaulted then raped. According to the P3 form, her petty coat was blood stained. She had tenderness on the anterior neck, scratch marks on both upper and lower mouth lips, cut wounds on several digits of her right hand and a whitish discharge on external genitalia. The PRC form indicated that she had multiple cuts and psychological trauma. It was PW1's opinion that the presence of pus cells, red blood cells and few epithelial cells in the complainant's laboratory report was evidence of rape. It is therefore clear that there was sufficient evidence of penetration. That medical evidence when combined with that by the complainant and her son support the finding that the prosecution had proved, beyond reasonable doubt, that, the appellant intentionally and unlawfully caused his genital organ to penetrate that of the complainant.

19. The second ingredient is whether that sexual intercourse was consensual. In my view, the infliction injuries sustained by PW2 cannot possibly be said to have been sustained in the course of a consensual sexual contact. They were more compatible with a non-consensual

sexual contact. PW2 stated that, **“he struggled with me and then raped me. He held me by force till his knife cut my fingers.”** I find that there would have been no struggle if the witness was willing to engage in the act. Accordingly, I find that the sexual contact was not consensual.

20. The last ingredient is whether it was the appellant who had sexual intercourse with PW2. The only evidence linking the appellant with the act was that of PW3 and to an extent PW2. According to PW2, it was PW3 who told her that it was the appellant who had raped her. She also stated that, **“he asked me whether I knew him and I said no. He shone a Torch in my face as I said so. I saw him when he was on top of me.”** That evidence was not impeached even during cross examination. PW3 on the other hand was categorical that he had seen and identified the appellant as the perpetrator of the offence. He even confronted the appellant for what he had done to her mother. The appellant, who was armed with a knife, threatened him. He went on to state that, **“I used to know Elias well. I even called him where he was sheltering.”** This evidence was not subjected to cross examination. It was evident that the appellant was well known to both PW2 and PW3. PW2 in her testimony stated that, **“I usually see the accused who carries luggage at Mikinduri town. I have known him for 2 months.”** I therefore have no doubt in my mind that the appellant was positively identified as the perpetrator of the offence by PW3. The circumstances of identification were also favourable as there was electricity light where the appellant was standing.

21. In **Peter Musau Mwanzia vs. Republic [2008] eKLR**, the Court of Appeal expressed itself as follows:

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances 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 sometimes, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”

22. There was therefore sufficient corroborative evidence that the appellant was the one who defiled the complainant.

23. I indisputably believe the violent manner in which the offence took place justifies the sentence meted out to the appellant. In fact, the prescribed sentence is imprisonment for a term of not less than 10 years, but can be enhanced to life imprisonment. He is even lucky the trial court handed him the minimum prescribed sentence, notwithstanding the fact that it could have enhanced the same to life imprisonment.

24. The upshot from the foregoing analysis and findings is that the appeal on conviction is devoid of merit and the same ought to be and is hereby dismissed.

25. On sentencing, however, the law obligates a criminal court, under section 333, the proviso thereto, to take into account the period an accused served in custody as the trial proceeded. In the record availed to me, the trial court, apparently, never took the period between arrest and sentence into consideration. That is a disregard of the law that this court is mandated to correct. For that reason, I direct that the sentence of 10 years shall be computed from the date of arrest being the 24.12.2018.

DATED, SIGNED AND DELIVERED AT MERU, BY MS TEAMS, THIS 1ST DAY OF JULY 2021

Patrick J.O Otieno

Judge

In presence of

Appellant in person in custody

Mr. Maina for the state

Patrick J.O Otieno

Judge