REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 54 OF 2020

SAMUEL MAIZA ……..……..……. APPELLANT

-VERSUS-

REPUBLIC …….……..…….. RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J.O Magori (S.P.M) in Makindu Senior Principal Magistrate's Court SPMCR Case No. 27 of 2017 pronounced on 7th May, 2020).

JUDGMENT

1. The appellant herein was charged in the magistrate's court at Makindu with rape contrary to section 3(1) (a) (b) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 30th April 2017 at Makindu Township Makindu Location in Makindu Sub-County within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of M.M (*name withheld*) without her consent.

2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to 10 years imprisonment.

3. Dissatisfied with the decision of the trial court, the appellant has now come to this court on appeal through counsel M/s Wandugi & Company on the following grounds –

1. That the magistrate erred in law and fact when convicting the appellant when there was no evidence to support the conviction.

2. That the judgment of the court is not supported by the evidence and indeed the decision is wholly against the weight of the evidence.

3. The learned magistrate erred in law and in fact in convicting the appellant on the charge of rape despite the complete want of evidence to support the charge and or the allegations made.

4. The court erred in law and in fact in failing to consider or consider adequately the absence of any evidence showing that the appellant raped the complainant.

5. That the learned magistrate erred and grossly misdirected herself in her holding by adopting the reason given by Pw2 that the doctor may have forgotten to indicate the date when he signed the P3 form. Taking into consideration that she was testifying on behalf of the maker of the document she was not in a position to explain why the doctor did not date the P3 form.

6. That the learned magistrate erred in law and fact by convicting the appellant despite the P3 form being defective.

7. That the learned magistrate erred in failing to consider the fact that Pw1 was intoxicated during the night of the alleged incident of rape thus impairing the ability to recall what exactly happened. This is evidence from the fact that PRC form from Nairobi Hospital indicated that perpetrator is unknown.

8. That by reason of the misdirection pointed out herein the learned SPM J.O Magori proceeded on the wrong premises as a consequence whereof she arrived at a wrong decision to the prejudice of the appellant.

9. The learned magistrate erred in law and in fact in failing to have regard to the fact that Pw2 did not rule out the possibility of any other object being the cause of the bruises on the labia majora of the vagina.

10. That the learned magistrate J.O Magori erred in law and facts by convicting the appellant despite lack of any collaborating evidence from Charles and the security guard at the Georgious whom the complainant claimed to have met immediately after the incident and further alleges that they took him (sic) to the police station.

11. That the learned magistrate erred in law and in fact to convict the appellant without considering that the prosecution evidence was contradictory and full of inconsistencies contrary to section 163 of the Evidence Act. The contradictions inter alia are as follows –

a) Pw1 at one point states that the appellant lowered his trousers and put the condom on his penis and during cross-examination by Mr. Onyancha she states that the appellant did not remove his clothes he unzipped his trousers and raped her.

b) Pw1 alleged that she was raped on 30th April 2017 however the treatment notes from Makindu hospital MF13 indicates that she visited there on 29th April 2017.

12. That having regard to the totality of the evidence, it is clear that the charge was not proved to the required standards and as a consequence all the findings and entire judgment cannot be sustained and ought to be quashed.

4. The appeal proceeded by filing written submissions. I have perused and considered the submissions filed by the appellant's counsel and those filed by the Director of Public Prosecutions.

5. This being a first appeal, I am duty bound to consider all the evidence on record afresh and come to my own independent conclusions and inferences. See **Okeno –vs- Republic (1972) E.A 32.**

6. I have re-evaluated the evidence on record. In proving their case, the prosecution called 3 witnesses. The appellant on his part, tendered his defence on oath and called one defence witness.

7. It is trite that in all criminal cases, the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. An accused person has no burden to prove his innocence. See **Woolmington –vs- DPP [1935] AC,** English case.

8. The appellant's counsel has raised several grounds of appeal. Some are of a technical nature, but most are with regard to the adequacy of the evidence and contradictions.

9. With regard to the technical ground that the P3 form was defective for not being dated, in my view though a date at the end of the P3 form is important, its absence is not fatal if the reason for the absence of dating is explained adequately. In my view, such explanation can be given either by the maker or by another person who is conversant with the working system of the place or institution where the P3 form was issued. I find no fatal defect on the P3 form herein. This disposes of ground 5 and 6 of the petition of appeal.

10. With regard to inconsistencies of the prosecution witnesses evidence, the appellant's counsel has argued that, at one point, the complainant Pw1 stated that the appellant lowered his trousers, and at another point, stated that he did not remove his clothes, but merely unzipped the trousers. Counsel for the appellant also argued that, though the complainant said that the incident occurred on 30th April 2017, the treatment notes from Makindu hospital indicated that medical treatment of the appellant was on 29th April 2017. In my view, these were merely minor contradictions. First, with regard to the trousers, it is obvious that the culprit could not bring out his penis without unzipping the trousers. Again, even if the culprit had lowered his trousers, he would still not have been undressed anyway. Thus the evidence on the trousers just indicated a difference of detail not a conflict. With regard to the date of 29th April 2017,

taking into account that the incident occurred at night, and the visit to Makindu hospital was at night, the variance of one day on the date could easily occur as the idea of counting days from midnight is a foreign idea, which this court takes judicial notice of.

11. In this regard, I rely on what was stated by the Court of Appeal in the case of **Richard Munene –vs- Republic [2018] eKLR as follows -**

"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witnesses that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

12. I thus find that the inconsistencies herein are trifling and cannot be fatal to the conviction.

13. With regard to the adequacy of the evidence, the first issue is with regard to whether sexual penetration did occur on the complainant. That evidence is from the complainant (Pw1), as well as the medical evidence of Pw2 Dr. Josephine Mueni Maithya. In my view, penetration of a sexual nature was proved by the prosecution beyond any reasonable doubt, based on the evidence on record.

14. The second issue is with regard to consent. Lack of consent is an important ingredient in cases of rape. The prosecution evidence on lack of consent is again that of the complainant Pw1. In my view, from the narrative or evidence given by Pw1, the complainant and the medical evidence of pw2, which showed the presence of injuries both to Pw1 genitals and her leg, establish a forceful act, and thus it was proved that indeed the complainant Pw1 did not give consent to the sexual penetration.

15. The third issue is with regard to the proof of the identity of the culprit. Was the appellant the culprit? In this regard, it is to be noted that this incident occurred at night. From her own account, the complainant Pw1 stated that she was intoxicated at the time. The people she first reported the incident to did not testify in court, and though she said that they were not willing to be involved in criminal trial, the police and the prosecutor did not give the reason why these people did not testify in court. The appellant on his part, tendered a sworn defence testimony and called one witness denying raping the complainant.

16. I note that from the contents of the judgment, the trial court merely addressed and determined two issues, that is sexual penetration, and consent. The trial court though it mentioned the issue of identity, did not address the issue of the identity of the culprit but merely took it that the appellant was the culprit, in the judgment as follows –

> **"The ingredients of the offence of rape are –**
>
> **1) Intentional and unlawful penetration.**
>
> **2) Lack of consent from the complainant/victim or consent by force or threats.**
>
> **3) Identification of the perpetrator".**

This was in my view, quite correct.

17. However, instead of addressing each of the above ingredients of the offence by weighing the prosecution evidence against the defence evidence, the magistrate assumed that the culprit had been identified to the required standards of proof, and proceeded to address only the two issues of penetration and consent as follows –

> ***"I have considered the evidence of the prosecution and defence. Pw1 the complainant testified how the accused touched her thighs and vagina after pushing her underpants aside in the car and she resisted and struggled with the accused who overpowered her".***

18. It is clear that in all the judgment of the trial court, there is no mention on how the appellant was identified as the culprit. This was an error. In my view, had the learned trial magistrate weighed the prosecution evidence against that of the appellant as required under section 169 of the Criminal Procedure Code, (cap.75), she would have come to the conclusion that it was not proved beyond reasonable doubt that the appellant was the culprit.

19. In my view, with the totality of the evidence on record, and since there was no evidence on record that the complainant told anybody that she knew the culprit immediately after the incident; the witnesses she initially reported the incident to did not testify in court and the prosecution did not explain the reason for the failure to testify; and the complainant was intoxicated at the time of the alleged incident; all these factors created a reasonable doubt in the case, whose benefit should have been given to the appellant, and I do so. As a consequence, I find that the appellant was not proved beyond any reasonable doubt to be the culprit. On that account alone, the appeal will succeed.

20. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty, unless otherwise lawfully held.

Delivered, signed & dated this 21st day of September, 2021, in open court at Makueni.

…….

George Dulu

Judge