



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 88 OF 2019

MWATSUMA KITI MWATSUMA.....APPELLANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. L. T. Lewa, Senior Resident Magistrate on 3rd August 2018 in S. O. Case No. 56 of 2017, *Republic v Mwatsuma Kiti Mwatsuma*).

JUDGMENT

Background

1. Mwatsuma Kiti Mwatsuma was charged in Shanzu Senior Principal Magistrate's Court S. O. Case No. 56 of 2017 with the offence of rape contrary to Section 3(1)(a)(b)(c) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars are that Mwatsuma Kiti Mwatsuma on 6th day of May 2017 at [particulars Withheld] area in Kisauni Sub-county within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of ST aged 82 years without her consent.
2. In the alternative count, the appellant was also charged with the offence of indecent act with an adult contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that Mwatsuma Kiti Mwatsuma on the 6th day of May 2017 at [particulars Withheld] area in Kisauni sub-county within Mombasa County, unlawfully and intentionally caused his penis to touch the vagina of ST aged 82 years.
3. The trial magistrate considered the evidence of the four prosecution witnesses and the sworn statement of the appellant and convicted the appellant who was sentenced to serve 8 years and 10 months imprisonment.
4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds:-
 - 1) That the learned trial magistrate erred in law and facts by convicting and sentencing the Appellant to 8 years 10 months without consideration that it was unconstitutional as per the weight of the evidence adduced.
 - 2) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering that the witnesses were not reliable as per the law.
 - 3) That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant without considering the evidence adduced was governed by mass contradiction and invariances.
 - 4) That the trial magistrate erred in law and in fact without considering the Appellant's defence.
5. The appellant prayed that the appeal be allowed, conviction quashed, sentence set aside, and he be set at liberty. This appeal was canvassed by way of written submissions.
6. According to the prosecution, PW1, ST, stated that she is 82 years old, lives in [particulars Withheld], has five children, and knows the Appellant who is from her clan. PW1 states that on 6.5.2017 during the day, the Appellant went to PW1's room, picked her up and took her to his room where he had sexual intercourse with her against her will. The Appellant then threatened her not to tell anyone and took her back to her room. PW1 further stated that on another day during morning hours, the Appellant went to her house again to pick her up with the intention of raping her again. However, on 10.5.2017, PW1 told her daughter-in-law about what had happened who informed her son K. On

11.5.2017, PW1 and some other people accosted the Appellant who was taken to the police station. PW1 stated that she was taken to hospital on the same day- 11.5.2017, for examination and the doctor confirmed that she had been raped. The doctor also filled some forms, PRC and P3 forms. PW1 stated that she does not have a grudge against the Appellant. She also identified the Appellant who was present in court. On cross examination, PW1 stated that the Appellant warned her not to scream and would harm her if she did, and that it was in the afternoon when the first incident happened. PW1 further stated that the house had four different rooms rented by different tenants but the other tenants were away in the afternoon when the incident first happened.

7. PW2, AK, the daughter-in-law to PW1 stated that on 10.5.2017 when she took food to PW1, she was told that the Appellant had raped PW1 who identified and pointed him out. PW2 immediately went and told her husband about the incident, who with other people came and took the Appellant to the police station. PW2 took PW1 to Coast General Hospital for examination. PW2 stated that they were given papers at the police station which they took to hospital for filling and more papers were given at the hospital. However, PW2 is illiterate and did not know the contents of the letters. PW2 stated that she lives in a different house but close to where PW1 lives and that the Appellant was the only male occupant in the house where PW1 lived. PW2 further stated that they had no grudge against the Appellant.

8. PW3, Dr. Salim Said, worked at Coast General Hospital for two years and had a P3 form for ST filled on 19.6.2017 by Dr. Ummu. From section A, there was a history of rape and from her examination, the complainant hymen was broken and there was healing abrasion of the posterior vagina. There were no other injuries noted. The degree of injury observed was maim. Urinalysis, HIV and VNRI tests were conducted which all turned out normal. PW3 produced the P3 form as P. exh1. PW3 further stated that he had a PRC form filled on 11.5.2017 where there was a history of rape by a person well known to the accused person and the examination made was abrasion on external posterior vagina, hymen was broken with an old scar and there were no physical injuries noted. Immediate management were antibiotics which were admitted. Tests were done which were all negative. The form was filled by Officer Saida Mwinyi. PW3 produced the form in court as P. exh2. On cross examination, PW3 stated that there were healing abrasion observed. The hymen was broken but with an old scar. No investigation was done to ascertain whether the abrasion was caused by any other cause other than assault.

9. PW4, No. 62566 CPL Beatrice Mwangeli from Bamburi Police Station, stated that on 11.5.2017 she was in the office when she was called by the OCS who informed her that there was a person who had been arrested by the public. The Appellant was rearrested and the police officers were told the he had been arrested because he was found to have rape an old woman aged 82 years. PW4 went to PW1's home where PW1 told her how the Appellant on 6.5.2017 found her seated outside her house and took her to his house/room where he raped her. After doing that on 6.5.2017, the accused ran away and on 11.5.2017, he was arrested when he emerged and the police were called in. PW4 requested relatives to take PW1 to Coast General Hospital where treatment was done and a PRC form filled. On cross examination, PW4 stated that the Appellant's room was opposite PW1's room.

10. The accused-when placed on his defense, gave a sworn statement and said that it is not true that he raped the complainant. That on 11.5.2017 at 7.00 am, he was in his house sleeping and on waking up, he realized that his door had been broken by people got in and started beating him up on claims that he had raped the complainant. Thereafter, the police from Bamburi Police Station went and took him away where he was charged with fabricated charges. The Appellant stated that on the day of his arrest, he had just come from a pub owned by his cousin and was not aware of the charges. He further stated that he does not Know PW1, the complainant. He used to go to work and would come back in the evening. Therefore, he did not know the happenings on 6.5.2017.

Appellant's Submissions

11. The Appellant submits that the issue of visual identification was questionable particularly when it was stated in the P3 form that the perpetrator was someone well known to her. The Appellant further submitted that persons well known to the complainant were many and she should have provided the full name of the person she alleged to know very well. The Appellant submits that the prosecution's habit of citing the words 'well known' creates a vacuum where the victim gets an ample time to implicate anyone of their choice so long as they know him to fill the gap of 'well-known' person.

12. The Appellant further submitted that PW1 pointed him out when PW2 took food to her. In light of the reasoning, who was the person who was pointed out when PW1 did not state the name? The Appellant submits that the record shows that he ran away, who then was pointed out to PW2?

13. The Appellant submits that the prosecution ought to have availed all those who were involved in his arrest. The reason as to why the Appellant was arrested had no connection with the said event as or it happened as a mistaken identity because PW1 made an effort of rescuing the Appellant from the mob which was catalyzed by PW2 when she saw the Appellant enter his house.

14. The Appellant submits that the authenticity of the PRC form is questionable in that the PRC form failed to show its origin or any other government seal. Additionally, the P3 form is not credible on account that it originated from a baseless PRC form. The Appellant further submits that the individual who filled the PRC form is not legally known. It is indicated that medical officer's ref. No. Coast G, Hosp. 618716. The reference number remained questionable because it is revealed in the PRC form that the number indicates an OP/IP No. 618716 being the one for ST. The Appellant submits that the reference numbers for the PRC and the P3 forms were not indicated rendering the document unreliable to support the Magistrate's opinion.

Respondent's Submissions

15. The Respondent submission is in support of the conviction and sentence by the trial court. They opposed the appeal on grounds that the prosecution proved its case to the required threshold which is beyond reasonable doubt and that all the ingredients of the offence were proved by the evidence tendered.

16. The Respondent submits that Section 3 of the Sexual Offences Act provides for the offence of rape in the following terms:-

“(1) A person commits the offence termed rape if:

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”

a. The Respondent submitted that the elements of the offence of rape namely, penetration, lack of consent and use of force were proved and that the evidence by the prosecution in that respect was not controverted. It was presented at the trial court that the elderly complainant who was not able to walk (82 years old) was alone in her house when the Appellant picked her from her house to his house and forcefully raped her then took her back. She was threatened not to report the occurrence but did report a few days later when the Appellant attempted to carry her again. She reported to PW2 who told her son and thereafter made a report to the police as was confirmed by PW4.

17. The Respondent also submitted the offence of rape was confirmed by the doctor who examined the complainant and filled the P3 form in which he observed a healing abrasion at the founchette (posterior vagina). PW3 further stated that the abrasion shows that there was a struggle which caused friction and which resulted to injuries observed. That evidence is therefore corroborative of the complainant's evidence that she was subjected to penetration in the manner envisaged by Section 3(1) (a) as read with the definition thereof set out in Section 2 of the Sexual Offences Act.

18. On the identity of the perpetrator, the Respondent submitted that the offence was committed in the afternoon and there was sufficient light to enable the complainant to see the perpetrator. She testified that the Appellant went back again in the morning of 10th May 2021. She also stated that the Appellant was well known to her since he was from her clan and a neighbour.

19. The Respondent urged the Court to uphold the conviction and sentence passed by the learned trial magistrate.

Analysis and Determination

20. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic [2010] eKLR** where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

21. After considering the grounds of appeal Records of trial court, submissions and circumstances of the case, the issues for determination are:-

- i. Whether the sentence was unconstitutional under the circumstances.
- ii. Whether the evidence adduced by the prosecution was reliable.
- iii. Whether the Appellant's defence was considered.

Whether the sentence was unconstitutional under the circumstances

22. **Section 3(1)** of the **Sexual Offences Act** states as follows:-

(1) A person commits the offence termed rape if:-

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

23. Further, **Section 3(3)** of the **Sexual Offences Act** states:-

‘A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.’

24. The trial court established that the charges levelled against the accused person were properly proved beyond reasonable doubt. Section 3(3) of the Sexual Offences Act provides for a minimum of 10 years imprisonment which can be enhanced to life imprisonment depending on the circumstances of the case. The Appellant was sentenced to serve 8 years and 10 months in prison after considering that he had been in remand for 1 year and 2 months. Therefore, the sentence was lawful under the circumstances.

Whether the evidence adduced by the prosecution was reliable

25. The Appellant in submissions stated that the issue of visual identification was questionable. Further, that it was not clear whom PW1 was pointing at and the complainant should have provided the full name of the said person to fill the vacuum of the well-known person. However, the uncontroverted prosecution’s evidence pointed to the familiarity between the Appellant and the complainant as their rooms faced each other and they were members of the same clan. Furthermore, the offence was committed during the day on 6th day of May, 2017 and there was no possibility of mistaken identity. During her evidence in court, the complainant pointed at the Appellant in the dock as the one who raped her.

26. In the case of *Anjonomi & Others v Republic [1976-80] 1 KLR 1566*, it was held that:-

“...Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).”

27. The Appellant’s submission’s questioned the authenticity of the PRC and the P3 forms. After the incident, the complainant was taken to Coast General Hospital for examination on 11.5.2017 where the PRC form was filled. Also, the P3 form was filled by Dr. Ummu which was produced in court by PW3-one Dr. Salim Said, who worked at Coast General Hospital. The forms confirmed that PW1 had been raped. The examination revealed a healing abrasion at the fouchette. This leads to the inference that the doubt being cast on the authenticity of the PRC and P3 forms is an afterthought and has no basis because the Appellant did not question PW 3- Dr. Salim Said, on the authenticity of the medical forms and the issue was not one of the grounds of appeal.

28. The prosecution’s witnesses-PW 1, PW 2, PW 3 and PW 4, supported the prosecution’s case that the Appellant raped the complainant. The Appellant submitted that the Prosecution ought to have availed all those who were involved in his arrest but it is not in dispute that he was arrested and it was raised as a ground of appeal.

Whether the Appellant’s defence was considered

29. The Appellant gave his sworn statement and said that the charges were fabricated; saying that he had just come from a pub owned by his cousin when at 7:00 am he woke up and realized that door was broken and there were people inside the house who started beating him and was not aware of the charges. He did not give evidence as to his whereabouts on 6th of May, 2017 when the offence was committed and the trial Magistrate finding that his statement was a mere denial was therefore proper.

30. The Appellant submitted that the complainant intervened when he was being beaten because he was mistaken as the perpetrator. However, from the evidence of the complainant, she said it took her intervention to be taken to the police station. It is therefore clear that she only sympathized when he was being beaten and it is not true that he did not commit the offence.

31. In conclusion, the appeal herein has no merit and it is dismissed. The conviction and sentence of the trial court is hereby upheld. These are orders of the court.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 5TH DAY OF NOVEMBER 2021

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE