



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CRIMINAL APPEAL NO. 63 OF 2018**

**FRANK MUTUKU MUIMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant was initially charged in Criminal Case No. 761 of 2014. The appellant absconded after 4 witnesses had testified. The case was withdrawn under section 87(a) and after the appellant was re-arrested he was now charged with the present case, subject of appeal.
2. The appellant was facing two counts. One rape contrary to section 3(1) (b) (3) of the Sexual Offences Act Cap 62A Laws of Kenya. He faced an alternative charge to Count 1 of committing an indecent act with an adult contrary to section 11(9) of the Sexual Offences Act Cap 62A Laws of Kenya.
3. The appellant faced Count 2 which was stealing contrary to section 268 as read with section 275 of the Penal Code. He also faced an alternative charge to Count 2 being handling stolen property contrary to section 322(1) of the Penal Code.
4. The appellant denied the charge and matter went into full trial. The matter was heard in full and appellant was found guilty, convicted and sentenced to serve 10 years' imprisonment on Count I and 1-year imprisonment on Count II. Both to run concurrently.
5. Being aggrieved by the above decision he lodged instant appeal with 6 grounds which mainly complain of-
  - i. The charge was defective.**
  - ii. The case was not proved beyond reasonable doubt.**
  - iii. There was grudge which made appellant framed up.**
6. The parties were directed to canvass appeal via submissions.

**APPELLANT'S SUBMISSIONS**

7. The appellant submits that, he does not dispute the prosecution allegations that the ill-fated victim was attacked and that in the course of the attack she was sexually assaulted and an offence of rape was committed and also stealing contrary to section 275 of the Penal Code. His only dispute is his involvement in the crime commission that he stands charged and convicted.
8. Appellant submitted that the charge sheet was defective to the extent it only referred penetration of penis to a vagina of MMN without giving the age of the victim.
9. Further he contends that in a sexual offence act the victim distinct age should be indicated in the charge sheet and the absence of the age assessment in the charge sheet and in the whole evidence on record created a contradictory compromise.
10. That the medical examination report document was obtained through corruption. Also the said medical document wasn't sufficiently assessed to reach to a logical conclusion that it was a genuine document since the record shows the victim was offended on 20/12/2014 at 10hrs and sent to hospital on 8/1/2015, 19 days later after the incident.

11. The appellant contention is that the prosecution did not prove its case beyond reasonable doubt, by the fact that the victim mental challenge was not affirmatively proved. Due to that psychiatrics' evidence was availed with supportive of any medical documentary and also there was no any good reason to attest as to why the exhibits got missing during the trial.

12. He argues that the trial magistrate did not evaluate the possibilities of grudge premised the mater, PW1 claimed to be attacked by the person not known to her. The question of identification is very paramount. The law is definitely clear as per evidence act on the mode of identification.

13. This can be done by giving a brief description of the person you saw at the scene of crime. Through general physical appearance, mode of dressing, or special marks on the body which are later confirmed through identification parade. It should be observed that the incident was committed in broad daylight as PW1 claimed.

#### RESPONDENT'S SUBMISSIONS

14. The respondent submits that the prosecution needed to prove the following aspects:

- ü ***That there was penetration.***
- ü ***That force was used.***
- ü ***That the same was against the complainant's will or consent.***
- ü ***That the culprit was infact the appellant.***

15. ***On whether the charge sheet was defective, the respondent submits that section 137 of the Criminal Procedure Code*** provides as follows:

***“The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in this accordance with this Code-***

***(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;***

***(ii) the statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;***

***(iii) after the statement of the offence, particulars of the offence shall set out in ordinary language, in which the use of technical terms shall not be necessary; provided that where any rule of law or any act limits the particulars of an offence which are required to be given in a charge of information, nothing shall require more particulars to be given than those so required.”***

16. The respondent submits that all the essential elements were well captured in the charge sheet read to the appellant on the 29th September 2016.

17. **Section 134 of the Criminal Procedure Code** provides that:

***“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to be offence charged.”***

18. In ***BND vs Republic [2017] eKLR*** the trial court laid out the test to be followed in determining whether a charge sheet is defective as follows:

***“...the principle of the law governing charge sheet is that an accused should be charged with an offence known in law.***

***The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”***

19. On whether the medical evidence was insufficient, the respondent submits that the doctor was able to observe and confirm that the complainant's genitalia looked reddish with soil an impression she had been raped.

20. It is respondent's submission that section 77(1) of the Evidence Act provides that:

***“In criminal proceedings any document purporting to be under the hand of a government analyst, medical***

**practitioner.....or anything submitted to him for examination or analysis may be used in evidence.”**

21. It submits that the said section on its own allows a person other than the one who prepared a report such as P3 form to produce it provided that the presumption of authenticity is met.
22. On whether prosecution failed to prove its case, the respondent submits that the evidence of the prosecution witnesses speak for itself and was well corroborated.
23. On whether the trial court failed to note that grudges existed, it is the respondent’s submission that the issue of grudges was never raised during trial as such, it’s an afterthought and his appeal should be dismissed.

#### ISSUES, ANALYSIS AND DETERMINATION

24. After going through the proceedings and the submissions filed, I find the issues are; **whether the charge sheet was defective? whether prosecution proved its case beyond reasonable doubt and whether the appellant defence was considered?**

25. On the whether the charge sheet was defective, for omission of the age of the victim, the same stated that; on 20/12/014 .....intentionally and unlawfully caused his penis to penetrate the vagina of MMN without her consent. The Ingredients of the Offence of Rape to be proved are:

**“[20] 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.”**

26. In **BND vs Republic [2017] eKLR** the court held **“....the principle of the law governing charge sheet is that an accused should be charged with an offence known in law.**

**The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”**

27. **See also sections 134 and 137 of the CPC** cap 75 Laws of Kenya. All the essential elements of the offence to wit penetration of genital organs and without consent were well captured in the charge sheet read to the appellant on the 29th September 2016. Thus the ground fails.

28. On whether the prosecution proved its case as required by the law, first the appellant submits that, he does not dispute the prosecution allegations that the ill-fated victim was attacked and that in the course of the attack she was sexually assaulted and an offence of rape was committed and also stealing contrary to section 275 of the Penal Code. He only dispute is his involvement in the crime commission that he stands charged and convicted.

29. On evidence tendered, **PW1** the complainant stated that she was at home on 20/12/2014. At about 10am she heard some noise outside. When she went to investigate, a man beat her, raped her after putting soil in her ears, nose and mouth. She was unable to identify him but he also took her phone Nokia 1200. The complainant called MMN.

30. **PW2 Benjamin Masita Kiteme** was called by a child to rescue the complainant. He called Nzangi a village elder who assisted with the chief’s number.

31. **PW3 Benson Muniki** at about 11am on the same day came across many people looking for the assailant. He knew the complainant. He therefore upon learning the theft of MMN’s phone, he dialed her number. It was answered. He tricked the appellant he would send some money and advised him to get a Safaricom line so as to receive Mpesa. The complainant’s line was Zain. The appellant then offered Safaricom number 0715 384298 which he had requested **PW5 Katika Mutua** to give him his phone to allow him receive some money. **PW5** was working at a club where the appellant was and he used his phone to communicate with **PW3** to enable him receive money.

32. **PW5, PW3** and **PW7** worked in conjunction to outsmart the appellant. He was arrested at the club where **PW5** worked as he waited to receive money. The complainant’s phone Nokia 1200 was recovered from him inspite of his attempts to hide it in his sleeves.

33. **PW4** produced the post rape care form treatment notes, outpatient card and P3 form as exhibits. The doctor noted the complainant was seen on 20/12/2014 the same day of the incident. She had soil on her blouse and in her genitalia. Her genitalia were also reddish and she had an infection. The hymen was noted not to be freshly broken and the victim was noted to be mentally challenged.

34. **PW9** the Executive Officer produced the proceedings of Criminal Case No. 761 of 2014. At page 4 the complainant had testified and identified her phone Nokia 1200 which was before court then. She also identified a blue pantie and bika shorts. At the time of this present case, the three exhibits could not be recovered.

35. **PW3** in this present case also had in Criminal Case No. 761 of 2014 identified the phone Nokia phone. In addition, **PW3** and **PW8** also

testified to having recovered the phone from the appellant. PW5 also testified the appellant told him he was expecting to receive some money and he in fact assisted him with his phone to communicate with PW3.

36. PW8 the investigating officer stated the appellant was arrested at a club at Mavoko. The complainant identified the phone Nokia 1200 and a bika shorts and a blue pantie. The file was said to have been landed to PC Wafula who upon transfer handed over to PC Nyakundi. The items were not found even though they had been in court when they were marked for identification.

37. The appellant tendered sworn evidence. He claimed he disagreed with PW3 over a USB which had some music and belonged to the employer of the appellant who worked as a conductor in a PSV matatu.

38. The appellant admitted he was arrested on 21/12/2014 at a club by an AP officer and PW3. The appellant claimed the AP officer also had arrested him earlier and on this occasion beat him during the arrest. The appellant claimed the disagreement was over the USB and because he refused to part with Ksh.40,000/=. The appellant insisted he was framed.

39. The only evidence relied by the prosecution to connect appellant with the offence is the recovery of the nokia 1200 which pw1 lost during attack one day before recovery. Thus the court applied the doctrine of the recent possession to convict.

40. In the case of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Cr App. No. 272 of 2005(UR)* the court held on all the elements necessary to establish recent possession to wit;

***“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.***

***In other words, there must be positive proof:***

- i). that the property was found with the suspect;***
- ii). that the property is positively the property of the complainant;***
- iii). that the property was stolen from the complainant;***
- iv). that the property was recently stolen from the complainant.***

***The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”***

41. The phone recovered other than being described as Nokia 1200, there was no other identifying mark. PW1 said she had receipts during cross-examinations and that her sister bought her the same. No serial number was cited to court which could have been found in the phone. Prosecution never bothered to explain why receipt was not produced to show the phone was positively identified as pw1 property.

42. The PW1 sim card allegedly used in tracking and getting appellant arrested was neither identified nor produced. No explanation of its where about was tendered.

43. The threshold of application of the doctrine of recent possession was not established. To say the least, the police and the prosecution handled the matters herein casually and carelessly that even the exhibits marked and released to them after first case was terminated against appellant after he absconded, were misplaced by the police.

44. Thus the court is left with no option but to allow the appeal and acquit the appellant. The court thus makes the following orders;

***(i) The appeal is allowed, the conviction is quashed, the sentence is set aside and appellant is set at liberty unless he is otherwise lawfully held.***

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JANUARY, 2020.**

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**C. KARIUKI**

**JUDGE**