



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 39 OF 2018

JOSEPH MUNYAO MUSYOKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant Joseph Munyao Musyoka was charged with rape contrary to section 3(1) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 2nd day of August 2017 at Ikanga Location in [particulars withheld] Sub-County within Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of MM aged 87 years without her consent.
2. In the alternative the appellant was charged with indecent act with an adult contrary to section 11A of the Sexual Offences Act, that on the 2nd day of August 2017 at Ikanga Location within Kitui intentionally touched the vagina of M with his penis.
3. PW1 MM alias M who is the complainant in this case testified that on the material date, at night while asleep in her house, she was woken up by an intruder who had entered into her house and gotten hold of her firmly around her waist.
4. When she tried to scream, the intruder got hold of her throat, lifted and threw her forcefully on the ground. She felt a lot of pain on an area on her abdomen which had been operated earlier. When the complainant aimed a torch at the intruder, the intruder picked and ran away with it.
5. The complainant further told the court that the perpetrator was known to her and that at the time there was no other person in her house other than herself and the perpetrator. She recognized the perpetrator as Munyao with the aid of the torch light.
6. Munyao used to frequently spend a lot of time at her home in her presence. She also added that Munyao's home is very close to her home. After the incident, she was taken to hospital by her son.
7. She also admitted that her eyesight was somehow weak but insisted that she could identify and recognize people from a close distance and she demonstrated this in court by differentiating between the appellant and a court orderly in court.
8. In cross examination, the complainant further admitted that the strength of her eyesight remains the same both at night and during the day. She reiterated that the appellant was too close to her at the material time hence the reason why she was able to identify him.
9. The complainant further reiterated that she couldn't scream because she was held firmly. She denied a suggestion by the appellant that she had decided to frame him because his donkeys had trespassed into her farm.
10. PW3 Kiruma Syengo told the trial court that on 2/8/2017 at about 7am the complainant visited her and reported to her that she had been raped at night by Munyao the appellant. The complainant sent him to the Area Chief to seek assistance on her behalf and he obliged.
11. PW4 Onesmus Nzomo Mutaula the Chief Ikanga Location testified in court and confirmed receipt of a report over the subject matter from Kiruma Syengo (PW3) on behalf of the complainant. He gave out Kshs.200/- for the complainant to be taken to hospital.
12. He also visited the scene where he found many people. When the complainant was discharged from hospital some days later, she explained to him that it's Munyao who raped her at night inside her house and that she was able to identify and recognize him with the aid of a torch.
13. PW5 PC(W) Caroline Kathambi being the investigating officer in this case summed up the foregoing evidence and produced in court as exhibits a lessa and a petticoat which the complainant was wearing at the material time.

14. In cross examination, PC Kathambi explained that the torch with which the complainant identified the appellant was not recovered because the appellant went away with it.

15. PW2 Vita Christopher a doctor from Ikanga Sub-District Hospital testified on the medical aspects of this case. According to his evidence the complainant sought treatment on 2/8/2017 following an alleged incident of rape.

16. On examination it was established that the complainant had the following:

o *Haematoma on the neck and cheeks.*

o *Tenderness on the chest area.*

o *Tears on the vaginal orifice.*

o *Tenderness on the vulva.*

17. There were also numerous cells detected on HVS Lab test, indicative of bleeding/trauma possibly due to forceful penetration. The doctor opined that the genital injuries were consistent with forceful penetration.

18. On being put on his defence the appellant told the trial court that he was summoned by the chief to his office and on arrival the chief referred him to Ikanga Patrol Base where he was interrogated by a police officer over a complaint of rape before being detained. The following day he was taken to court.

19. After full trial he was found guilty, convicted and sentenced to serve 10 years' imprisonment.

20. Being aggrieved by the verdict above he lodged instant appeal in which he set 5 grounds which mainly complained of-

o *Whether the prosecution case was proved beyond reasonable doubt?*

o *Whether appellant's defence was considered by the trial court?*

21. The parties were directed to canvas appeal via submissions.

APPELLANT'S SUBMISSIONS

22. The appellant submits that the identification by the PW1 was or is beset by multiple problems of unreliability that directly and fatally undermine the probative value of the evidence.

23. It is appellant's submission that a brief sighting of a stranger or attack by the complainant (PW1) who was very elderly whereby she could not tell how old she was because of her old age. She was very categorical that she was raped at night by someone in her house.

24. She doesn't know how he had got into her house. She only felt someone touching her, holding her by force whereby the perpetrator held her by her waist and she tried to scream, he got hold of her throat. The perpetrator lifted and dropped her on the ground with force.

25. He relied in the case of *Karanja & Anor vs Republic [2004] 2KLR 240* whereby the court held that:

“Recognition maybe more reliable than identification of a stranger, but even when a witness is purporting to recognize someone he knows, it should be born in mind that mistakes of recognition of a close relative and friends are sometimes made.”

26. See also the case of *Choge vs Republic [1985] KLR*.

27. It is his submission that it was a very grave error in both law and facts for the trial court to convict him relying on PW1 (complainant's) evidence that she identified the appellant and recognized the perpetrator as Munyao with the aid of the torch lights failing to bear in mind that the subject torch was not brought before the court as an exhibit to prove whether there was a torch or the evidence of the torch was just hearsay evidence and framed up evidence.

28. That PW2 Dr. Vita Christopher told the trial court that at the time of filling the P3 form, she didn't have clothes she was wearing on the material day.

29. He relied in the case of *Augustine Njoroge Ritho & Anor vs Republic Cr. Appeal No. 99 of 1986* where it was observed that, **“contradicted and insistence evidence is unreliable and cannot convict.”**

30. It is his submission that the appellant was to be taken to hospital for medical examination to establish if he was the one who was involved in that crime and thus for the prosecution failing to do so left a lot of gaps and doubts to prove their case beyond the reasonable doubts.

31. See the case of *Woolmington vs DPP [1935] AC 462* where the court held that:

“It is the duty of the prosecution to prove the prisoner’s quietly, if at all the whole case there was doubt created by the evidence fronted by the prosecution, then the prosecution has not proved its case and the accused person is entitled to an acquittal.”

32. Also in the case of *Gathago Nganga vs Republic Cr. Appeal No. 98 of 1995 CA* the court observed that:

“...the presumption of innocence is our cornerstone in our criminal justice system. If a court of law has to strain itself to arrive at a finding of guilty, the obvious inference is that of if there are lacking doubts must be resolved in favour of the accused person.”

33. The trial court magistrate would have cautioned itself before overlooking appellant’s defence statement hence convicting him. See the case of *Johnson Anthony vs Republic [1962] Cr. Appeal No. 55* where it was held that:

“A person who puts forward an alibi defence as an answer does not thereby assume a burden of proving that answer, it is a misdirection to refer to any burden as resting on the person in such case for burden of proving his guilty through put the trial rests on the prosecution.”

RESPONDENT’S SUBMISSIONS:

34. It is the respondent’s submission that the prosecution needed to prove the following aspects:

- (a) *That there was indeed sexual intercourse.*
- (b) *That the same was unlawful.*
- (c) *That force was used.*
- (d) *That the same was against the complainant’s will.*
- (e) *That the culprit was infact the appellant.*

35. On whether there existed inconsistency in the prosecution case, PW1 then aged 87 years testified that she was in her house sleeping at night but then recalled she had forgotten to lock it. Her evidence was clear that she felt someone touching her that night and she could feel his breath and sound even as she was being indecently assaulted.

36. She stated that she could tell that the appellant was the perpetrator by the very fact that he lived closer to her and was also a frequent visitor to her home and got to know him well. That she was able to detect his physic and by the aid of the spotlight she knew it was the appellant even though her sight failed her due to advanced age.

37. In *Anjononi vs Republic [1976-1980] at 1566 to 1568* the court held that:

“Recognition of an assailant is more satisfactory, more assuring, and more reliable that identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

38. On whether the complainant’s evidence raised any doubt, the complainant was unequivocal that she knew the appellant well since he lived close by, which fact the appellant did not shake during his defence.

39. She was able to establish the circumstances that proved that the appellant was not a stranger to her hence differentiated recognition and identification in this case which proved her personal knowledge of the appellant having known him for long.

40. On if there was need for parade identification; it is the respondent’s submission that parade identification is only necessary where there is doubt as to the identity of the assailant. In this case the complainant testified that due to close conduct with her attacker, she was able to tell who it was.

41. On whether the appellant defence was ignored, the appellant’s defence did not shake the evidence tendered by the prosecution.

ISSUES, ANALYSIS AND DETERMINATION

42. Section 3(1) (a) and (b) defines the offence of rape as an intentional and unlawful penetration of his/her genital organs of another person if that other person does not consent to the penetration. As such, the points for determination in this case are as follows:

- (1) Did the appellant penetrate with his genital organ (penis) the genital organ (vagina) of the complainant on 1/8/2017 without her consent?**

43. The first sub-issue for determination under this point is whether the complainant positively and without the possibility of an error, recognized the accused person as the culprit. The offence, there is no doubt, took place at night, but the complainant insisted in her evidence that she had a torch with whose light she was able to recognize the appellant who was known to her before.

44. In *Anjononi vs Republic [1976-1980) at 1566 to 1568* the court held that:

“Recognition of an assailant is more satisfactory, more assuring, and more reliable that identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

45. The complainant consistently reported the appellant as the person who had invaded her in her house to the people she spoke to immediately after the incident. She further told the trial court that the torch she had was snatched and carried away by none other than the appellant.

46. First and foremost, the appellant didn't deny that he was known to the complainant before and indeed it's clear from the evidence adduced by the prosecution and in defence by the appellant that they are close neighbours. In her evidence, the complainant told the trial court that the appellant was a frequent visitor to her home which was not controverted by the appellant.

47. The complainant was steadfast in her testimony and despite her weak eye sight as disclosed by herself and observed by the trial court when she testified, the trial court believed in her testimony that she could identify and recognize people from a close distance. In her evidence she told the trial court that she had a torch whose light she aimed at the appellant from a close distance before the appellant snatched it and went away with it.

48. The trial court found it credible evidence that the appellant held the complainant by the waist and at times by the throat, which confirmed the complainant's evidence that the appellant was too close to her hence her ability to recognize him with the aid of torch light.

49. With regard to the actual penetration, the complainant opened her testimony by stating that on the material night she was raped. She identified the appellant as the culprit as already discussed above.

50. When she was taken to hospital for examination and treatment, it was observed that she had tears on two areas of her vaginal orifice, tenderness on the vulva and blood spots within the vaginal orifice. These injuries were according to the medical evidence on record as summarized in the P3 form (Pexh 4) and treatment notes (Pexh 3) consistent with forceful penetration.

51. This medical evidence corroborates the oral testimony by the complainant that she was raped on the material night, and the person who was responsible for that rape was none other than the appellant; Joseph Munyao Musyoka who was positively identified by the complainant as found earlier.

52. The complainant had not consented to the penetration, and indeed no consent was alleged by the appellant in his general defence, nor did the appellant offer any justification for his cruel act against such a defenseless and an elderly lady.

53. Thus the court finds no merit in appeal and makes the following orders;

(i) The appeal is dismissed, the conviction is upheld and sentence confirmed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE