



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 31 OF 2018

JOSEPH MAFUA MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of the Hon. L Simiyu, SRM dated 25th May, 2016 in Machakos Chief Magistrate's Court in Criminal Case No. 35 of 2015)

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MAFUA MUTISYA.....ACCUSED

JUDGEMENT

1. The appellant, **Joseph Mafua Mutisya**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 35 of 2015 with the offence of rape contrary to section 3(1) and 3(3) of the **Sexual Offences Act. No. 3 of 2006**. The particulars of the offence were that the appellant, on the 4th day of January, 2015 at 2300 hours at [particulars withheld] Village in Kaiyani Sub-location, Kathiani Sub-county in Machakos County, he unlawfully caused his penis to penetrate the vagina of **MN** without her consent.

2. In support of the prosecution's case, four witnesses were called.

3. PW1, **MNN**, testified that though she could not remember her age due to old age, on 4th January, 2014 at 2300 hours, she was in her house, when she heard someone knock on her door with a loud thud before the appellant, her distant grandchild, entered the house through the window, threw her from the bed to the floor and raped her and threatened her that she would face dire consequences if she reported the incident. According to her, she recognised the appellant by his voice and when the appellant gagged her on her neck since one of his fingers is deformed and twisted. It was her evidence that the appellant grabbed her neck and her mouth. The appellant also used the bed sheet which PW1 had used in covering herself to strangle her till she promised not to report.

4. After the appellant left, PW1 went to her closest neighbour, **Kitonga**, 500 metres away and spent the night there but never disclosed to the said neighbour what happened to her. The following morning, she met her son, Tom, who was looking for her, on the way and reported to him. Tom then took her to the hospital in Kathiani after which they returned home. The said Tom also took her to the police where she reported and was issued with a P3 form. According to her the appellant was commonly known as **Langi**, son of **Mutisya**. According to PW1 thought her sight was diminished due to age, she could identify the appellant if he was close to her and could recognise his finger and also recognise his voice. It was her evidence that the appellant had a very tiny torch which he flashed on her face. She however did not light her lamp.

5. In cross-examination, she stated that the appellant blindfolded her. According to her she screamed but no one went to her rescue. It was her evidence that the appellant was the only person she knew with deformed finger.

6. PW2, **Tom Nthenge**, was employed as a night guard at a bar at Misooni. Due to the nature of his work, at night he would leave his mother, PW1, alone since his family was away in Nairobi. On 5th January, 2015 at 6.00 am he returned home and on checking on his mother, he found the door locked from the outside and his mother was not around. Suspecting foul play, he got out and saw his mother, PW1, returning. PW1 then told him that she had been attacked and raped at night by the appellant. PW2 then reported the incident to the village elder, one **Nzioka Matheka**, and the appellant was apprehended at 10.00 hours. PW2 then took PW1 to make a report at Kathiani Police Station from where they were escorted to Kathiani Hospital PW1 was treated and was issued with a P3 form as well as post rape care form.

7. According to PW2, the appellant, their neighbour, was well known to him. It was his evidence that when he entered PW1's house he found it disturbed and the window had been pushed open.

8. PW3, **Charles Kituva**, a clinical officer, Kathiani Level 4 Hospital filled in the P3 form for PW1, a 90 year old patient, who had the history of sexual assault on 4th January, 2015 by a person own to her. Upon examining PW1, it was found that she had sustained a bruise on the lower vaginal opening, urine samples had pus cells, there were red blood cells between 1-15 and high vaginal swab revealed blood stains with red blood cells of 3. According to PW3, urine is not supposed to contain red blood cells. It was his opinion that PW1 had been raped and he filled the P3 form and signed the same which he produced as exhibit. According to the PRC form, the victim was an elderly widow while the perpetrator was 40 years old unrelated to the patient.

9. According to the witness though PW1 had bathed, it only interfered partially but did not interfere with urinalysis. According to him, PW1 revealed that she knew the assailant.

10. PW4, PC **Beatrice Kadeanga**, the investigations officer, testified that she recorded PW'1 statement and that the appellant was taken to the police station by civilians and the village elder and upon observing him, she noticed that he had a deformed right middle finger confirming the report made by PW1. He then caused the appellant to be charged. It was his evidence that when PW1 reported the incident, she was distraught and was crying. At the scene, PW4 picked a *lesso*.

11. Upon being placed on his defence, the appellant testified that on 4th January, 2015 he was at his work of carrying concrete where he worked from 8.00 am to 5.00 pm. He then proceeded to the market where he stayed up to 8.00 pm when he went home and slept with one **Katonye**, his colleague and neighbour, because the next day they were to go back to work. The following day, 5th, he took tea and went to work where he was picked up by the village elder, **Nzioka Matheka**, who informed him that he was needed. He was then taken to Kathiani where he was informed that he raped PW1, a known neighbour, was arrested and locked up.

12. According to the appellant, both PW1 and PW2 lied to court as he did not rape PW1. He however stated that he had no dispute with PW1 who was elderly and surmised that there could have been a dispute between them regarding the fact that the appellant's cows entered PW1's land. He insisted that

PW1's home was over one kilometre away and on the night of the alleged offence, he was in his house and did not leave.

13. In cross-examination, the appellant stated that he had a wife and one child and that on 4th his wife was at her parent's home and he was with **Kitony**, who though not a relative, lived close to their home. He admitted that he knew the complainant, PW1, with whom he talked severally and who knew him very well since childhood. He however admitted that his finger was deformed and that there is no other person in their village with such a deformity.

14. **John Mbithi Mutuku**, DW2, testified that he was the appellant's co-worker and a neighbour. On 4th January, 2015 he worked with the appellant till 5pm and since he had lost his keys, he went to the home of the appellant to pass the night. While there, they were served food by the appellant's sister, Rachael, after which they slept and returned to work the following morning. The next day, the village elder picked the appellant and after finishing his work at 1.00 pm he was informed to go to Kathiani where he learnt of the offence. According to him no one left the house.

15. In her judgement, the learned trial magistrate found that from the medical evidence adduced, there was sexual contact on the complainant. From the evidence, there was lack of consent by the complainant. It was also found that the appellant was properly identified by the complainant who knew the appellant very well. The learned trial magistrate found that there was inconsistency between the evidence by the appellant and his witness regarding their marital status which made their alibi evidence unbelievable. The court found the appellant guilty and sentenced him to 15 years imprisonment.

16. In this appeal, it is clear that the appellant is only aggrieved by the sentence imposed on him. Section 3(3) of the **Sexual Offences Act** provides as follows:

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.

17. It is therefore clear that the sentence prescribed for the offences in question is between ten years and life imprisonment. In other words, the minimum sentence is ten years which can be enhanced to life imprisonment. In this case the appellant was sentenced to neither the minimum nor the maximum. Since the prosecution had no previous records of the appellant he ought to have been treated as a first offender. In my view where the law prescribes the minimum and maximum sentences, in sentencing an accused to a sentence other than the minimum sentence the Court ought to give reasons for that since an accused is entitled to the benefit of a lesser sentence. To simply state that the gravity of the offence was considered without indicating what made the offence grave, in my view, will not do.

18. In the premises having considered the circumstances of this case, I hereby allow the appeal in so far as the sentence is concerned and substitute therefor a sentence of 10 years imprisonment to run from 7th January, 2015 till 19th January, 2015 when he was in custody before being admitted to bond and from the date of sentencing on 25th May, 2016.

19. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 15th day of January, 2020.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey