



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL APPEAL 73 OF 2017**

**(From original conviction and sentence Criminal Case. 1699 of 2016 of the**

**Senior Principal Magistrate's Court at Baricho – E. H. KEAGO - SPM)**

**SWM.....APPELLANT**

**V E R S U S**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT**

1. The appellant SWM was convicted of the offence of Rape contrary to **Section 3(1) (a)(b) of the Sexual Offences Act** by the Senior Principal Magistrate at Baricho and sentenced to serve Ten years imprisonment.

2. The appellant was aggrieved and dissatisfied with the Judgment and sentence and file this appeal which raises the following grounds:-

**1. That the trial Magistrate erred by shifting the burden of proof from the Prosecution to the Accused.**

**2. That the trial Magistrate erred in law by misinterpreting Section 11(1) of the Sexual Offences No. 3 of 2006.**

**3. That the trial Magistrate erred in law by failing to appreciate that the offence if at all it was committed at night and therefore the necessity of positive identification.**

**4. That the trial Magistrate erred in law for making findings of fact which were not adduced in evidence and effectively becoming a witness.**

**5. That the trial Magistrate erred in law by making a finding that the accused escaped from the scene of the alleged offence which was not supported by any evidence on record.**

**6. That the trial Magistrate erred in law by making a finding that the accused was treated for injuries sustained a fact which did not emanate from any evidence adduced.**

**7. That the trial Magistrate erred in law and fact by failing to appreciate medical evidence adduced and which was indicative that the spermatozoa seen on the complainant may have been as a result of sexual intercourse with her husband barely Forty Eight (48) hours earlier.**

**8. That the trial Magistrate erred in law by not observing the provisions of Article 50 of the Constitution.**

3. He prays that the judgment be set aside, he be declared innocent and he be acquitted.

4. The State opposed the appeal and through the submissions filed by Geoffrey Obiri Assistant Director of Public Prosecution prayed that the appeal be dismissed.

5. The brief facts of the case are that on 10/11/2015 at 10.00 Pm the complainant MWM was in her house at 10.00Pm when somebody called her by name and he told her that her cow was at their farm eating maize. She went out and found the accused standing next to the window and he told her that the cow was at his home. She went there and found the cow tethered to a tree. She untied it and led it to its shed. She

went back to her house to sleep. After about 30 minutes she realized there was someone on top of her. The person covered her mouth. The person told her that she had found her and would kill her and go to Mombasa. The person told her to call his wife C. The complainant and the man struggled and she realized the man was stark naked. The man threatened her with a knife and ordered her to remove her clothes. She refused whereupon the man removed her biker and her pant. The man then raped her. After that the man removed his shoes from under the bed. She agreed to go with him to his house but on reaching the door she shut the door behind him.

6. The complainant informed her brother-in-law and her mother-in-law as to what had happened. The village In Charge was informed. The accused who was the person who raped her escaped from his house and ran away.

7. The complainant reported the matter at Sagana Police Station at 3.00 am and she was referred to hospital. She was treated at Sagana Sub-County hospital and a PRC form was filled. A P3 form was also filled by Benard Wanjohi Githaka (PW-3-) a Clinical Officer who examined the complainant. The complainant had normal genitalia and laboratory test of High Vaginal Swab revealed traces of spermatozoa which confirmed penetration. He produced the Post Rape Care Form (PRC) and a P.3 form as **Exhibit 1 & 2**.

8. The appellant was arrested by members of the public who took him to the police station. He was then charged.

9. The appellant gave a sworn defence and denied that he raped the complainant. He called one witness NWM who testified that he was present when the appellant was arrested by the brothers of the complainant.

10. The appeal was disposed of by way of written submissions. For the appellant, submissions were filed by Mr. Nduku Njuki Advocate who submits that the Eight grounds can be condensed into two, that is:-

a) Matters of Evidence.

b) Matters of Law.

11. On matters of Evidence Mr. Nduku submits that the complainant claims to have been raped by the appellant and the only evidence on record that she had engaged in penetrative sex was the traces of spermatozoa seen on examination at Sagana Health Centre. That she was evidence on record that the previous weekend (less than 48 hours) she had hosted her husband and they had sex with him. That considering that the Clinical Officer (PW-3) had stated that spermatozoa can survive for upto Seventy-Two Hours, the presence of spermatozoa cannot be conclusive evidence that the appellant engaged in sex with the appellant. There should be more corroborative evidence.

12. Mr. Nduku faults the trial Magistrate on over reliance on the testimony of the complainant's brother who went to the scene much later and claimed that the suspect ran away. The trial Magistrate stated:-

***“The question that begs for answers is why the accused was running away ----- . The only reasons why the accused was running away is because of the guilt mind.”***

Page 35 line 20. It is submitted that the fact of accused running away was not proved. He faults the trial Magistrate for playing the role of a witness by stating:-

***“If indeed it was a frame up why will the complainant wait until midnight to call all the stated people to the scene”*** Page 34 line 21.

13. Mr. Nduku further submits that the trial Magistrate erred by shifting the burden of proof where he stated:-

***“It is clear from the testimony of the accused that he has merely denied that he did not commit the alleged offence. He didn't explain where he was on the material day.”***

14. He submits that the burden was on the prosecution to prove the allegations beyond any reasonable doubts.

On matters of Law counsel cites **Article 50(2) (e) & (g) of the Constitution**:-

15. He submits that though Judgment was slated for 24/8/17 there is nothing on record to show that appellant appealed in court four times before the Judgment was read on 30/10/17. The trial Magistrate casually informed the court that the Judgment was not ready and amounted to Psychological torture by the court which infringed on the rights of the accused. It is further submitted that the rights of accused were infringed as he was not represented by his Advocate on the date the Judgment though he had a counsel on record from the date the trial started. For the State it was submitted by Mr. Obiri Assistant Director of Public Prosecutions is that the appeal is opposed as the prosecution proved the offence of rape to the required standards. He submits that the prosecution proved:-

**a) The identity of the perpetrator.**

**b) Lack of consent**

**c) Penetration.**

16. On the identity of the appellant it is submitted that the complainant MWM at Page 11 of the record informed court that she heard

someone knocking on the door and call her name. I found W standing next to the window. That she further testified that W's sister is married to my brother-in-law. W is a neighbor at home.

17. Mr. Obiri submits that the complainant knew the appellant very well and there was no possibility of mistaken identity he urges the court to find that it is the appellant who raped the complainant.

18. It is submitted that there was no consent which is a core ingredients of the charge. That **Section 3 of the S.O.A** defines rape as follows:-

**A person commits the offence of 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.**

**c) The consent is obtained by force or by means of threats or intimidation of any kind.**

19. That the testimony by the complainant clearly demonstrates that there was no consent.

20. On prove of penetration it is submitted that the appellant penetrated the complainant and the testimony of the complainant was corroborated by the testimony of PW-3- the Clinical Officer who noticed that there were traces of spermatozoa in the complainant's genitalia. PW-3- concluded that the assault was penetrative.

21. On the defence of the appellant, Mr. Obiri submits that the appellant was positively identified and his defence was a mere denial which should be treated as such by the court.

22. I have considered the appeal and the submissions. This is a 1<sup>st</sup> appeal and this court has a duty and the appellant has a legitimate expectation that this court will subject the evidence to a fresh analysis, consider it and evaluate it then come up with its own independent finding. The court is supposed to bear in mind that it did not see the witnesses and when they testified and leave room for that. This was the holding in the case of **Okeno –v- R 1972 E. A 32** where the court stated:-

***“An appellant on a first appeal is entitled to expect the evidence as a while to be submitted afresh and exhaustive examination. (see Padya –v- Republic (1957) EA 336) and to the appellate court own decision on the evidence.***

***The appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala –v- Republic, 1957 E.A 570) it is not the function of the 1<sup>st</sup> appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and draw its own conclusion, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”***

23. I will proceed to consider the evidence, and evaluate it. In so doing I will consider the matters raised in the submission which I have analysed above. Having considered the evidence and the submissions, I find that the issues for determination are whether the complainant was raped on the material night and whether the appellant is the one who raped the complainant.

24. Whether the complainant was raped on the **Material night**. The complainant MWM testified that on the material night she was called by name by a person at about 10.00Pm. The person alleged that her cow was grazing in their farm eating maize. The complainant took a torch and went out of the house. She found the appellant standing by the window. The two talked and the appellant proceeded to his home. She found the cow tethered to the tree. She went and tethered it to its shed. She went back to her house and slept. After 30 minutes she realized there was somebody on top of her totally naked. The man raped her. She realized it was the appellant. The complainant informed her mother-in-law and her brother-in-law. She then reported at Sagana Police Station and was referred to hospital for examination. PW-3- a Clinician at Sagana Sub-County hospital examined her and found that:-

- She was traumatized.

- She had bruises on the neck caused by a sharp object.

- She had injuries in the finger.

- Genitalia appeared normal.

- Laboratory test HVS indicated traces of spermatozoa, which confirmed that assault was penetrative.

25. He filled the PRC and P.3 Form, exhibits 1 & 2. The examination was done Twelve hours after the incident.

26. The ingredients of rape as provided under **Section 3 of the Sexual Offences Act** which have been pointed out by Mr. Obiri and which I have quoted above are that: A person commits an act which causes penetration with his or her genital organs into the genital organs of another person.

- The act which cause penetration must be committed unlawfully and intentionally.
- The other person who is penetrated has not consented to the act and the consent is obtained by force or by means of threats or intimidation of any kind.

**Section 43 of the Sexual Offences Act** has expounded as to what amounts to intentional and unlawful acts.

27. The trial magistrate in his judgment analysed this ingredients at Page 34 of the record where he relied on the case of **Dominic Ochieng Odoyo & Another –v- Republic (2015) eKLR**.

28. The complainant gave a detailed account of how she was raped. The PW-3- who examined her Twelve hours after the rape ordeal found some fresh physical injuries on the complainant. They confirmed that there was struggle. She was an adult and testified that she was raped. Medical evidence by PW-3- found that there was penetration. Though the defence counsel argues that the complainant had coitus with her husband roughly 48 hours before the rape and hence presence of spermatozoa is not supportive of penetration, the presence of other fresh injuries on her body which suggest that there was struggle confirms her testimony. In the circumstances of this case it is expected that the penetrator used force. The complainant’s testimony is that there was penetration. The presence of spermatozoa alone in a woman’s vagina is not conclusive proof that she had sexual intercourse nor is the absence of spermatozoa in her vagina proof of the contrary. What requires proof that sexual intercourse has taken place is proof of penetration, an essential ingredient to the offence of rape is penetrative sex. Penetration maybe partial or complete. **Section -2- of the Sexual Offences Act** defines penetration as follows:-

***“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”***

29. This means that penetration need not be complete insertion of the genital organ. Penetration does not therefore require to be proved by the presence of spermatozoa. Tears and bruises also prove intrusive acts of penetration. In this case, the testimony of PW-3- proved beyond any reasonable doubts that there was penetration and this court need not go further. Indeed the Court of Appeal has held that rape can be proved by the testimony of the victim giving evidence on oath that she was raped. In the case of **Kassim Ali –v- Republic (2006) eKLR** the Kenya Court of Appeal at Mombasa considered the issue of lack of medical evidence in the context of sexual offence of rape and held that:-

***“ Moreover as the Superior Court correctly held, the commission of a sexual offence can be properly corroborated by circumstantial evidence (see Ongweya –v- Republic(1964) E.A 129.)***

***So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”***

30. The court is saying that the oral evidence of the victim is sufficient to base a conviction. Again the Court of Appeal in Nairobi in a related holding in **Denis Osoro Obiri –v- Republic 2014 eKLR** cited **Geoffrey Kionji –v- Republic Cr. Appeal. No. 270/2010 (Nyeri)** where the court while considering the issue of medical evidence in a case of defilement, stated as follows:-

***“Where available medical evidence arising from examination of the accused linking him to the defilement would be welcomed. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the victim was penetrated by the accused person.”***

31. What I am trying to say is that the submission by the defence that the medical evidence is not reliable as the complainant had engaged in coitus with her husband 48 hours before the rape cannot be relied on to say rape was not proved as I have stated above. The evidence of complainant is sufficient to prove that there was penetration.

32. The trial Magistrate while considering whether the complainant was raped stated:

***“The complainant stated that in her testimony she was penetrated without her consent and by use of force and coercion. The incident happened at night. When she was released she called one Pius who is a brother in law to the accused and other people who came to the scene. If indeed it was a frame up why will the complainant wait until midnight to call all the stated people to the scene? The only reason why she did that is because she didn’t appreciate what had been done to her. I do find that she had been raped.”***

33. The trial Magistrate had the chance to see the complainant and believed her testimony.

34. I find that the testimony of the complainant sufficiently proved that she was raped on the material night and the testimony was well corroborated by medical evidence. The prosecution proved beyond any reasonable doubts that there was penetration of the complainants genital organs without her consent.

35. The second issue which I have to determine is whether the appellant is the one who raped the complainant. There is no dispute that the appellant was well known to the complainant. The genesis of the incident as narrated by the complainant is that the appellant called her to tell her that her cow had strayed in their farm. PW-1- took a torch and found the appellant who she knew as W. They talked and she then went and tethered the cow. She returned to the house and entered her bed. Suddenly a person lay on her naked. The complainant realized it was the appellant as he talked as they struggled and he was threatening her with a knife. For somebody who was well known to the complainant there was no possibility of mistake.

36. The evidence of the complainant was corroborated by PW-2- who testified that he was called by the complainant who told her to call his mother and they go to her house. PW-2- obliged and he called her mother and they went to the house of the complainant. The complainant narrated how she was called by the appellant alleging how cows had strayed and how the appellant ended up raping her. PW-2- went to the house of the appellant but he escaped through the roof. The following day PW-2- searched for the appellant and managed to arrest him. PW-2- took the appellant to Sagana Police Station.

37. The testimony of PW-2- shows that it is the appellant who was implicated soon after the offence was committed and no other person.

38. Having considered the evidence tendered on the identity of the rapist, I find that the appellant was well known to the complainant. There is therefore no question of mistaken identity. The trial Magistrate after analyzing the evidence arrived at the conclusion that it is the appellant who committed the offence. I find that the conclusion by the trial Magistrate was inevitable in the light of the evidence tendered before him. There was nothing wrong in the trial Magistrate concluding that the appellant ran away out of guilty mind as the finding was based on evidence and a trial court is supposed to make a finding based on the weight of the evidence.

39. I find that the evidence tendered by the prosecution proved beyond any reasonable doubts that the appellant was the perpetrator who raped the complainant on that material night.

40. The complainant testified that she did not consent to the sexual act. Absence of consent is a key ingredient in the offence of rape. **Section 3 of the Sexual Offences Act** which I have cited above provides that rape is committed where the person raped does not consent to the penetration. Where there is no consent, the act of penetration is unlawful. The particulars of the charge that the appellant, intentionally and unlawfully caused his penis to penetrate the vagina of MWM without her consent were proved beyond any reasonable doubts.

On the issue of the trial Magistrate shifting the burden of proof, to the appellant. I agree with the counsel for the appellant that the burden of proof in criminal cases never shifts. I have looked at the defence of the appellant and there is no doubt that it was a mere denial. The appellant had explained where he was on the material night line 26-27 at Page 23 of the Judgment. There was nothing prejudicial to the appellant. The trial Magistrate did not shift the burden. He considered the defence and made a finding. **Section 169 (1) of the Criminal Procedure Code provides:-**

***“Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”***

41. The trial Magistrate cannot be faulted for giving reason for rejecting the defence. Indeed the submission by the defence is that **“It tends”** to shift the burden.

Tends means -

***“To be disposed towards(something), to serve, contribute or conduce in some degree or way to have more or/less direct bearing or effect. To be directed or have a tendency.”***

42. In his own words, no burden was shifted on him, only a possibility.

43. On the submission under **Article 50 of the Constitution** it is admitted that the appellant was informed that the Judgment was not ready though not recorded on court proceedings. The appellant was facing a criminal trial and it was heard and determined. It is now well settled that matters of violation of rights of an accused will not necessarily lead to an acquittal of the accused in a criminal trial. Such violations must be determined in a separate suit. **Article 22(1) of the Constitution** provides for institution of proceedings claiming violations. It provides:-

***“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”***

44. The alleged violations cannot therefore form part of the grounds of appeal.

45. In conclusion, having considered the evidence tendered before the trial Magistrate I find that the conviction of the appellant was proper. The charge was proved beyond any reasonable doubts. I find that the appeal is without merits and is dismissed.

**Dated at Kerugoya this 13<sup>th</sup> day of February 2020.**

**L. W. GITARI**

**JUDGE**