



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 59 OF 2019

DOMINIC ONCHIRI MOKAYAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence of Hon. G.N Barasah – RM dated 13th May, 2019 at the Senior Principal Magistrate's Court at Ogembo in Criminal (Sexual Offences) Case No. 34 of 2019)

JUDGEMENT

1. Dominic Onchiri Mokaya (*the appellant*) was charged before the Senior Resident Magistrate Court at Ogembo with the offence of **Rape** contrary to **Section 3(1)(a) (b) and (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 16/2/2019 at Kenyena, Kisii County, intentionally and unlawfully caused his penis to penetrate the anus of DOM without his consent.
2. He faced an alternative count of **committing an indecent Act** with an adult contrary to **Section 11(A) of the Sexual Offences Act No. 3 of 2006**. That at the said time and place he intentionally touched the anus of DOM with his penis against his will.
3. The appellant was tried and in a judgement of court dated 13th May, 2019, he was found guilty of the main count herein and sentenced to 20 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant lodged this appeal raising of grounds which largely speak to 3 broad themes namely;
 1. **That he was denied enough time and equipment for his defence and for cross examination.**
 2. **The findings of the DCIO who visited the scene and recovered a jacket were never brought before the court.**
 3. **The doctor's report was contradictory and the trial magistrate failed to record the proceedings to capture the appellant's case.**
5. The appeal was canvassed by way of written submissions by the appellant and an oral response by the DPP.
6. Being a first appeal, I am alive to the role of the first appellate court as spelt out in **Okeno –vs- Republic [1972]E.A 32** where at page 36 the court stated;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975]E.A 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –vs- Sunday Post (1958) E.A 424.”

7. The evidence on record is that PW 1 (*the complainant*) went to Hunters Choice at 3.00 pm for refreshment. He was served Furaha Vodka and stayed there till 6.00 pm. He briefly left and came back to the pub where he met Mike with Yasmine. He was tipsy. A bar attendant called Kiage took him to a room behind with a bed to sleep. He dosed off. On waking up he saw Dominic (*the appellant*). He knew him before as they used to meet at joints for an year. There was light from outside but not from inside the room.

8. It is PW 1's case that the appellant was trying to kiss him. The appellant held him by the bed, removed his trouser and boxer and sodomised him. He lost consciousness. He came to at Kenya hospital with injuries at the anus.

9. PW 1 stated on cross examination that there were 2 gates to the room where he was. The room was locked from outside and he confirmed he was drunk.

10. PW 2 examined the complainant. On examination the patient was smelling of alcohol. He confirmed there was penetration of his anus.

11. PW 3 testified that he took the complainant to a room behind Hunters Wines where he (PW 3) used to sleep. He closed the door but did not lock up. The appellant came to the bar about 7.30 – 8.00 pm. He then left. When PW 3 went to answer a call, he saw the appellant coming from the said room. PW 3 entered the room and found the complainant covered with his trousers and briefs removed. The appellant returned stating he had forgotten his cap in the room. One Dishon held the appellant and asked him what he had done. PW 3 examined the complainant and found blood at the anus. One Mike screamed. The appellant overpowered the group and pushed a gate that had rotten timber, jumped and ran away.

12. PW 4 was present too and witnessed the complainant get drunk and later taken to the backroom. He then saw PW 3 struggling with the appellant. On going to the room he found the complainant did not have his boxer and clothes. He saw blood at the complainant's anus. The appellant managed to escape through the back gate. PW 5 was called to the scene. He saw the injury on the complainant's anus.

13. PW 6 the investigating officer collected a jacket suspected to belong to the appellant at the scene. He collected enough evidence that the appellant was the perpetrator of the crime.

14. In an unsworn defence, the appellant stated that on 16.2.2019 he was at one place in Kisii town (sic) in his grandfather's shamba. He was at his home on 21/2/2019. He was back there for his mum's memorial. He was with friends and he was arrested by 2 police officers. He was taken to the police station where he found another person who was said to be his co-suspect.

15. For determination is whether the conviction was safe based on the evidence on record. If that answers in the affirmative, the court is invited to re-look at the sentence and make a finding as to whether the same is harsh or manifestly excessive in the circumstances.

16. After careful consideration of the evidence, I am persuaded that there is sufficient direct evidence linking the appellant to the offence herein.

17. The evidence of PW 3 who was first at the room, the scene of the crime herein and who saw the appellant coming out of the room is corroborated by PW 4, an administration police officer who was at the said bar and he saw the appellant struggling with PW 3. He saw the injuries on the complainant and he also witnessed the appellant escape through a back gate.

18. These 2 are independent witnesses with nothing to gain from framing the appellant. They saw and talked with him. Indeed, there was a struggle and the appellant managed to escape. Their evidence is one of identification through recognition.

19. These witnesses' evidence is based on their recognition of the appellant. The appellant had earlier come to Hunters bar where all the witnessed were. He was known to the witnesses. The place at which he was found leaving the room (scene of crime) was lit. The witnesses had adequate time with him including a scuffle before he escaped.

20. As held in **Ashmond Visu Owino –vs- R [2019] eKLR**, I bear the onerous duty to examine thoroughly the evidence of identification before confirming a conviction based on the same. This I have done and I have in that regard got useful guidance from the decision of the Court of Appeal in **Wamunga –vs- R [1989]eKLR 426** where the court stated;

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

21. I am further fortified in my conclusions by the decision in **Anjonini & Others –vs- R [1980]eKLR 59** where the Court of Appeal delivered itself thus;

“This was however a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”

22. The injuries on the complainant's anus are confirmed by PW 2, the clinical officer who examined him.

23. In countering this evidence, the appellant gives an alibi defence which is not corroborated. If he was not at the scene of crime as alleged, nothing would have been easier than to call evidence in support. In light of the evidence on record, the alibi cannot possibly be true.

24. In his petition, the appellant states he was denied enough time for his defence and cross examination. The record shows the converse is true. The appellant was as per the record of the proceedings accorded adequate opportunity (and he seized the same) to cross examine each and every witness. Indeed, even at the close of the evidence he was on the 10.4.2019 allowed time to submit by the 24.4.2019. When on the 24.4.2019 he had not filed submissions and on his request he was granted an extension to submit by 13.5.2019. The tenets of a fair trial are manifestly clear from the proceedings.

25. On the issue of the jacket collected at the scene and the lack of a report on the same before the court, it is trite law that it is not the quantity of but the quality of evidence that leads to a conviction.

I fail to see what value evidence related to the jacket alluded to would have added to the prosecution's case in light of the other evidence on record.

26. In **Nicholas Muema Ndunda v R [2011] eKLR** Justice Asike Makhandia (as he then was) had this to say on the issue;

“With regard to failure to call witnesses which were not called, what matters in criminal cases is not the quantity of witnesses, but the quality. The appellant claims that the young man selling roast maize and who requested the appellant to take the complainant to her husband's house should have been called as a witness. I do not think that such witness was essential.”

27. It is thus clear that once the prosecution has gathered its case and presented it to court, it's upon it to consider what is sufficient to prove their case and no further obligation can lie or their part to call more evidence than they deem necessary. It is then left to the court to determine whether based on evidence produced the case has been proved beyond reasonable doubt.

28. My re-evaluation of the evidence leads me to the conclusion that the evidence against the appellant was overwhelming. He was convicted on sound evidence.

29. In so far as the sentence meted out is concerned, I note the trial court took in the appellant's mitigation. It then considered the nature of injuries suffered by the complainant. The court addressed itself to the sentence provided in Law for the offence. It proceeded to sentence the appellant to 20 years imprisonment.

30. Having considered the above, I am satisfied that the sentence meted out to the appellant was lawful and appropriate. It was neither harsh or excessive. I have no ground(s) upon which to disturb it.

31. In the end and for reasons above stated, I am satisfied that the conviction of the appellant was safe. The sentence imposed was neither illegal, harsh or excessive. I make a finding that the appeal herein has no merit and is disallowed in its entirety.

Dated and delivered at Kisii this 13th day of May, 2020.

A.K NDUNG'U

JUDGE