



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 68 OF 2019

PATRICK ONDIEKI OKARI alias OMARIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. S.N Makila – SRM dated 19th July, 2019 at the Chief Magistrate's Court at Kisii in Criminal(Sexual Offences)Case No. 25 of 2017)

JUDGEMENT

1. Patrick Ondieki Okari alias Omari (appellant) was charged with **rape** contrary to **Section 3(1) (a) (c) (3) and (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of which were that on the 11/6/2017 at [particulars withheld] Village, Nyosia Sublocation in Kisii Central Sub County within Kisii County, intentionally and unlawfully caused his penis to penetrate the vagina of VK by use of force.
2. He faced an alternative count of **indecent act with an adult** contrary to **section 11(A)** of the Sexual Offences Act. That at the said time and place he intentionally touched the vagina of VK with his penis against her will.
3. In a judgement dated 19.7.2019 the appellant was found guilty of the main charge, convicted and sentenced to 10 years imprisonment.
4. Aggrieved by the whole judgement, the appellant lodged this appeal citing the following grounds in his petition;
 1. **The learned trial magistrate erred in law and fact by convicting the appellant for the offence of rape.**
 2. **The learned trial magistrate erred in law and fact by admitting evidence of complainant which was full of contradictions and not truthful.**
 3. **The learned trial magistrate erred in relying on the report of clinical officer who examined her and said there was delay in examination.**
 4. **The learned trial magistrate erred in law and fact by relying on the charge sheet which states same reported on 14/6/2017 while evidence states 12/6/2017.**
 5. **The learned trial magistrate erred in relying on photocopies of medical report with no explanation.**
 6. **The learned trial magistrate erred by not inquiring of the report of the appellant.**
 7. **The Learned trial magistrate was biased upon the appellant.**
5. The summary of the evidence adduced at the lower court is as follows. PW 1 the complainant testified that she had known the appellant about one week before 11/6/2017. On this day at 9.00pm she was asleep when someone knocked at her door. She opened and found the appellant who had a phone torch (sic). He enquired about PW 1's husband. The appellant told her that he had left PW 1's husband at Keumbu. He had come to her since he liked her since he met her. A struggle ensued. The appellant produced a knife. He tore her clothes and told her to co-operate. He tore her biker and pant and raped her.
6. PW 1's husband came shortly after. The incident was reported to him. The next morning PW 1 was examined at Keumbu hospital. A P3 form was filled. PW 1 identified her red pant and pink biker in court. On cross examination, PW 1 denied framing the appellant over a

debt. In his evidence PW 2 referred to the colour of PW 1's biker and panty as white. He however offered that he was not good with colours.

7. PW 3 confirmed that the appellant had passed at Keumbu Transline Office where PW 3 was with PW 2 at around 8.50 pm. He greeted them and walked away.

8. The medical evidence tendered showed that the complainant's vaginal area had lacerations with whitish discharge.

9. The appellant gave a sworn defence and called 2 witnesses. He said that on 12/6/2017 he was in a hotel in company of DW 2 and DW 3. There was a man seeking directions to the home of O. The appellant took him to the home. In that home there was a lady who was the estranged wife of the man. A fight ensued. The appellant was later arrested and accused of raping the wife of RO. DW 2 said the appellant took the man seeking directions to the home of O at 3.00 p.m. DW 3 testified that he was with the appellant when the appellant assisted to take a certain stranded man to the home of O. It was 3pm. When the appellant returned, his suit was torn. The said man left with his wife one K. They saw them leaving the area.

10. Being a first appellate court I am aware of the onerous duty bestowed on me by law to re-evaluate the evidence and make my own independent conclusions all the while alive to the fact that I neither saw nor heard the witnesses testify and give due allowance in that regard.

11. This principle is well enunciated in the decision of Okeno –vs- R [1972]EA 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.”

12. I have had occasion to consider the record of appeal, the petition and submissions made. Of determination is whether there existed sufficient evidence to warrant the conviction of the appellant.

13. The available direct evidence is that of PW 1 who was alone in the house when the incident occurred. She avers that the appellant knocked at her door. She opened. The appellant had a phone torch (sic) and she saw him. She knew him. They talked, the appellant telling her that he liked her since he met her. A struggle ensued and PW 1 was subdued when the appellant removed a knife. The appellant tore her clothes and raped her. Medical evidence revealed that there were lacerations at PW 1's vaginal area and there was a white discharge. The torn under garments were produced in court. PW 1 was steadfast in her evidence even under cross examination.

14. Notably, this evidence is one of a single identifying witness. This evidence is however given a special place in law by dint of **Section 124** of the **Evidence Act**. That section provides;

“S 124 Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

15. As held in Anjonini and Others –vs- R (1980) KLR 59, where identification is pegged on recognition it is more assured. The court stated;

“This, however, was 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 the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. The republic (unreported.)”

16. The offence herein being a sexual one, the evidence of PW 1 is insulated by the exception in **Section 124** of the **Evidence Act**. In my considered view there is no demonstration of any ulterior motive that the witness would have to warrant her frame the appellant.

17. Further, the medical evidence proves a fact that she was raped and it would be improbable that the witness would go to the extent of hurting herself at the genitalia just to frame the appellant. Am satisfied the witness was truthful.

18. The accused offered sworn evidence in defence in which he states he only directed a stranger to the home of one O. There was a woman who was the estranged wife and they started fighting. DW 2 and DW 3 state that the appellant escorted the said man at 3.00 p.m. These 2 witnesses never gave evidence relating to the events of 11/6/2017 at 9.00 pm and on cross examination they admit they may not know what the appellant did when they parted company.

19. Having closely examined the record, I am satisfied that the trial properly directed itself to the evidence on record and the law and

reached the correct verdict.

20. The appellant has raised a ground stating that the trial magistrate was in error by relying on the charge sheet which states that a report was made on 14/6/2017 while the evidence states 12/6/2017. I note the charge sheet has an entry showing O.B No. 12/14/6/2017. This is an anomaly curable under S.214 and 382 of the **Criminal Procedure Code**. It is not fatal to the prosecution case. In **JMA v Republic (2009) KLR 671**, it was held;

“It was not in all cases in which a defect detected in the charge sheet on appeal would render a conviction invalid. S 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant is not discernable.”

21. **Section 382** of the **Criminal Procedure Code** provides;

“S 382 Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

22. The complaint about use of photocopies of the medical report as raised in ground 5 of the Petition cannot also see light of day in view of the provision of **S 382** of the **Criminal Procedure Code**. I emphasize the last words of S 382 that;

“Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The appellant was represented by counsel in the trial. No objection was raised regarding the medical report. Again, no prejudice is demonstrated on the part of the appellant.

23. It has been submitted that the trial magistrate was in error for convicting the appellant on the evidence of a clinical officer who examined the victim and the appellant but was not having the appellant’s medical report. The pus cells and epithelial cells (dead sperms) would have been somebody else’s not the appellant’s.

24. This submission is not supported by Law. In **George Kioji v Republic Cr. App No. 270 of 2012**, the Court of Appeal stated;

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. 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 defilement was perpetrated by the accused person. Indeed under the proviso of Section 124 of the Evidence Act, Cap 80 Laws of Kenya, a Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

(See also **Robert Mutungi Muumbi –vs- Republic C.A No. 5 of 2013** and **Williamson Sowa Mbwanga –vs- Republic, Cr. App No. 109 of 2014.**)

25. I am satisfied that based on the evidence on record, the appellants’ conviction was anchored on sound evidence and was safe. The appeal herein is found without merit and is disallowed.

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

A.K NDUNG’U

JUDGE