



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 162 OF 2015

**(An Appeal arising out of the conviction and sentence of Hon. E.K. NYUTU– PM delivered on 12th June 2015 in Makadara CMC.
Cr. Case No.686 of 2013)**

JACOB OMONDI ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act. The particulars of the offence were that on 7th day of February 2013 in Kasarani Estate within Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of PWW by use of force. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11(6) of the Sexual Offences Act. The particulars of the offence were that on 7th day of February 2013 at Kasarani Estate within Nairobi County, the Appellant intentionally and unlawfully touched the vagina of PWW (the complainant) with his penis against her will. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge rape contrary to Section 3(3) of the Sexual Offence. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for convicting him, yet the key element of identification was not established by the prosecution. He was aggrieved that the trial court failed to appreciate that vital prosecution witnesses were not availed to adduce evidence during trial. He took issue with the trial court's decision to convict him yet the prosecution failed to discharge its burden of proof to the required standard of proof beyond any reasonable doubt. Finally, he was aggrieved that the trial court failed to take into account his defence in arriving at its decision.

During the hearing of the Appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Atina for the State opposed the appeal. Learned State Counsel stated that the Appellant was positively identified. She averred that the complainant and the Appellant had a conversation before the alleged sexual assault occurred. A struggle ensued between the two. The Appellant grabbed her and took her to a bushy place. She was laid down facing upwards. The Appellant raped her. He afterwards ran away. Members of the public ran after the Appellant. They managed to apprehend him. They brought him back to the complainant who identified him as the perpetrator. Learned State Counsel further submitted that medical evidence established that the complainant was raped. She asserted that the arresting officer as well as the investigating officer confirmed the occurrence of sexual assault as narrated by the complainant. She therefore urged this court to dismiss the Appellant's Appeal.

The facts of the case according to the prosecution are as follows: PW1, PWW is the complainant. She stated that she was about eighty (80) years old at the time. She resides in Korogocho. On the material day of 7th February 2013, she was going to her farm in Kasarani. She carried a basket, a jembe and a sack on her back. She had a basket in her hand. As she was walking, she met the assailant. He was walking in the same direction using a different path. When she arrived at her farm, she heard the assailant who was behind her asking to assist with her luggage. She declined. The assailant grabbed the luggage on her back. A struggle ensued between them. She fell down. The assailant punched her on her mouth. Her teeth came off. The assailant dragged her into a bush. He lifted her and dropped her on the ground. She began to feel weak. The assailant undressed her. He also removed his clothes. He then proceeded to rape her. He removed a knife which he used to threaten her. She pleaded with him not to kill her. He raped her for the second time. He then ordered her to stand up. When she stood up, she heard voices nearby. She recognized one of the voices. It was Gicheha's voice, her neighbour at the farm. She started running towards the voices. She was screaming saying that she had been raped. She saw the assailant running in the opposite direction. She described the assailant to the members of the public. She stated that he was wearing a white shirt and green trousers. Members of the public managed to apprehend the assailant. He was the Appellant. She identified him as the perpetrator of the sexual assault. A person who identified himself as

a police officer managed to rescue the Appellant from the irate mob. He was taken to a nearby D.O's office. She reported the matter at Kasarani Police Station. She was thereafter examined and treated at a hospital in Eastleigh.

PW2, Barbara Salano, stated that she was a Clinical Officer at Medicins Sans Frontieres. She testified that the complainant was examined at the said clinic on 7th February 2013. Her clothes were soiled. She had a tear and dried bloodstains on the upper and lower lips of her mouth. She had a loose tooth on her lower jaw. Her right cheek had a haematoma. PW2 also examined the complainant's genital area. The complainant had a small tear at the vestibule. There was presence of blood on her vaginal opening. Her anal region was normal. PW3, Dr. Joseph Maundu, examined the complainant on 8th February, 2013. He found bruises on her head, neck and mouth. The injuries were approximately one day old. With regards to her genital exam, she had a tear on her perianal area. She also had visible bruises on her vagina. There was no vaginal discharge found.

PW4, Sgt. Esther Gatheru, was the investigating officer of the case. She stated a report was made on 7th February 2013 by an eighty (80) year old woman who alleged that she had been raped. She was on duty the following day. The complainant narrated to her how the Appellant had sexually assaulted her. She escorted the complainant and the Appellant to the Police Surgery for examination. PW5, Cpl. Samuel Atudo Kakuko stated that he was attached at the D.C's Office, Kasarani. About five people came to the office. One of them was an elderly woman aged eighty (80) years old. The Appellant was also among them. The elderly woman reported that the Appellant had raped her at her farm. PW5 escorted the Appellant and the complainant to the police station.

The Appellant was put on his defence. In his unsworn statement, the Appellant stated he resided in Dandora. On the material day, he was going to work at Kasarani at around 8.00 a.m. As he was walking, he heard the voice of a woman crying out for help. He started walking towards the source of the voice. Suddenly, two men appeared and pointed at him, accusing him of having raped a woman. The two men started beating him up. He ran away. They ran after him. Members of the public arrested him. They took him to a woman who claimed that he had raped her. He was escorted to the D.O's Office in Kasarani. The complainant and some of the members of the public recorded their statements. He was later taken to the police station. He denied the allegations that he had raped the complainant.

This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1982 – 88] 1 KAR 1134** stated this on the duty of the 1st Appellate court;

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”

In the present appeal, the issue for determination is whether the prosecution established the offence of rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case.

According to **Section 3(1)** of the **Sexual Offences Act**, a person commits the offence of rape if;

“(a) He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;

(b) The other person does not consent to the penetration; or

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

The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the act.

Section 2(1) of the Sexual Offences Act defines penetration as:

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

PW1 narrated to the court how the Appellant sexually assaulted her. The medical evidence adduced by the prosecution corroborated the fact that she had been sexually assaulted. The complainant was examined at Medicins Sans Frontieres on 7th February, 2013. PW2 testified that the complainant's clothes were soiled. She had a fresh tear at the vestibule. There was presence of blood on her vaginal opening. The Post Rape Care form indicated that she had visible injuries on both labia and clitoris. The complainant was examined a few hours after the sexual assault. PW3, Dr. Joseph Maundu examined the complainant on 8th February 2013. He stated that she had a tear on her perianal area. She also had visible bruises on her vagina. Taking into consideration the medical evidence, as well as the complainant's testimony, this court is of the view that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.

Was there absence of consent? A person is said to consent, if he or she agrees by choice, and has the freedom and capacity to make that choice. In the case of **Republic V. Oyier [1985] eKLR**, the Court of Appeal held as follows:-

“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.”

It was PW1's evidence that the assailant offered to assist her carry her luggage. She declined. He grabbed her luggage. A struggle ensued between them. PW1 fell down. The assailant punched her on the mouth. Her teeth fell off. He grabbed her and dragged her into a nearby bush. He lifted her and dropped her to the ground. PW1 felt weak. He then proceeded to have sexual intercourse with her. He had a knife which he used to threaten her. It was clear from PW1's testimony that the assailant threatened and coerced her into having sexual intercourse with him. She did not consent to the sexual intercourse. The medical evidence adduced by PW2 and PW3 corroborate the fact that there was physical resistance on her part. PW2 stated that on examination, PW1 had a tear and dried bloodstains on the upper and lower lips of her mouth. She had a loose tooth on her lower jaw. Her right cheek had a hematoma. PW3 testified that he found bruises on her head, neck and mouth. The injuries were approximately one day old. The medical evidence corroborates PW1's claims that her assailant punched her on the mouth. He also lifted her and dropped her on the ground. The injuries sustained by PW1 due the physical assault were proved. In addition, the assailant had a knife which he used to threaten to kill her if she did not cooperate. This court is of the opinion that PW1 yielded to the sexual intercourse due to fear of death. She did not give her consent. The prosecution was therefore able to establish the element of absence of consent.

The third issue is whether the Appellant was positively identified as the perpetrator. The complainant was an 80 year old woman. She testified that she was carrying a lot of luggage on her back i.e. a sack, a basket and a jembe. She heard someone from behind asking to assist her carry her luggage. The person then grabbed her luggage from behind. A struggle ensued between them. She was punched on the face. The assailant lifted her and threw her twice on the ground. She felt weak. This court is not convinced that the complainant was able to positively identify and memorize the physical features of the assailant under these circumstances. After such a physical assault, she could not have been in the right frame of mind to positively identify her assailant.

The complainant further testified that she informed members of the public that her assailant was wearing a white shirt and green trousers. Members of the public managed to apprehend the Appellant as he was running away. However, none of the said people who effected the arrest were availed in court to adduce evidence. She stated that her neighbour Gicheha was among the members of the public who arrested the Appellant. He was not availed to give his testimony. The testimony of one of them would have corroborated the complainant's claims. Absence of the testimony of a member of the public who participated in the arrest of the Appellant meant that the chain of events from the alleged sexual assault to the arrest was broken. Doubt was created as to whether the Appellant was the person who sexually assaulted the complainant. The claim by the Appellant in his defence that he was a victim of mistaken identity may well be the likely scenario. The complainant also stated that a person who identified himself as a police officer managed to rescue the Appellant from the members of the public. Again, the prosecution did not deem it necessary to avail the said police officer to give his testimony before court to corroborate PW1's claims.

When the Appellant was apprehended by the members of the public, he was escorted to the D.O's Office at Kasarani. PW5 was on duty at the said office when the Appellant was brought in by members of the public. However, PW5 did not inform the court whether the Appellant was indeed wearing a white shirt and green trousers when he was apprehended. This would have confirmed that the Appellant was the same person described by the complainant as her assailant. PW5 and PW6 did not state whether the complainant gave a description of her assailant in her first report made to the police. It should be noted that after his apprehension by members of the public, the Appellant was taken to where the complainant was. The Appellant was thus exposed to the complainant rendering any subsequent public identification parade otiose.

PW1's description of the Appellant in her statement to the police was crucial, if the Appellant was to be convicted on the sole evidence of identification. As no description of the Appellant was given in the said statement, the subsequent identification at the trial became mere dock identification which the court finds worthless given the circumstance of the Appellant's apprehension. In addition, **none of the members of the public who participated in the arrest was availed in court to give evidence.**

The court has a duty to examine thoroughly the evidence on identification before confirming a conviction based on the same. In the case of Francis Kariuki Njuri & 7 Others -v- Republic [2001] eKLR, the Court of Appeal held that;

"The law on identification is well settled and this Court has from time to time said that the evidence of identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (See R -v- Turnbull, [1976] 63 Cr. App. R 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity, or at all. This Court in Mohamed Elibite Hibuya & Another -v- R, Criminal Appeal No. 22 of 1996, (unreported) held that: - 'It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the suspicious details regarding his features given to anyone and particularly to the police at first opportunity'".

In the present appeal, the evidence of PW1 did not reach the threshold of a positive identification as determined above. A member of the public who apprehended the Appellant ought to have been availed in court to give evidence as to the circumstances of the Appellant's arrest. Lack of a description of the Appellant by PW1 in her first report made to the police as well as the circumstances of the Appellant's apprehension, raise reasonable doubt regarding the evidence of identification. The Appellant in his defence denied sexually assaulting the complainant. No other evidence was given before this court to connect the Appellant to the sexual assault. From the foregoing, the evidence of identification, taken into totality, is not watertight as to be free of error to support the conviction of the Appellant.

In the premises therefore this court finds merit with the appeal lodged by the Appellant. The Appeal is hereby allowed. The conviction is quashed. The Appellant is acquitted of the charge. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF MARCH 2019

L. KIMARU

JUDGE