



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.133 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. Juma - SPM delivered on 12th November 2017 in Kibera CMC CR. Case No. (SO) No.59 of 2013)

MESHACK SIMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Meshack Simba was charged with the offence of **rape** contrary to **Section 3(1)(a)(b)** as read with **Section 3(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 23rd November 2013 in Nairobi County, the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate the female genital organ namely vagina of SWG, aged twenty-two (22) years without her consent. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged. He was sentenced to serve ten (10) 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 was aggrieved that he was convicted on the basis of the evidence adduced by the prosecution witnesses that was inconclusive and incapable of supporting a conviction. He faulted the trial magistrate for failing to consider his defence statement in arriving at its decision. He asserted that the trial court failed to properly evaluate the evidence adduced by the prosecution witnesses hence arrived at an erroneous decision. He was of the view that the trial court improperly shifted the burden of proof from the prosecution to the defence. He pointed out that the evidence by prosecution witnesses was full of contradictions. He stated that the prosecution failed to establish the element of lack of consent to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court failed to acknowledge that the prosecution failed to call crucial witnesses. He was of the view that the prosecution failed to establish the ingredients of the offence of **rape**.

During the hearing of the Appeal, this court heard oral submission made by Mr. Otieno for the Appellant and by Mr. Momanyi for the State. Mr. Otieno submitted that the sexual intercourse between the Appellant and the complainant was consensual. He stated that the Appellant and the complainant met on several occasions within the campus. On the material day of 23rd November 2013, the Appellant was invited by the complainant to her room. They proceeded to have consensual sexual intercourse. The complainant thereafter noticed that the Appellant's phone's screensaver had the photo of another lady. She got annoyed. She reported that the Appellant had raped her the following day. Counsel for the Appellant submitted that the Appellant did not coerce or threaten the Appellant into having sex with him. He was of the view that the prosecution witnesses' testimony, especially that of the investigating officer, raised a lot of doubt as to the absence of consent. He averred that the trial court ought to have resolved the said doubts in favour of the Appellant.

Mr. Otieno further submitted that the complainant stated that she did not scream. She also stated that she undressed and changed her clothes in the presence of the Appellant after he allegedly raped her. Counsel for the Appellant argued that that was an unnatural reaction if indeed she had been sexually assaulted by the Appellant. He pointed out that DW2 corroborated the Appellant's evidence that he and the complainant were lovers. He asserted that the complainant stated that he informed her husband, mother in law and the hostel custodian of the alleged sexual assault. However, none of these witnesses were availed in court to give evidence. He maintained that the complainant's evidence was not sincere or truthful. In the premises therefore, he urged this court to allow the Appellant's appeal. Mr. Momanyi for the State conceded to the appeal. Learned State Counsel stated that the evidence adduced by the prosecution was not sufficient to sustain a conviction. He therefore urged this court to re-evaluate the evidence presented before the trial court and consequently allow the Appellant's Appeal.

The facts of the case according to the prosecution are as follows: The complainant was a student at the [particulars withheld], main campus. She stated that on the material day (23rd November 2013), she was in her room located at BQ1 Hall 20. She had three roommates who were absent at the time. She was watching videos from her laptop. The Appellant barged into her room. He was furious that she had told her husband that he was stalking her. He threatened to harm her husband. He grabbed her and held her tight. She said that she protested and

asked him to leave her alone. She however stated that she did not scream. The Appellant held her hands together. He forcefully kissed her and hurt her lip. He opened his zip. He pushed down her trousers and proceeded to sexually assault her. The incident took a few minutes. The Appellant thereafter left the room. She was crying when he left.

The complainant stated that her roommate came back and found her crying. She told her what had happened. She afterwards called her husband and informed him of the ordeal. Her husband referred her to his mother (her mother-in-law). Her mother in law advised her to report the incident immediately. She therefore went to the custodian of the hostel and reported the sexual assault. The custodian took her to the student clinic within the campus. She was later referred to Kenyatta National Hospital for further treatment. The following day, in the afternoon, she went to Kileleshwa Police Station and reported the incident. Before she proceeded to the police station, she went back to the campus. She gave the campus security officers the Appellant's phone number, which they used to track him.

The complainant stated that she had seen the Appellant within the campus prior to the material day. She had also met him in town. He introduced himself as 'Mariano'. The day of the alleged sexual assault was the second time the Appellant came to her room. He first came when he was searching for applicants to participate in a project for Bidco Company. She exchanged contacts with the Appellant. She stated that she participated in the project. At some point in her testimony, the complainant stated that she and her husband had met the Appellant before the sexual assault occurred. She informed her husband that the Appellant was stalking her. She testified that the Appellant had asked her to be his girlfriend. She however declined and told him that she was married.

PW3 was a security officer at the [particulars withheld]. He stated that the complainant accompanied by her father came to his office on 24th November 2013 at about 11.00 a.m. His colleague, R, was also in the office. She reported that she had been sexually assaulted on the previous night. She stated that she was sexually assaulted by a student known as 'Simba'. She gave them the student's phone number. They dialed the phone number. At about 2.00 pm, the student finally answered his phone. They asked him to come to their offices. It was the Appellant. He took the Appellant to his superior's office. The Appellant was afterwards escorted to Kileleshwa Police Station. His colleague, R (PW4) corroborated his evidence. PW4 stated that the complainant identified her perpetrator by the name S. The complainant told them that the said Simba and herself had been friends for a while.

The complainant was examined by Dr. Maundu (PW2) on 17th January 2014. He noted that she did not have any physical injuries on her body. She also did not have any visible injuries on her vagina. She however had a white discharge from her vagina. On cross-examination, he stated that the complainant's hymen was broken. It was however an old tear which had since healed.

PW6, a Government Analyst based at the Government Chemist, stated that he received a piece of underwear and the Appellant's blood sample from Kileleshwa Police Station. There was presence of semen on the underwear. After his analysis, he noted that the DNA profile generated from the semen matched the DNA profile generated from the Appellant's blood sample. This case was investigated by PW7, who was at the time based at Kileleshwa Police Station. She stated that the complainant came to the police station on 24th November 2013. The complainant reported that she was sexually assaulted by a person who was well known to her. PW7 stated that after her investigations, she discovered that the Appellant was a friend to PW1. She stated that when the sexual assault occurred, the two were in a relationship. She asserted that both the Appellant and the complainant admitted that they were friends and had a sexual relationship. On cross-examination, PW7 stated that it was difficult for her to tell whether the sexual encounter was consensual or not. She stated that the Appellant did not coerce or threaten the complainant to yield into having sexual intercourse with him. In her view, the complainant's report of the sexual assault was possibly an afterthought. PW8 Simon Nzana, a Clinical Officer based at Nairobi Women Hospital testified that the complainant was seen at the Nairobi Women Hospital on 23rd November 2013. This was a few hours after the sexual assault. Medical examination confirmed that indeed the complainant had been sexually assaulted. A medical report to that effect was produced into evidence.

The Appellant was put on his defence. He denied the allegations that he had sexually assaulted the complainant. He stated that the complainant was his girlfriend. They had been in a relationship for about a year. It was his testimony that the complainant had visited him on numerous occasions at his house in [particulars withheld], and later when he moved to [particulars withheld]. They had sexual relations when she visited him. He also visited her on a number of occasions at her hostel at the [particulars withheld]. He met her roommates. The complainant had also met his housemate. He asserted that on the material day, he had visited the complainant at her hostel. They had consensual sexual intercourse. He afterwards took photos of her as she was dressing up. She then took his phone. She saw a photo of a lady on the Appellant's phone. She got annoyed. He assured that the said lady was just a friend and nothing more. She saw him off and he left. He denied having any sexual relations with the complainant against her will.

The Appellant called his housemate, DW2, to adduce evidence. DW2 corroborated the Appellant's evidence that he had a sexual relationship with the complainant prior to the material day. He stated that on the material day, he escorted the Appellant to the complainant's hostel. He then went home. When the Appellant came back to the house, he informed him that he had sexual intercourse with the complainant that night. The complainant called the Appellant to confirm that he got home safe. DW2 stated that the complainant also spoke to him. She asked him if the Appellant had another girlfriend besides herself. He told her that the Appellant did not have another girlfriend. The Appellant went to the campus the next day. He later got a call from the Appellant informing him that he had been arrested.

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. In the present appeal, the only issue of contention is whether the sexual act that happened between the Appellant and the complainant on the material day was consensual. Both the complainant and the Appellant admitted that they had sexual intercourse on the material day. It's the complainant's case that she did not consent to the sexual act. However, the Appellant maintains that the sexual act was consensual. Therefore the only issue for determination by this court is whether the prosecution established the ingredient of absence of consent to the required standard of proof beyond any reasonable doubt.

According to the Proviso to Section 42 of the Sexual Offences Act, 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 the complainant's evidence that the Appellant had previously, before that material night, threatened her. She got scared and gave her husband the Appellant's number. The Appellant later came to her room on the material night. He was furious that she had informed her husband that he was bothering her. He grabbed her and held her tight. She protested. She asked the Appellant to leave her alone. He held her hands together. He forcefully kissed her and hurt her lip. He pushed her trousers down and raped her. She stated that she did not scream. The medical evidence adduced indicated that she did not sustain any physical bodily injuries. However her lower lip was swollen. The Appellant on his part does not deny visiting the complainant that evening. He stated that they had consensual sexual intercourse. He averred that he had been in a sexual relationship with the complainant for about a year prior to that material night. Therefore it was not the first time they were having sexual intercourse. He stated that the complainant however was not happy when she saw a photo of another lady on his phone.

This court notes that the complainant in her testimony did not state that she had any sort of relationship with the Appellant. She intimated that she had met him a couple of times around campus. She stated that the Appellant had asked her to be his girlfriend but she declined. However, the Appellant stated that they had dated for close to a year. DW2 corroborated this evidence. The investigating officer (PW7) testified that when the complainant reported the sexual assault, she did not tell her that she had a relationship with the Appellant. However she later admitted to being in a relationship with the Appellant. PW7 stated that from her investigation, at the time the alleged sexual assault incident occurred, the Appellant and the complainant were involved in a sexual relationship. It should therefore be noted that the complainant was not a truthful witness.

That being said, even if they were in relationship, consent was still necessary when they had sex that material night. This court notes that the complainant did not scream when the Appellant allegedly used force to sexually assault her. She lived in a hostel. There was bound to be other students in the hostel. It was therefore logical that she would raise an alarm if she was attacked by the Appellant as claimed. The students staying at the hostels would have easily come to her aid. Medical evidence adduced showed that she did not sustain any physical bodily injuries to indicate that she tried to resist. The complainant stated that the Appellant left immediately after he sexually assaulted her. The incident took a few minutes. She stated that she was crying. However on cross examination, her story changed. She stated that after the Appellant sexually assaulted her, she undressed and had a change of clothes in the presence of the Appellant. This is not a natural immediate reaction of someone who has just been sexually assaulted. In addition, the complainant's evidence is contradictory. This court is of the view that the complainant's conduct exhibited above sheds doubt as to whether the Appellant had sex with her without her consent. The surrounding circumstances of the case point to the fact that the same was consensual.

The complainant stated that after the incident occurred she informed her roommate. She also called her husband who referred her to his mother. The said roommate was not availed in court to give evidence. She would have informed the court whether she indeed found the complainant in distress as narrated by the complainant. Her husband was a crucial prosecution witness. He ought to have been availed before the trial court to confirm whether the complainant's claim that the Appellant stalked her was true. He would also have testified whether indeed the complainant called him and informed him that the Appellant had sexually assaulted her. His testimony would have cleared some of the doubts raised by the Appellant with regard to the complainant's evidence. The complainant testified that she first reported the incident to the hostel custodian. The said custodian was also not called to give evidence. She stated that the custodian took her to the student clinic within the campus. Similarly, no one from the said clinic adduced evidence before the trial court to corroborate the complainant's evidence. Since this court has already established that the complainant was not a truthful and sincere witness, failure to call these witnesses weakened the prosecution case.

The trial magistrate in convicting the Appellant was of the view that it was unlikely that the complainant was jealous to the extent of informing her husband about the sexual act between her and the Appellant. However, this court notes that the said husband was not availed before court to confirm that the complainant indeed called him to inform him that she was sexually assaulted by the Appellant. No reasons were advanced by the prosecution as to why he was not called as a witness. The learned trial magistrate failed to properly evaluate the Appellant's defence and the evidence of DW2 and contrast the same with the prosecution evidence. The Appellant's defence raises reasonable doubt as to whether the complainant did not consent to the sexual intercourse. Taking into consideration the totality of the evidence adduced, this court cannot reach a finding that the sexual intercourse between the Appellant and the complainant was not consensual.

The prosecution, correctly in this court's view, conceded to the Appeal. In the premises therefore, this court finds merit in 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 2ND DAY OF APRIL 2019

L. KIMARU

JUDGE