



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CRIMINAL APPEAL NO. 16 OF 2016**

**SAMSOM LERIONGA KAMORO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the Original Conviction and Sentence dated 3/3/2016 in Criminal SO*

*Case No 3 of 2015 in the Chief Magistrate's Court, Naivasha –*

*(S.Muchungi (Mrs) – RM)*

**JUDGMENT**

**Background**

1. The appellant was charged and convicted with the offence of rape contrary to section 3 of the Sexual Offences Act No. 3 of 2006. He was sentenced to 10 years in prison. The particulars were that on the 19<sup>th</sup> day of December 2014 in Mai-mahiu sub county within Nakuru County he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of PSK. The victim was a girl aged 18 years.

2. Dissatisfied with the lower court decision, the appellant has appealed against conviction and sentence on the following grounds:

- 1. That the trial Magistrate erred in law and in fact by convicting the appellant based on evidence that was otherwise contradictory*
- 2. That the trial Magistrate erred in law and fact by convicting the appellant yet failed to appreciate that lack of forensic tests on the appellant rendered her conclusion on penetration by the appellant unreliable.*
- 3. That the trial Magistrate erred in law and fact to have convicted the appellant based on medical evidence whose authenticity she doubted as it was not presented by the maker,*
- 4. That the trial magistrate erred in law and fact not to have found that the appellant's defence created a reasonable doubt as to oust the prosecution's case.*

3. The brief background of the facts is as follows. Five prosecution witnesses testified. PW1, the victim, testified that on 19<sup>th</sup> December, 2014, she was walking alone going home alone at about 4.00pm via a shortcut. It was a bushy road. She suddenly met the appellant who she knew as a neighbor. He grabbed her by the throat and threatened her with a maasai knife. She tried to scream, but he stuffed his cap into her mouth and raped her. He then ran away

4. The complainant put on her clothes and ran home which was about a kilometer away. She told her elder brother C, who took her to South Lake Dispensary on a motorbike. She was treated and given a letter to take to the police. She went to the AP camp at Sakutiek and reported. She was told to go to Kongoni police station, where she went and was given a P3 form, and sent to Naivasha District hospital. She produced treatment notes from the dispensary, and Naivasha District hospital, and also her birth certificate which showed she was born on 13/6/1996.

5. In cross examination, she denied that she had framed the appellant due to grudges and arguments her father had had with the appellant.

6. PW2, Martin Olekanya testified that on 21/12/2014 he met the appellant who told him that he was being accused of raping a girl from

[particulars withheld] family. The appellant said the situation was bad and he would kill the girl accusing him and take his own life. As a relative to that family, Olekanya, he followed up the issue, but the accused disappeared. On 31/12/2014, he planned with others from the family and they went to CID offices for help to trace the appellant. He was later arrested.

7. PW3 CK, the complainant's elder brother, testified that his sister came home on 19/12/2014 crying, and reported that she had been raped by a neighbour. He told their father, and thereafter took her to the nearest health centre where she was treated. He also took her to Kongoni police station. In cross examination, he denied that his father had a dispute with the appellant.

8. PW4, Jane Njoroge, a clinical officer at Naivasha District hospital for seven years, was allowed by consent to produce the P3 form (Exb 3) and Post Rape Care form (EXb 4). She testified that the Post Rape Care form was filled from treatment notes made at Sagutiek Dispensary on 19/12/2014. She also produced the treatment notes from Sagutiek as Exb 2, which showed that the complainant's hymen was broken, and spermatozoa had been seen. The PRC form was filled on 23/12/2014. The P3 form was filled on 17/2/2015 by Dr Osoro, who saw the complainant and completed the form using information from the treatment notes from Sagutiek Dispensary.

9. PW5, PC David Ndegwa the investigating officer, testified that he issued the complainant with a P3 form which was then filled at Naivasha hospital. The complainant had by then already been treated at Sagutiek Dispensary. She made her report to the police on 20/12/2014, the day after the incident. According to him, the suspect went into hiding after realizing he had been reported. He was arrested on 3/1/2015 in Narok after co-ordination between the complainant and the police. He produced the complainant's birth certificate as PExb 1.

10. In cross examination, the officer stated that he did not investigate whether the appellant had any differences with the complainant's father, although appellant had stated so in his statement. He conceded that when recording the complainant's statement he indicated her age as 17 years, which is what she stated, but he however told her to avail her birth certificate. He stated that when the P3 form was brought to him, it had not been sealed, so he took it back and it was sealed and dated 27/2/2015, although it had been filled earlier.

11. The accused gave sworn evidence. He said his farm neighbours the complainant's family's farm. He denied the rape charge. He stated that on 19/12/2014 he was walking on the road from Maella to Kimonti. He met the complainant whom he knew with a young man, the son of Kabaata, making love at the roadside. He told her he would report to her father, and she said she was an adult. On 21/12/2014 he visited his other family in Narok where he stayed for about a week. Later he was arrested.

12. He said he told the investigating officer that he had a dispute with the complainant's father who had stayed with his step mother and had two children with her, and started getting involved in their land issues. As a result of the complainant's father getting involved in appellant's family land issues, he told complainant's father never to step on their land again.

13. In cross examination, he admitted that he signed his statement and that in it, he said that the complainant was sitting by the roadside with a young man. He couldn't call the young man as a witness because they were still lovers. When asked how they were sitting, he said they were sleeping on top of each other, with the man on top.

14. During this part of the cross examination, the trial magistrate recorded the accused's demeanour, stating that the accused was:

*“taking a lot of time to answer questions and taking me in circles....*

*Demeanour of accused wanting”*

#### **Issues for determination**

15. The issues which arise for determination are as follows:

1. Whether production of P3 form by non-maker was fatal to prosecution's case
2. Whether there were fatal contradictions in the prosecution's case.
3. Whether the prosecution proved its case beyond reasonable doubt: whether the appellant was properly linked to the rape and whether appellant's defence was adequate for his acquittal.

#### **Whether production of P3 form by non-maker was fatal to prosecution's case**

16. On this ground the appellant argues that the fact that the P3 form was not produced by the maker, the prosecution's case had been fatally affected. PW4, Jane Njoroge, a clinical officer at Naivasha District hospital, is the one who produced the P3 form as Exb 3.

17. I am aware of the decision of the Court of Appeal in **Sibo Makovo V. Republic, Criminal Appeal [1997] eKLR**, where it held that:

**“The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is not taken seriously and we wish to**

impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.

*However, the P3 form did not add to the prosecution case in the magistrate's court. There was evidence of the condition in which PW2 was in fact defiled."*

18. The proceedings show that on 6/7/2015 the prosecutor made an application in court for PW3 to give evidence in the absence on leave of the examining clinical officer. The application was as follows:

*"Prosecutor: we wish to make an application that Jane Njoroge, clinical officer, be allowed to produce the P3 form and Post Rape Care form on behalf of Osoro Dorcas. Today is her off day.*

*Mr Leina (Advocate): No objection to application*

*Court: Application allowed"*

19. Section 77(1) of the Evidence Act, Cap 80, provides that:

*(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*

*(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and the qualifications which he professed to hold at the time when he signed it*

*(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist as the case may be, and examine him as to the subject matter thereof" (Emphasis supplied).*

20. During her testimony, PW3 stated:

*"I have worked at Naivasha District Hospital for 7 years. I know Osoro Dorcas. She is a clinical officer. I worked with her and I know her handwriting and signature"*

The prosecution ensured that an officer who worked with the maker of the document and knows her signature testified. The trial court was entitled to exercise discretion under **Section 77(3) Evidence Act**, if it thought fit in this case, to summon the actual maker of the P3 form. The court exercised its discretion pursuant to the consent of the appellant.

21. In light of the above authorities and the fact that the appellant, who was legally represented by counsel, consented to the production of the P3 form by PW4, pursuant to an application in court, the appellant's present complaint is really a non-issue and need an afterthought.

22. On these grounds, I am satisfied the P3 form was properly produced and therefore stands.

#### **Whether there were fatal contradictions in the prosecution's case.**

23. The appellant's arguments on this ground are that there was contradictory evidence on the part of the prosecution. He pointed to four main contradictions as follows.

24. Firstly, in that the report by PC Barake indicated that the complainant screamed for help and said 2 people well known to her came to her rescue and that this was in contradiction with the complainant's testimony that she saw people at a distance but did not recognize them but she saw that they were men. Secondly, that RK's statement that he took the complainant to the dispensary on the same day of the incident and to Naivasha district hospital the following day contradicted the medical evidence that showed that the complainant was seen on 23/12/2014 which was also in contradiction with PW3's assertion that complainant was seen at Naivasha District hospital on 20/12/2014. Thirdly, that Jane Njoroge's testimony that that she had the treatment documents to prove that the complainant was treated at Sakutiek on 19/12/2014 contradicts her later statement that she was treated at Sakutiek on 25/12/2014. Finally, that the magistrate's assertion that the appellant was arrested on 06/01/2015 was in contradiction with her later statement in her judgment where she indicated that the accused was arrested on 03/01/2015.

25. On the first contradiction, I have carefully perused the lower court proceedings. In cross examination, the complainant stated that there were two people she saw by "far" while going home. She didn't recognize them. In re-examination she clarified that she did not know the two people who she had seen from a distance and that nobody rescued her.

26. On the second contradiction, the correct position on the record is that PW3 RK stated that he took the complainant to the dispensary on the same day of the incident and to Naivasha district hospital the following day. He also stated that he took the complainant to Sakutiek Health centre where she was treated and put on drugs and they were told to report to Kongoni police station where they went the following day. He further added that the P3 form was filled at Naivasha District Hospital but he doesn't state when. This testimony is supported by the complainant's testimony and the medical evidence on record. There is therefore no contradiction here.

27. On third contradiction, it is true that in the proceedings two different dates were mentioned by PW4. In evidence in chief PW4 stated that

the complainant was treated at Sakutiek on 25/12/2014. But in the same evidence in chief she referred to the accused being treated at Sagutiek Dispensary and to the treatment notes thereof several times. Similarly in re-examination she stated it was on 19/12/2014. It appears to me that this is an error on the face of it for the reason that PW4 was merely reporting what was contained in the medical documents. I do not think that that contradiction is fatal as the treatment notes on record show the date of 19/12/2014 and that is what the witness came to give evidence of.

28. With regard to the fourth contradiction on the date of arrest, it is clear in the record all through that the appellant was arrested on 03/01/2015. The date of 06/01/2015 appears only once. On its face I take it as an error that is not fatal to the prosecution's case.

29. On errors and irregularities in proceedings, **Section 382** of the **Criminal Procedure Code** provides as follows:

***“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.”***

30. Further, in **Jackson Mwanzia Musembi v Republic [2017] eKLR** the court relied on the case of Uganda Court of Appeal in **Twehangane Alfred vs. Uganda- Criminal Appeal No 139 of 2001, [2003] UGCA**, in which the court noted that not every contradiction warrants rejection of evidence. That court said:

***“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”***

31. I am of the view that the contradictions in the instant case are minor and do not go to or affect the substance of the prosecution's case.

**Whether the prosecution proved its case beyond reasonable doubt: whether the appellant was properly linked to the rape and whether appellant's defence was strong enough.**

32. The first complaint here was that the medical evidence adduced did not connect the appellant to the act of penetration. He pointed out that there was absence of bruises and laceration which was an indication that no forced sex took place; Further, that the failure of the prosecution to conduct forensic tests on the appellant meant that his culpability to the offense with which he was charged was never proved beyond any reasonable doubt.

33. He also argued that duration of the assault at 30 minutes as testified by the complainant was not credible noting that the act is alleged to have occurred by the roadside. He also pointed out the discrepancy in time of the alleged incident where the complainant testified it as 4.00pm while the treatment notes indicated time at 7.00pm. Finally, the appellant stated that the trial magistrate did not take into consideration the appellant's testimony that he found the complainant with another boy by the roadside – presumably her boyfriend – and that the complainant's family was trying to frame him because the complainant's father had a land dispute with him.

34. With regard to the medical evidence, the case of In **Kassim Ali vs. Republic [2006] eKLR** is apt where it was stated:

***“... [The] absence of medical examination 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.”***

35. The same was further reaffirmed in the more recent case of **George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012** (unreported) which held that:

***“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 accused person. Indeed, under the proviso to 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.”***

36. Thus whilst forensic evidence is an added advantage, it is not the only overriding evidence that is relied on in sexual offences. It must be remembered that offences of this kind often result in feelings of shame, guilt and ostracism which are factors that make reporting and effective follow up and investigation difficult. as stated in the case of **Kassim Ali**, the evidence of the victim alone is enough to convict an accused person in a sexual offence case.

37. In the present case, the victim gave a clear account of the incident. In his defence, on the other hand, the trial magistrate made a clear note of the wanting demeanour of the accused, that he was taking her round in circles. The trial magistrate found that the accused was not being truthful and not giving straight forward answers. Therefore, his defense cannot stand against the strength of the prosecution case.

38. Overall, I find that the medical and other evidence on record was sufficient to prove the commission of the offence. I find that it was

sufficient to warrant the conviction.

39. Accordingly, the appellant's appeal fails and is hereby dismissed

40. Orders accordingly.

**Dated and Delivered at Naivasha this 13<sup>th</sup> Day of May, 2019**

---

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Samson Lerionga Kamoro - Appellant present in person
2. Mr. Koima for the State
3. Court Clerk - Quinter Ogutu