



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 66 OF 2018

BMM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Judgment of Hon. C. A. Mayamba (SRM) in the
Senior Resident Magistrate's Court at Kilungu Criminal Case No.8 of 2018,
delivered on 22nd March, 2018)*

JUDGEMENT

Introduction:

1. The appellant was charged with offence of rape contrary to section 3 (1) (a) (c) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that on the 4th day of February 2018 in Mukaa District of Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of MK by use of threats.
2. In the alternative he was charged with committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act No. 3 of 2007 (2006). The particulars being that on the 4th day of February 2018 in Mukaa District of Makueni County intentionally touched the vagina of MK with his penis against her will.
3. He pleaded not guilty and matter went into full trial.
4. The appellant was found guilty and was convicted and sentenced to serve 30 years imprisonment.
5. Being aggrieved by the aforesaid decision the appellant lodged instant appeal and set out 4 grounds of appeal.
6. During the hearing of the appeal he presented 5 amended grounds of appeal as follows:-

(1) The learned trial magistrate erred in law and facts by conviction him in the bases of defective charge sheet.

(2) The learned trial magistrate erred in law and facts when he failed to note that the doctor evidence had exonerated him from the crime perpetration.

(3) The learned trial magistrate erred in law and fact by conviction him while understanding that the case was not affirmative investigated.

(4) The learned trial magistrate erred in law and facts when he failed to consider the facts that due process was not adhered to when the AP Officers arrested the appellant herein.

(5) The learned trial magistrate erred in law and facts by failing to find that the age of complainant (PW1) was not proved beyond reasonable doubt.

7. The matter came for directions and parties agreed to canvass appeal via written submissions. The appellant lodged his, but respondent did not but stated that the appeal was opposed as ingredients of offence were proved by the evidence on record.

Appellant's Submissions:

8. The appellant submits that the subordinate court failed to consider the possibilities of a defective charge sheet as there was no record of language the appellant used during the trial.

9. The appellant submits that on evaluation of the trial record and drawing the inference of the guilty as charged, the learned trial magistrate decided to shift the onus of proof to the defence, a duty wholly bestowed to the prosecution. The medical test done could not produce results that would prove the offence of rape hence medical tests done did not link him to the offence.

10. The appellant further submits that the court erred in admitting the opinion evidence of PW1, PW2 and PW3 without subjecting it to scrutiny. It was erroneous of the trial court to satisfactorily hold that there was penetration.

11. The appellant submits that the mode of arrest was not established as required by the law.

12. He also submits that it is not the duty of the court to stage manage case for prosecution nor is it the duty of the court to endeavour to make a case against the co-appellant where there is none. See the case of *Burunyi & Anno. vs Uganda [1968] EA 123.*

13. The learned trial magistrate failed to observe the regulations of the Criminal Procedure Code as required. This resulted into conducting an irregular trial.

14. Appellant submits that he was arrested because PW1 (complainant) was his fiancée and she had been demanding a piece of land from him but she was insisting not to marry the appellant.

15. He further submits that the trial court failed to adequately address itself on the issue of the age of PW1 which is vital ingredient to an offence of a sexual nature and hence the prosecution failed to prove the age of PW1 beyond reasonable doubt.

16. He prays that the appeal be allowed, conviction be quashed and sentence be set aside.

Duty of the First Appellate Court:

17. The duty of first appellate court is to evaluate evidence on record and reach its own conclusion. In *Okeno vs Republic [1972] EA 32,* the Court of Appeal for East Africa expressed this principle thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 court's findings and conclusion; 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..."

Prosecution's Case:

18. PW1 stated that appellant comes from [particulars withheld] and she stays at Chemwate within the same area. She stated that appellant's mother was called BM. It was her testimony that she woke up at around 2 am to pray. She saw someone in her room as she had solar light on. She saw appellant very well as he was wearing a sky-blue shirt.

19. She started to scream when appellant jumped on to her warning her not to scream. He got hold of her by the neck while threatening that he was going to stab her. He hit her on the head and left shoulder which made her gave into the pressure. She went quiet and gave in as appellant started to forcefully have sex with her.

20. It was her testimony that she was wearing a night dress at the time with no panties on. It was her testimony that appellant lowered his trouser and pulled up her night dress while having sex with her.

21. She gained consciousness and found him still having sex with her while insisting that he wanted them to be friends. It was her testimony that appellant was insisting that if found in that house, he would insist that they were together. She further informed court that appellant stopped and started to sleep.

22. She waited until morning and quietly left the house but he woke up. She was able to convince appellant that she was just leaving shortly to answer to a short call. She went to her neighbor's house seeking for help. It was her testimony that while at her neighbor's home, appellant left the house in their full view and came to the neighbour while demanding for his shoes. She started to scream for help and people converged.

23. It was her testimony that appellant as he had promised insisted to the people that they were together. She informed court that there was an old man among the group who insisted that appellant was speaking the truth and left with him to a hotel. It was her testimony that she was

staying alone being a widow.

24. She went to Sultan Hamud Police Station to report and was issued with a P3 form. She further informed court that she could not tell how appellant had gained entry into her house. She further informed the court that she was injured on the left shoulder and denied having relationship with appellant.

25. PW2 examined the complainant and filled the P3 form. In his testimony he stated that the complainant had a tear on her vagina about 2cm in length in the posterior aspect. The hymen was absent and the labia majora and minora was absent. It was further his testimony that the complainant revealed the presence of epithelial cells though the high vaginal swab had no spermatozoa.

26. He informed court that HIV test was positive with other tests being negative. It was his medical opinion that the tear was caused by rough sexual intercourse occasioned by a forced entry. He filled the P3 form which he tendered as Pexh 1, PRC form which showed injuries as Pexh 2.

27. It was further his testimony that they examined the appellant as well and his test revealed that he was HIV negative, with nothing unusual noted in his examination on the 20/3/2018. He tendered the lab request form for the appellant as Pexh 3 and the P3 form as Pexh 4.

28. It was also his testimony that the reason as to why there was variance in HIV status was because that at time one can have sex with a positive person and fail to contract the virus or that the person used a condom or that the window period for the virus to be exposed which is 6 months had not elapsed. He further informed trial court that lack of spermatozoa could also be explained with situation where there was no ejaculation or that the complainant may have showered.

29. PW3 carried out investigations and preferred the current charges as against appellant person. It was her testimony that when the complainant who had earlier reported came back from the hospital, it was noted that indeed she had been raped. She tendered the crime and incident report as Pexh 5 and investigations diary as Pexh 6.

Defence Case:

30. DW1 stated that he knew the complainant from long ago and they used to have sex using condoms. He informed her that he wanted now to marry but the complainant declined to marry him as he was a child.

31. It was his testimony that he asked the complainant to give him time to marry but the latter insisted that he must give her a parcel of land separately to be her owns. It was also his testimony that the complainant sent men from her village who also demanded that he gives out the parcel of land of which he agreed. He asked the court to be lenient with him.

Issues:

32. After considering evidence on record and submissions, the court finds the issues were: ***whether the prosecution proved its case beyond reasonable doubt?***

Analysis and Determination:

33. The prosecution was duty bound to prove Ingredients of the Offence of Rape beyond reasonable doubt.

[20] Section 3 of the Sexual Offences Act provides for the offence of Rape in the following terms:

"(1) A person commits the offence termed rape if--

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

34. It was the prosecution's case that the complainant was had carnal knowledge of. In determining this issue, they relied on both oral and documentary evidence. PW1 stated that appellant went to her house at around 2 am, which defence has admitted.

35. It was further her testimony that appellant stayed up to the following morning when she screamed for help with appellant claiming that they were together. It raised no doubt in mind that indeed the two persons herein met on that day, and so it was not a case of mistaken identity.

36. The complainant informed court that appellant grabbed her by the neck before forcefully having sexual intercourse with her, suffice to

note that appellant did not dispute that fact though he was contending that she was his girlfriend. It was also clear that appellant was not denying that the complainant was had carnal knowledge of with the question being whether it was by her consent or not.

37. In further proof of the contention that the complainant was had carnal knowledge of, the prosecution summoned medical officer namely PW2. It was his testimony that on examination the significant finding revealed that the complainant had a tear on the posterior aspect of the vagina measuring about 2cm in length indicating that she had been penetrated.

38. It was clear from the evidence on record that indeed there was no doubt as to fact that the complainant was had carnal knowledge of with the question whether she gave the consent which would make the act lawful.

(a) ***Whether the complainant gave consent for the sexual activity?***

The main issue in this appeal is whether lack consent as an element of rape was proved by the prosecution. In this regard **sections 42 and 43(1) of the Sexual Offences Act, 2006** are relevant and they provide as follows;

42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

43.(1) An act is intentional and unlawful if it is committed—

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or....

39. Consent is a vital element of the offence of rape. This has repeatedly been emphasized by the courts in Kenya prior to and after the passing of the Sexual Offences Act.

40. In ***Republic vs Oyier (2008) eKLR*** which was decided under the Penal Code, the Court of Appeal reiterated that lack of consent is an essential element of the crime of rape.

41. The court stated that the *mens rea* in rape is primarily an intention and not a state of mind. The mental element is the intention to have intercourse without consent or without caring whether the woman consented or not.

42. Where a woman yields through fear of death or through duress, it is rape and it is no excuse that she consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact. The courts in Kenya have distinguished between true consent and mere submission.

43. It was the complainant testimony that she woke up at around 2am to pray when she saw somebody in her house. Appellant did not deny going into the house of the complainant at 2am. It was clear from the evidence presented that he was not invited as clearly the complainant was shocked to see him contrary to what he wanted us to believe.

44. The complainant also informed court that appellant forced himself into her by pulling her night dress as she was not wearing any panties on, a fact that appellant has not disputed. In giving a consent does not need to pull people's night dresses but it will be removed on own account.

45. The complainant also informed court that accuse hit her on the head and left shoulder which made her to give up any resistance after being grabbed on the neck. Her testimony of being hit was confirmed by the medical officer who testified as PW2, who noted abrasive injuries on the left shoulder which was swollen and tender.

46. Appellant did not dispute that fact. It is common knowledge that sexual intercourse does not involve fights for one to be beaten into submission as this pointed to forceful encounter. The hitting of the complainant on the head and left shoulder also proved lack of consent.

47. The medical officer while examining the complainant noted that she had a tear on her vaginal posterior aspect measuring 2cm in length. It was his testimony that it confirms forced entry. The findings clearly corroborate the fact that this sexual activity was obtained through force.

48. It is worth noting that this is a full-grownup woman who owing to her sexual experience would not need to be torn all around which

pointed at something being a miss.

49. Thus it was justified to find that on this day, the complainant consent was obtained through coercion which supports the ingredient of rape as envisaged under section 3 of the Sexual Offences Act No. 3 of 2006.

(b) Whether the defence by the appellant was credible?

50. Appellant contended that the complainant was his girlfriend and he had just gone to her, suffice to note that no law allows one to forcefully have sex with another even if she is his wife as the same is termed as marital rape.

51. In further analysis of his claim of the complainant being the girlfriend, it was not possible for one to beat his girlfriend dead to obtain her consent as that will still be considered as rape.

52. Appellant has also contended that the complainant wanted a parcel of land from him to allow them to separate as he wanted to marry. He did not pose the question to the complainant about the demand of land.

53. Further still clear informed court that he did not have a parcel of land as the one they had belonged to his father, but again later changed the tune by claiming that when the men from the complainant's village came, he agreed to give the parcel of land. He was confused and clearly making up the story.

54. Having considered the defence of the appellant, trial court also did consider any other exonerating factors which could go in favour of the appellant.

55. It was noted in the P3 form that the complainant was HIV positive with appellant upon examination was found to be HIV negative. In his testimony, appellant contended that they used to have sex with the complainant many times using condoms.

56. It was noted that there were no spermatozoa noted on the complainant. The medical officer opined on the various possibilities. He stated that the complainant may have taken a shower. He also informed court that the appellant may have worn a condom or did not ejaculate inside. Appellant confirmed to the trial court that indeed he was wearing a condom and so that answers the puzzle.

57. It was clear that there were no other reasons available in favour of the appellant which further compounds the fact that the complainant herein was forced into sexual intercourse by the appellant.

58. Thus the trial court finding that the prosecution proved their case as against appellant for the offence of rape contrary to section 3 of the Sexual Offences Act No. 3 of 2006 was justified.

59. Thus court find no merit in the appeal and dismisses the same,

60. The court makes the orders;

i) Appeal is dismissed, conviction is upheld and sentence confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE