



**REPUBLIC OF KENYA**

**AT THE HIGH COURT IN NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 139 OF 2018**

**BETWEEN**

**JULIUS SANINGO SANGONYA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court in Makadara Cr. Case No. 161 of 2016 delivered by Hon. S. Jalang'o on 27<sup>th</sup> July, 2018.)*

**JUDGEMENT**

**BACKGROUND**

1. The Appellant was charged with rape contrary to **Section 3(1)(a)(c) as read with Section 3(3) of the Sexual Offences Act No.3 of 2006**. The particulars were that on the 13<sup>th</sup> November 2016 at Umoja III area in Njiru sub-county within Nairobi County intentionally and unlawfully caused his penis to penetrate the vagina of JMN without her consent. He was further charged with an alternative count of committing an indecent act with an adult contrary to **Section 11A of the Sexual Offences Act no.3 of 2006**. The particulars were that on 13<sup>th</sup> November 2016 at Umoja III area in Njiru Sub-County within Nairobi County, intentionally and unlawfully touched the vagina of JMN without her consent.

2. He was convicted of the main count. Dissatisfied with the decision he preferred this appeal by way of a Petition of Appeal dated 9<sup>th</sup> August, 2018, he framed his grounds as follows;

- a. That the trial magistrate made an error in law by finding that there was positive identification;*
- b. That the trial magistrate erred in law and fact by relying on the contradictory evidence of the prosecution witnesses to convict the appellant;*
- c. That the trial magistrate erred in law and fact by failing to find that the prosecution did not avail crucial and essential witnesses;*
- d. That the trial magistrate erred in law by failing to observe that the investigations were shoddy; and*
- e. That the trial magistrate erred in law by failing to consider his defence..*

**EVIDENCE**

3. This is the court of first appeal. I am therefore enjoined to reanalyze the evidence afresh and arrive at a conclusion that is independent of the trial court finding. (See **Okeno V Republic [1972] EA 32**).

**Summary of evidence**

4. PW1, JMN a resident of Umoja III Mwangaza was a teacher at [Particulars withheld] Academy. She testified that on 13<sup>th</sup> November, 2016 she was escorting her friend FK to Kangundo Road. Three men emerged and turned flashlights on their faces. On realizing that they were not police officers she ran away. The assailants followed her and slapped her. Her friend had since disappeared. She was thereafter taken around

until 11.00 pm. The assailants demanded Ksh. 3000/- from her. She told them that she did not have the money. She was made to call her relatives using their phones. However, she did not get any money.

5. The assailants threatened to rape her if she did not comply. Afterward, one of the assailants left. She was then taken to a garage on Kangundo Road. The assailant bundled her in the backseat of a saloon car and repeatedly raped her without a condom. At one point, the assailant fell asleep and she took the opportunity to escape.

6. PW1 met a vendor, PW2, who was preparing chapatis. She narrated the ordeal to him and he assisted her with his phone. She swapped simcards on the phone then a message came in. It read "pole sana" (I am very sorry) from mobile number 0718\*\*\*\*\*. She gave him a description of the assailant. PW2 told her that he knew the person. He then called the Appellant and requested him to come to his shop. The Appellant came and she identified him as her attacker.

7. **PW2, William Oketch Koga** testified that he was approached by PW1 with a request to help her use his phone after the ordeal. He called the contact that had sent her a message and recognized the voice of the assailant. He thereafter called the assailant again and urged him to come to the shop. It was his testimony that the assailant sounded like a customer of his. He testified that he had known the Appellant since 2015. When the Appellant arrived PW1 and PW2 both identified him. He tried to escape but was arrested.

8. **PW3, PC Robi Nyabola** of Molem Police Post was at the station on the 14<sup>th</sup> of November, 2016 when a mob brought the Appellant to the Police. He rearrested the Appellant and placed him in cells.

9. **PW4, Ann Wangui Wachira** was a resident of Umoja III Estate and a colleague of PW1. She recalled that 14<sup>th</sup> of November, 2016 PW1 told her that she had tried to call her using the Appellant's phone to ask for KShs 3000/- which the Appellant had demanded. When PW4 put her phone on she realized a new number 0791\*\*\*\*\* had tried to call her.

10. **PW5, Jecinta Gatungu**, a nursing officer at Mama Lucy Hospital examined PW1 on the 16<sup>th</sup> of November, 2016. It was her testimony that she noted injuries on PW1's right hand side of her buttocks. Further that she was bleeding from her hand. She stated that PW1 also appeared distraught. It was PW1's account that she had been raped from 7.00 pm to 4.00 am. On genitalia examination, there was injury noted on the posterior forchette and the hymen was broken. As well, a vaginal swab and urinalysis showed presence of sperm. She filed a Post Rape Care Form and medical certificate.

11. **PW6, Dr. Kizzi Shako** of Police Surgery Nairobi Area examined JMN on 16<sup>th</sup> of November 2016. She did not find any injuries on the external genitalia. She also examined the Appellant and noted cut and laceration on the right side of the head and a cut on the forehead.

12. **DW1**, the Appellant, in his unsworn defence stated that left work at 6.00 am on the 14<sup>th</sup> of November 2016 when he met two men with a lady outside a kibanda. They stopped him. He told them that he was coming from work. The girl claimed that he resembled the person that raped her. He was first taken to the Chief's office and thereafter referred to Mama Lucy Hospital. He was thereafter voluntarily taken to the Police Station. He was locked up at Molem Police Post without reason. He was arraigned in court on 17<sup>th</sup> of November, 2016.

### **Determination**

13. I have accordingly considered the evidence on record and the respective rival submissions. I have concluded that the issues arising for determination are, whether the Appellant was positive, whether the prosecution failed to call crucial witnesses and whether the case was proved beyond all reasonable doubt.

14. On the issue of identification, the Appellant submitted that the description of the assailant and him were different. It was his submission that PW1 testified that the assailant wore a brown trouser and he was short physically while Dr. Kizzi Shako of Police Surgery testified that the Appellant on being examined wore a black/blue jacket, grey shirt, grey trouser and brown boxer.

15. Further, the Appellant raised a query on the use of a mobile number to identify him. He submitted that the mobile number 0718\*\*\*\*\* allegedly belonging to him that sent PW1 a message was registered, according to PW1, to someone named Kariuki. Further, that the number 0791\*\*\*\*\* that PW4 noted had tried to call her was different from the one that sent the message.

16. Lastly, the Appellant submitted that traces of sperm were found after an examination done on PW1 but were not subjected to a DNA analysis. Hence, he could not be linked to the offence.

17. Counsel for the Respondent, Miss Akunja, submitted that identification of the Appellant was positive. She submitted that PW1 identified the Appellant as the assailant. This identification was aided by the phone call that PW2 had made luring the Appellant to the shop. As well, identification was also assisted by a text message that came in with an apology as soon as she put her simcard into PW2's mobile phone.

18. My view is that the identification of the Appellant was not properly attended to by the trial court. The judgment of the trial court dated 27<sup>th</sup> July 2019 states as follows:

***"Paragraph 26: "...PW2 stated that he met the complainant on the fateful night. He(sic) gave him a mobile number used by the assailants. He called the number and the Accused responded. He knew his voice. He requested the accused to come and meet him. It's his evidence that the accused went to meet him. That the complainant positively identified the accused and they managed to arrest him."***

***Paragraph 28: "...She stated that the accused sent her(sic) text reading, "pole sana" using mobile no. 0718\*\*\*\*\*. PW2 stated***

***that they called the number and the accused responded they managed to arrest him.”***

19. I find an issue with understanding which number was used to reach the Appellant. While it was PW1’s testimony that PW2 called number 0718\*\*\*\*\*, she also stated that the said phone number was registered under a person called Kariuki. It was also PW1 and PW4’s testimony that there was a number belonging to the assailants that was used to attempt to solicit monies from PW1. PW4, noted that a new number had attempted to reach her. This was number 0791\*\*\*\*\*. It is not demonstrated in all of the evidence that this number belonged to the Appellant or that it was in his possession at the time of the offence.

20. Secondly, it was PW1’s testimony that mobile number 0718\*\*\*\*\* was used to lure the Appellant to the place of arrest, in her testimony she stated as follows:

***“I told the person what happened. The incident occurred in a garage next to the place where the guy cooked chapatis. I gave a description of the assailant. He knew the person. He called back that number that texted “pole sana”.***

21. It is evident that this may have been incriminating to the Appellant. However, the prosecution failed to establish that the phone number was in the possession of the Appellant. Except for the curious incident that the Appellant happened to be at the place where PW1 and PW2 were, nothing else would render him culpable.

22. Further, PW2 claimed that he recognized the voice of the Appellant. However, this recognition by voice was not tested. It is therefore a safe conclusion that this could easily have been mistaken identity. I find that the identification of the Appellant was not established.

23. Nevertheless, a second identification attempt was made by PW1. She testified that she was able to identify the Appellant as the assailant. The assailant accosted her at 7.00 pm and detained her until 4.00 am when she was able to escape. It is clear that visual identification between these hours was bound to be difficult. The rules of identification espoused in the case of **R v Turnbull [1977] QB 224** state that identification in difficult circumstances must be accompanied by factors that aided the observation.

24. In the present case, PW1 only stated that the Appellant wore brown trousers. However, she did not state how she was able to observe her assailants yet the ordeal was during night hours. She also stated that the first encounter with her assailants was when they flashed torches on her face. This could not possibly have assisted her in identification as the strength of the lighting was not elucidated. Thus, it is difficult that she identified the Appellant.

25. The only thing that would have nailed the Appellant was DNA analysis to compare samples obtained from the urinalysis and vaginal swab done and the Appellant who submitted himself to medical examination. Nothing was followed on this line of investigations, rendering a total blow to the case of the prosecution.

26. In sum, I find that the prosecution failed to establish the culpability of the Appellant. Although medical evidence pointed to a case of rape nothing linked the Appellant to the offence. His conviction was therefore not safe.

27. I accordingly quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

**Dated and Delivered at Nairobi This 14<sup>th</sup> October, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE.**

**In the presence of:**

1. *Appellant in person*

2. *Mr. Momanyi for the Respondent.*