REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEALS

CRIMINAL APPEAL NO. 8 OF 2017

KANYOIKE NTUMA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an Appeal from the conviction and sentence in Criminal Case No. 917 of 2016 at Kajiado Chief Magistrate's Court before Hon. Kasera (PM) in a Judgement delivered on 19th September 2016)

JUDGEMENT

Kanyoike Ntema, the appellant herein has filed an appeal arising over the conviction and sentence for the offence of rape contrary to section 3 (1) (a), (b) (3) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence which demonstrated the alleged criminal act are that on 21st day of June 2016 at around 1500 hours within Kajiado County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of N R without her consent.

At the conclusion of both the prosecution and defence case the appellant was found guilty, convicted and sentenced to 20 years imprisonment. Being aggrieved with both conviction and sentence he filed the appeal anchored on the following grounds:

(a) That the Learned Trial Magistrate erred in both law and fact when he convicted him on unsatisfactory evidence.

(b) That the Learned Trial Magistrate erred in both law and fact when he convicted him on a case which was poorly investigated

(c) That the trial Magistrate erred in both law and facts when he failed to comply with Article 50 (2) (g) and (h) of the constitution hence occasioning unfair trial.

(d) That the Learned Trial Magistrate erred in both law and facts when he dismissed his plausible defence in this case five (5) witnesses testified for the prosecution to prove the case as alleged in the charge sheet.

Their brief summary of the evidence as captured by the trial court:

PW1 W R sworn and stated before court how while looking after sheep in the fields she came into contact with the appellant. In the course of a short conversation the applicant who was armed with a Maasai club struggled by grabbing her pushed her to the ground while holding the throat and the breast. According to the Appellant accompanied with threats to kill from the appellant she was undressed and at the same time he also lowered his trouser. PW1 further stated that the appellant while on top overpowered her and used his penis to forcibly have sexual intercourse with her. The aftermath of the forced carnal knowledge was a swollen tummy and bleeding from the genitalia. The screams raised attracted the attention of her daughter **PW2 W. M. E:** In her evidence PW2 testified on how she witnessed the appellant forcefully have carnal knowledge with PW1 in the fields where they had gone to fetch firewood.

PW3 Siasi Kesiaya who testified as the area Assistant Chief told the court below that he received a rape complaint involving PW1. He took action of arresting the appellant whom he escorted to the police station for further action.

PW4 George Thiong'o, a Clinical Officer gave evidence on the role he played in examining PW1 who came to the Health Centre with a history of being raped. On examination PW4 testified that injuries confirmed bleeding and laceration from the private parts and he further confirmed that the vagina walls had suffered some trauma. His medical findings were reduced into a report in the P3 produced as exhibit2.

PW5 PC Lanet Kendi police detective was tasked with the investigations of the incident. In her testimony PW5 recorded statements from various witnesses and caused the P3 to be filled regarding the sexual assault against PW1. The investigations led to the recovery of blood stained skirt of PW1 which she produced in evidence as exhibit 3(b).

The appellant denied the allegations and the charge as put forth by the prosecution. In his defence he was arrested while looking after animals and fixed for the offence he knows nothing about.

Submissions on Appeal

The appellant has relied on the four issues mentioned above, to seek a second shot at his case. On appeal the applicant submitted that the case lacked sufficient evidence to support the charge of rape beyond reasonable doubt. He further contended that the evidence of the star witnesses PW1 and PW2 was full of contradictions and inconsistences rendering it incapable of proving the elements of the offence. In support of his submissions the appellant cited the case of **Agustino Njoroge Ritho and another – Versus – Republic Criminal Appeal No. 99 of 1986.**

Secondly, the appellant submitted and took issue with the medical evidence in respect to sexually transmitted infection. He seems to be aware of the period and such infection is capable of being detected. His argument was on the aspect of not being medically examined to corroborate the rape and transmission of any sexually transmitted disease. In other words, the medical evidence was at variance with the testimony tendered by PW1.

Finally, the appellant submitted on the constitutional violation of his rights under Article 50 (2) (g) and (h) of the constitution. He faulted the trial court for not allowing him the opportunity to seek legal Counsel or assign one from the state. In all the appellant urged this court to allow the appeal on the stated grounds by setting aside the conviction and sentence.

The respondent's submissions in constituting the appeal

Mr. Akula the Senior Prosecution counsel vehemently opposed this appeal. In his submissions Learned Prosecution Counsel mentioned the case to uphold the warrant of the arrest by the five prosecution witnesses. His contention was that the evidence proved the case beyond reasonable doubt. The respondent's Counsel recalled further submission made reference to the testimony of PW1, PW2 and PW4 who examined the complainant and corroborated their testimony on sexual assault. He urged the court to affirm the judgement of the trial the court and dismiss the appeal on both conviction and sentence.

Analysis and Determination

I have considered the charges, the evidence, submissions by the appellant and the prosecution counsel for the state.

In my considered view the appellant complaints outlined into four grounds can be reformulated into two key issues:

(1) Whether the prosecution proved its case beyond reasonable doubts at the trial court

(2) Whether article 50 (2) (g) and (h) of the Constitution were violated or infringed against the appellant.

On the first ground I proceed in the following manner. By Starting to restate the law on the offence of rape. Rape is defined under Section 3 of the Sexual offences act No. 3 of 2006 as comprising the following elements:

(a) The intentional and unlawful penetration of the genital organ of a male person to a female genital organ.

(b) The absence of consent or where consent is obtained by force, threat, intimidation, fraud or false pretence of any kind.

(c) That the accused person was positively identified and placed at the scene

It is therefore settled in law that any person who commits the offence of sexual assault and elements set out above are proved he is guilty of the offence of rape.

Section 2 of the sexual offences Act defines penetration to mean the partial or complete insertion of the genital organ of a person into a genital organ of another person. As would be noted from the definition for rape in section 3 and penetration in section 2 of the sexual offences Act.

The offence is procured when any of the elements on intention and unlawful Acts are provided as stated under section 43 of the Act. Under this section, intentional and unlawful acts include any coercive act, an act committed under false pretence or fraudulent means, intimidation, use of force, threat, harm and absence of power of any kind so as to have carnal knowledge with the complainant. The position in law is under section 124 of the Evidence Act is that the evidence of the victim or complainant in sexual offences need not require corroboration for a conviction to be sustained. The safeguards on how the court should proceed to deal with such evidence of a single witness of the victim is with stated in the provisions to section 124 of the Act.

In this case the state has proved that penetration took place between the complainant and the appellant as is defined in law.

(b) Lack of consent

Lack of consent as the constitutional element of rape is clearly provided for under section 43 of the Sexual Offences Act. The question before this court is whether any of the acts specified in section 43 are entailed in the case directed against the appellant by the prosecution. In particular there is no consent where the act is forced by reasons of violence coercion, intimidation. It is also provided in section 44 that the failure or omission by that person to offer resistance to the sexual act does not of itself constitute consent to that act.

From these provisions the *actus reus* of the offence of rape is completed where sexual penetration occurs without the consent of the victim. The phrase consent as defined in Black Law dictionary means ***"The agreement approval or permission as to some act or purpose especially given voluntarily by a competent person".***

Section 42 of the Sexual Offences Act states that: ***"A person consents if he or she agrees by choice and has the freedom and capacity to make that choice".***

The circumstances under which the court has to presume that consent was withheld in sexual act are specified in section 44 (2) of the said act. It follows from this section that once the prosecution has discharged the burden of proof the question as to whether the sexual act was obtained with consent of the victim shifts to the accused to discharge that burden in rebuttal. The test to be applied can be formed in the principles set out in the case of **Sheldrake Versus DPP 2005/AC 277**

> ***"An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail to the defendant".***

The court in the cases of **Republic Versus Oyier 2008 KLR** lack of consent has been placed to be one of the core elements for the offence of rape to be proved by the state.

Applying the above legal provisions to the present case I find that from the record the appellant while armed with a Maasai club the appellant approached the appellant in a menacing manner and threat while snatched the panga from her to repulse any retaliatory attack. In any event the complainant testified that the appellant moved to get hold of her neck and the breast simultaneously. This was accompanied with threats and removed her shuka. What followed was the way laying the complainant to the ground and by use of his penis had sex with her. According to the complainant the sexual act occasioned injury to her genital organ and trauma due to forcible entry of the appellant penis.

The Clinical Officer PW4 who conducted the medical examination confirmed the evidence by the complainant with positive findings of bleeding from the vagina. The trial court record is therefore clear on the struggle between the complainant and the appellant before sexual intercourse took place. The threats and intimidation and forced penetration are the indicative of lack of consent on the part of the complainant. I agree with he trial magistrate that the consent here was obtained by force and by means of threats and coercion.

(c) Identification of the appellant

Dealing with the issue of identification I rely on the principles on the test to be applied in the cases of: **Benjamin Mingo & another Versus Republic CR. Appeal 100 of 1984, Republic Versus Tumbell 1976 63 CAR132.** Turning to the evidence in this appeal first there is the testimony of PW1, the complainant. Secondly, PW2 deposed that when all this was taking place she was able to see and identify culprit who is the appellant. Neither of these circumstances referred to by PW1 and PW2 have been controverted by the appellant in his defence before the trial court. I think the Learned Trial Magistrate was right on this aspect in relation to identification and placing the appellant at the scene.

With the above scenario it is clear that the appellant was positively identified as the circumstances for such identification to take place were favourable.

The issue at hand is about the offence of rape. The general principle of law under section 124 of the Evidence Act on corroboration was factored in this trial by the Learned Trial Magistrate. This can be inferred from the evidence of PW2 being direct evidence on the commission of the offence and circumstantial evidence by PW4 the Clinical Officer who prepared the medical report.

As to what constitutes corroboration has been stated in the following cases: In the **English case of DPP – Versus – Kilborne 1973 AC 729 – 758** it is trite trial corroboration need not consist of direct evidence regarding the extent that the appellant committed the offence nor need it amount to confirmation of the whole account given by the witness provided that it corroborates the evidence in some respect material to the charge. In the case **Republic – Versus – BaskerVille H 1916 2 KB 658-667**. The court held interalia that

> ***"evidence on corroboration must be an independent freshly, direct or circumstance which confirms in some material particular not only that the offence has been committed but that the accused person has committed it".***

On evaluation of the evidence before the trial court, it emerges that the testimony of PW2 and PW4 amounts to corroboration for the offence of rape against the accused. In the instant case the prosecution placed before the trial court the evidence of PW1 – the complainant who gave a description of the ordeal and also positively identified the appellant as the culprit. The circumstances of the offence were further corroborated by the testimony of PW2 who apparently is the daughter to PW1. She narrated the sequence of events which resulted in PW1 being raped in her presence on the material day.

This offence was reported to the area chief PW3 and in turn referred to the police as confirmed by PW5. The police officer who investigated the case PW5 testified that the P3 was issued to the complainant PW1. The Prosecution summoned the Clinical Officer PW4 who had examined the complainant and reduced his findings in the P3 form produced in evidence as exhibit.

As rightly produced by PW4 the complainant's medical examination revealed penetration of her genitalia with residual evidence of vagina

trauma, lacerations and bleeding.

The appellant in his defence never answered to any of the various aspects of the evidence by PW1, PW2, PW3, PW4 and PW5. His defence was a mere denial without addressing any of the pieces of evidence stated by PW1, PW2, PW3, PW4 and PW5. In the charge against the appellant it remains eminently clear the PW1's testimony was strengthened by the evidence of PW2 and PW4 in some material particulars implicating the appellant. The evidence by PW2 falls under the category of independent direct cluster of evidence for the prosecution.

The medical evidence by PW4 corroborated the evidence of PW1 and PW2 on the commission and occurrence of the offence of rape against the complainant. In the **English case of DPP – Versus – Kil borne 1973 AC 729 – 758** it is trite trial corroboration need not consist of direct evidence regarding the extent that the appellant committed the offence nor need it amount to confirmation of the whole account given by the witness provided that it corroborates the evidence in some respect material to the charge.

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> ***"evidence on corroboration must be an independent freshly, direct or circumstance which confirms in some material particular not only that the offence has been committed but that the accused person has committed it".***

I am therefore of the conceded view from re-evaluating the entire record of the trial court that the evidence confirms the occurrence of sexual intercourse, it took place on 21st June 2016 at 1500 hours. The carnal knowledge happened without the consent of the complainant.

On this ground, whether the charge was proved beyond reasonable doubt I have no hesitation in affirming the conviction against the appellant as per the judgement of the trial court.

The Appellant also raised the ground in this appeal involving the question under Article 50 2 (g) (h) of the Constitution. Under Article 50 2 (g) the accused has a right to choose and be represented by an advocate and to be informed of this right promptly.

Under Act 50 (h) a right to have an advocate assigned to the accused person by the state and at the state expense. If substantial injustice would otherwise result and to be informed of this right promptly.

In the current constitution, the right to legal counsel for those charged with criminal offences has remained a constitutional aspiration as it is incumbent for the courts to enforce and manifest this right under Article 50 (h). it is my believe that with the legislation on legal aid the parameters and regulatory framework on legal representation will go a long way to remove procedural challenges associated in realising this right by the accused person.

The only lacuna in the record of the trial court is that it does not show that an inquiry was conducted to establish whether the appellant case fell within Article 50 (h). It is not in dispute that the appellant was not provided with legal representation as provided under Article 50 (h) of the constitution.

Our criminal justice system is adversarial in nature. The principles and rights to a fair trial as stipulated under Article 50 of the constitution 2010 should be enforced at every stage by the trial court. The criteria and procedural structures to be adopted is for the court record to show the manner in which those rights to a fair hearing have been enforced by the Judge or Magistrate. More specifically evidence on explanation to the defendant or accused person on the right to counsel with an assessment that substantial injustice may result if he is not accorded the right to counsel. The importance of the right to legal representation was expressly articulated by non-other than Lord Denning in the case of **Pett – Versus – Grey Hound Racing Association 1968 2 All ER 545 at 549** where he stated as follows.

> ***"it is not every man who has the ability to defend himself or herself. He cannot bring out the rules in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting intelligence. He cannot examine or cross-examine the witnesses. We see it every day. A Magistrate says to a man You can ask any questions you have. Where upon the man immediately starts to make a speech? If justice is to be done, he ought to have the help of someone to speak for him who better than a lawyer who has been trained for the task".***

The question which arises is whether lack of a legal representation in this case is sufficient to warrant this court to vitiate the trial and order for an acquittal of the appellant. The issue as to the constitutionality right to legal representation has been briefly alluded to in this analysis of this appeal. To me right to counsel under Article 50 (h) is not really an option when it comes to the administration of criminal justice.

In practical terms with the legislation on legal aid in place courts should now take a pragmatic approach in safe guarding the rights of an accused person on right to counsel during the trial of a case where substantial injustice may result.

Given this background, I have been able to peruse and appraise the entire record and the conduct of the case between the prosecution and the defence. I find no evidence to warrant this court to quash the appeal on grounds that the state failed to provide legal representation. The appellant understood the charge and was able to challenge it by way of cross-examination of the prosecution witnesses. I find no miscarriage of justice in the entire trial.

On what I have stated above I am satisfied that the appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit on both conviction and sentence. In the result, I affirm the judgement of the court below and dismiss the appeal in its entirety.

Dated, delivered in open court in the presence of the accused on 8th February 2018.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for Director of Public Prosecutions present

Appellant - Present

Mr. Mateli Court Assistant