REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL NO. 57 OF 2015

BONIFACE NGUMBI MBIDYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence of C.K. Kisiangani (RM)

in Machakos Chief Magistrate's Court Criminal Case

No. 1440 of 2013 on 7th April, 2015)

JUDGEMENT

1. The appellant was charged and convicted of rape contrary to section 3(1) (a) as read with section 3 (3) of the Sexual Offences Act No 3. of 2006.

2. His appeal is on grounds that:

a) He was convicted on hearsay and contradictory evidence.

b) That crucial witnesses were not called and;

c) He was convicted on circumstantial evidence which did not pass the test.

3. This being a first appeal, this court's duty is to consider the evidence tendered before the trial court afresh, re-evaluate it, re-analyze it and come to its own independent conclusion on the matter bearing in mind that it did not have the advantage of observing the demeanor of the witnesses. (**Mark Oiruri Mose v. Republic [2013] eKLR**).

4. The evidence on record was as follows. S S (PW1) on 1st December, 2013 was feeling unwell and left church. She had epileptic fits. She went to a hotel for tea. While taking tea she had bout of fits and became unconscious. She only regained consciousness at the hospital. She was informed that the appellant had found her in the hotel and took her away saying he would give her medication. He however gave her alcohol and took her to a lodging where he raped her. She stated that it was at the hospital that she was informed that she had been raped. That the people who found her were the ones who reported the incident.

5. Peter Kisilu Musyoka (PW2) was on the material day in a hotel when he was called by someone who had seen PW1 and the appellant and that PW1 was being harassed in a bar. He went into the bar and inquired from the appellant why he gave PW1 alcohol. The appellant then informed him that he was waiting for PW1 to sober up so that he could take her home. He stated that PW1's clothes had been raised up to the waist and was sleeping on a seat. They were in a room on the back room of the bar. He reported to the police who visited the scene. The appellant was arrested and taken to the Chief.

6. K W E (PW3) on the material day was informed by the children that their mother had been brought and she appeared to be dead. She found her to be unconscious and drunk and had foam coming from her mouth. She was among those who took PW1 to Katulani Health Centre. She stated that she checked PW1 and established that she had been raped. She then reported to Masii Police Station and was directed to take PW1 to Masii Health Centre. She stated that she was informed by the doctor that PW1 had been raped.

7. James Kilonzo (PW4) a Clinical Officer at Masii Health Centre stated that he examined PW1 who had been referred from Katungao Health Centre. He observed that her clothes were soiled but there was no blood. She was said to have bruises on her feet. On vaginal examination, there was no bleeding, no tear but it appeared reddish on the majora.

8. Police Constable William Bosire (PW5) received the appellant on 2nd December, 2013 from A.P. from Ikalaasa Katungani. He was informed that the appellant had been arrested by members of the public for rape. PW1 later went to the police station in company of her relatives. She was given a p3 form and referred to hospital. PW5 interrogated witnesses and recorded statements and found that PW1 and the appellant were together in a hotel at about 2pm and later went to a bar. That the appellant requested for a private room where he raped PW1.

9. The appellant was put on his defence and gave unsworn evidence as follows. He was on the material day at about 2.00 pm in Kitindo bar. He found other people together with PW1 drinking beer. That PW1 was seated with two (2) men while he was seated alone. The two men went through the back door. The owner of the bar called PW1's family who came and found PW1 still on the ground. He informed them that PW1 was in company of two (2) men and that he was alone. He was taken to the Chief's office and later charged with the offence of rape.

10. In his submissions, the appellant faulted the trial court stating that it based the conviction on evidence of PW1, PW.2 and PW.3 which were all hearsay and that the circumstantial evidence therein did not pass the test. He further submitted that the crucial witnesses like the bar attender was not called casting doubt on the prosecution case.

11. On the other hand, the respondent submitted that hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that assertion was made. That it is not original evidence. It was submitted that the evidence of PW1 was corroborated by PW2, PW3, PW4 and PW5. That the prosecution evidence was consistent as it points out to the appellant. That the prosecution satisfied the tests for circumstantial evidence as settled in **Nicholas Watuma Mutua v. Republic, Criminal Appeal No. 198 of 2013**. That most significantly PW2 and PW3 created a nexus between the appellant and the crime by stating that they saw the appellant with PW1.

12. It was submitted that the prosecution was not obliged to call multiple witnesses to prove any fact. That it is PW2 who went into the room where the appellant and PW1 were and saw PW1's clothes raised up to the waist. That PW1 was unconscious therefore lacked capacity to consent. That a careful examination of the trial court's judgement reveal that the magistrate actually considered the appellant's defence but found it to be hopeless.

13. This is the appellant's first appeal. This court is therefore duty bound to re-consider the evidence afresh with a view of arriving at its own independent conclusion but bearing in mind that it did not have the benefit of hearing and seeing the demeanor of the witnesses.

14. In determining this appeal, I am guided by the Court of Appeal's finding in **Republic v. Oyier (1985) KLR** page 353 where it was held:

> ***" 1. The lack of consent is an essential element of the crime of rape. The mens rea in a 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.***
>
> ***2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, of she did not, that her understanding and knowledge were such that she was not in apposition to decide whether to consent or resist.***
>
> ***3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman 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."***

15. In this case, it emerged from PW1's evidence that she was raped. PW3 too alluded to confirming that PW1 was raped. The same was established and confirmed by PW 4, the Clinical Officer who examined PW1. It is not disputed that none of the witnesses saw the appellant commit the offence and PW1 too did not know who raped her, however, it emerged from the evidence of PW2 that he was informed that the PW1 was being disturbed at the bar. When PW2 went to the bar, he found the appellant in a secluded room with PW1 whose clothes were raised to the waist. Although the appellant denied by stating that PW1 was in company of some two (2) men, he failed to explain clearly in what condition the two men left her. He did not further explain why he chose to sit with PW1 with her clothes raised to her waist. In view of the circumstances, the appellant's explanation does not add up and only point toward him as the assailant. Further, it is undisputed that PW1 was unconscious and could not have been in a position to consent to the act. The appellant's defence was not in my view tenable in view of the evidence on record. In the end, I find that the appellant was positively identified as the person who committed the offence and the trial court was correct in dismissing his defence.

16. The appellant lamented that a crucial witness namely the bar attendant was not called. It is well settled that no particular number of witnesses ought to be called to prove a fact. The witnesses availed by the prosecution sufficiently proved the case against the appellant and there is no prejudice occasioned by not calling the bartender. Further, the evidence by PW1 was corroborated by the other prosecution witnesses and were not inconsistent. In the end I find that the prosecution proved the case against the appellant beyond reasonable doubt and the appeal is accordingly dismissed. The conviction and sentence of the lower court is upheld.

Orders accordingly.

Dated and delivered at Machakos this **16th** day of **May, 2018**.

D. K. KEMEI

JUDGE

In the presence of:

Boniface Ngumbi Mbindyo - the Appellant

Machogu - for the Respondent

Kituva - Court Assistant