



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA TA KABARNET

HCCRA NO 71 OF 2017

[FORMERLY ELDORET HCCRA NO 113 OF 2015]

J K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in the Principal Magistrate's Court at Kabarnet criminal case no 1043 of 2014 delivered on the 14th day of July, 2015 by Hon. S.O. Temu PM]

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 3(a) (b) 3 of the Sexual Offence Act and an alternative charge of indecent act with an adult contrary to section 11A of the Sexual Offences Act. The particulars of the rape charge were that the Appellant on the 5th day of December 2014, at around 1300hrs within Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of E S T without her consent. The particulars of the alternative charge were that the Appellant on the 5th day of December, 2014 at around 1300hrs within Baringo County, intentionally touched the vagina of E S T with his penis against her will.

2. The appellant was dissatisfied with the judgment of the trial court and appealed against conviction and sentence on the following grounds:

1. That I pleaded not guilty on trial.

2. That the learned magistrate erred in both law and facts in failing to consider that the prosecution failed to prove its case beyond reasonable doubt.

3. That the learned magistrate erred in both law and facts in failing to consider that, the evidence tendered by the prosecution witnesses was inconsistent.

4. That the learned magistrate erred in both law and facts in failing to consider that the prosecution witnesses were not credible witnesses.

5. That the learned magistrate erred in both law and facts in failing to consider my evidence in defence.

3. The prosecution called 5 witnesses whom gave evidence before the trial court as follows:

Prosecution's case

1. **PW1** E S T

“My name is E S T, I am a resident within Baringo. I know the accused. The accused is a relative as he is a son to my in-law. On the 5/12/2014 I had gone to get goats from the fields at 1 pm. The accused had come to where I was and he got hold of me and asked me to give in for sex. The accused held me and pushed me to the ground and he had raped me. The accused had informed me that he was to kill me if I was to report the incident. I had informed him that I was not going to report him.

The accused had removed his trousers when he raped me. He had put my legs on his shoulder and he raped me three times.

The accused had pulled my pant. He did not use a condom when he raped me. Since the accused had threatened to kill me if I

screamed, I had asked him to complete raping me. When he finished he asked me to follow him. We had gone to one house where cards were played and when I stayed for a while I had escaped and I went to Kuikui hospital where I was examined and treated. I had then gone to the Chief's Office at Kuikui on the same day and I reported the incident.

The accused was arrested on the same night. We had gone to hospital on the following day and we were examined again. We had then gone to Kasisit Police Post where the accused was left. I was issued with P3 and it was filled and I had left it at the police station.

The accused was wearing jeans on the date of incident. I was wearing blouses, petty coat and skirt.

I had no dispute with the accused before the date incident. The accused had inserted his penis to my vagina. Accused is identified in court."

Cross-examination

"The houses are far from where you had met me. I did not inform the people who were at the centre about the incident because I was afraid you could attack me as you had warned me. I had met Chemamet on the road but I did not tell him as I was afraid that a report could have reached you before I could reach at the hospital. You had taken a phone from one girl who later committed suicide."

2. PW2 Levi Kamama Keino

"I am a resident of Kambi Nyasi. About 8 pm I received a call from the area assistant chief Jacob Kaptum who asked me to go to Chesisat and arrest one person the accused herein. I went to Chesisat with my colleague and we arrested the accused on the same day. We took the accused to Kinyach Police Station where we left him. We had taken the accused to Kinyach Hospital but I did not know what had happened as we stayed outside. I later recorded my statement at Kinyach Police Station."

Cross-examination

"I was asked to come to testify. I was not at the scene of incident. I did not meet the complainant. We had walked to the Police Station without any difficulties."

3. PW3 Japheth Cheserek

"I am a Clinical Officer at Kuikui Health Centre. I have been at Kuikui for six months now. I have the P3 form for E S T. The complainant had come to Kuikui Trading Centre on 5/12/2014 where we met the Chief and the Chief paid me and asked me to go and treat her.

I went with the complainant to the hospital then I took samples for lab testing. The lab technician was not there as I had preserved the specimen to the following day the sample was conducted but there was no evidence of spermatozoa or anything unusual with the complainant's private parts. She had no injuries on her private parts. The complainant's clothes had creases. I had the filled p3 form."

4. PW4 Jacob Kiptum

"I am the Assistant Chief Kuikui Sub-Location. I know E S T the complainant herein as she is from the area. I know the accused as he is from the area. On 5/12/2014 I was at the centre Kuikui at 5 pm when E S T came and asked to talk to me. She had informed me that a person had gone to where she was taking care of goats and he had raped her and he had threatened her that she was to kill her if she screamed. The said person had then raped her.

The complainant was with dust on her clothes and back of her head. The complainant was crying as she explained to me what had happened. I had then looked for a doctor a Clinical Officer at the centre and the complainant went to hospital for examination. The complainant had informed me that it was J K who had raped her. I had then sent the village elder to arrest the accused with the help of KPR.

The following day J K was arrested and I had asked the doctor to examine him and he be taken to the Police Station."

Cross-examination

"The complainant had come to where I was about 5.30 pm. I had rung the village elder and I asked him to arrest you. It is about 5 km from the village to Kuikui centre. The complainant had informed me as a government officer."

5. PW5 No. 42250 CPL Michael Malaha of Kinyach Police Station.

"I am the office in-charge investigating Kinyach. On 6/12/2014 at about 5pm the complainant herein E S T while in the company of Police Reservist came to my station while in the company of the accused who is before court.

The complainant stated that she was at the shamba taking care of goats when the accused went there and raped her after warning her that he was to kill her if she screamed. I had then recorded statements and I had re-arrested the accused. I had issued the complainant with a P3 for which was filled, I had recorded her statement also and I charged the accused.”

Cross-examination

“I had visited the scene of where the incident had taken place after two days that is on 7th December, 2014. I had not stated that the clothes were torn.”

Defence case

4. When put on his defence the appellant who testified as DW1 gave an unsworn statement and stated as follows:

“My name is J K. I am a resident of Sirare, I am a farmer. On 5/12/2014 I woke up and the complainant’s husband came and requested for an animal injection and I gave him. I then went to see my goats and I went to the centre and I purchased beer for the complainant’s husband and I took it to him and he drunk and I asked him to give back my injection and he stated that he was to bring it to me. I had gone home and while in the house some people came and informed me that I had raped the man’s wife. I was taken to where the Chief was at the hospital where I found him with the doctor. I was removed blood and my brothers came.

The complainant’s husband came and we asked him where the complainant was and he stated that he did not know. The complainant was asked by the husband what had happened and she stated that I had raped her while taking care of the goats. The chief had asked her whether she was ready to resolve the matter at home or go ahead and she stated that she wanted Ksh.50,000/=. I decided to have the case taken to the police station. It is not true that I had gone with the complainant to the centre after raping her. The investigating officer did not visit the scene of incident.”

Statement of the judgment

5. In convicting the appellant the trial court found that the prosecution had proved its case beyond reasonable doubt and proved the charge as follows:

“Upon hearing the evidence tendered the issues for determination were: whether the accused had indeed raped the complainant; whether the complainant’s evidence alone with corroboration by the clinical officer who prepared the p3 could attract a conviction for the charge of rape.

As per the complainant’s evidence she demonstrated that she was truthful and she had taken all the necessary measures to make her case. She had co-operated as she was being raped as the same had taken place in the forest for fear of being attacked and or killed by the accused. She walked from the scene together with the accused so that she could not raise any suspicion from the accused. She had gone straight to the chief where she reported the incident on the same day and she was taken to hospital for examination but sadly the sample which were taken from her urine were not able to be examined on the same day for lack of the technician.

One could thus not tell how they were reserved to the date they were analysed.

I am convinced beyond any doubt that the complainant had told the court the truth which was tested through cross-examination and there was no contradiction. **The accused’s defence did not also shake the prosecution’s case and it only confirmed that the complainant was not at her home when the accused took alcohol to her husband was asked on her whereabouts he stated that she did not know which merit that she was not at home but at the field where the accused met her and raped her.**

Pw3 and Pw4 confirmed that there was dust on the complainant’s clothes and back of the head when they went to report the incident to them. That then corroborates the complainants evidence that the accused had laid her down and put her legs on his shoulder were on the said. I had no doubt on the credibility and the honesty of the complainant’s evidence.

Under section 124 of the Evidence Act provides that where in a criminal case involving sexual offences the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reason to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.

In this case I have stated above that I had no doubt that the complainant stated the truth and her conduct after the incident left no doubt and she took all the precautionary measures immediately, by co-operating with the accused as he had threatened her, escaped where there was an opportunity immediately went direct to the area Assistant Chief who confirmed that indeed she had dust on her head and shoulder. She went to hospital where specimens were taken immediately but no analysis as there was no technician. The sequence was of an honest person who had been wronged and needed help.

The P3 produced indicated that there was no lacerations no signs of infection no discharge and no spermatozoa seen **with the said finding above the evidence left was the testimony of the complainant only and circumstantial evidence by the chief Pw4 who saw her first hand with dust on her clothes and back of her head.**

I has been held severally by the Court of Appeal that: “it is not necessarily that the presence of spermatozoa be established for the offence (of rape) to be complete. It is sufficient for the trial court to proceed to convict on the evidence of the complainant upon being satisfied that she was a “truthful witness” which I hereby do.”

Written Submissions

6. The Appellant's written submissions received before court on the 19th of July, 2017 together with the DPP's oral response on the same date are as follows:

Appellant's submission

1. Ground 2 and 3 combined

I humbly contest my conviction was manifestly unsafe from the evidence adduced by the prosecution. The court failed to look at the manner in which the foregoing events occurred. PW1 as old as she is doubtful and her allegations ought not to be relied on. The nature of the act of rape that occurred and the way she acknowledges that she accompanied me to the market puts doubt to what was happening. It was the complainant's testimony that I went to where she was and asked for sex, I pushed her down and raped her. There was no struggle all was well. It is not easy for someone to give to sexual assault in the simple manner the complainant says.

*It was after the same act was complete that she says we went together to the shops where people were. If they were from a bush where people were, what then happened when they had come to the open where people were. Was it still a threat to this woman if really such allegations were true. It is not clear whether we had enmity between me and the complainant. She also says she feared telling anybody what had happened, what actually was making her believe I was a threat yet she had been raped and needed assistance. On this I contest the testimony is not worth compared to triage and the circumstances surrounding it. On p. 19 the complainant said she met one Chemamet, this time without the assailant but she could not reveal as to what had happened. I refer to the case of **Maina v. Republic** [1969] CR 955 it was held that: "it has been said again and again that in the cases of alleged sexual offences it is dangerous to convict on the evidence of a woman alone or girl alone. It is dangerous because human experience has shown that girls and women do sometimes tell an entire false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason." From the case at hand it is true that the complainant's allegations is a mere puff.*

*In **Jon Wagner and Others v. Republic** [2009] eKLR the court held that: "if a material element is an evidence and one which must have been within the knowledge of the person giving the evidence is demonstrably untrue, the value of the evidence as a whole is destroyed and cannot be relied upon." The complainant's allegations on rape on the issues she raised ought to have been disregarded. See also **Ndungu Kimanyi v. Republic** [1979] KLR 282 where it was held: "the witness upon whose evidence it is proposed to rely should not create an impression in mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or do say or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept this evidence." It is true that the court relied on the uncorroborated testimony of the complainant yet her testimony lacks merit. The court relied on section 124 of the Evidence Act to convict me yet the same section states:*

*"notwithstanding the provisions of section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused person shall not be liable to be convicted on such evidence **unless it is corroborated by other material evidence in support thereof implicating him.**"*

The evidence which had to support was that of the doctor who in this case never brought up any positive links to the rape charges.

*The complainant's testimony and the Assistant Chief PW4 are contradicting. I rely on **Rawala v. Republic** [1957] E A 570 where it was stated that: "where a witness causes contradicting and inconsistent testimony, the evidence should not be admitted as being true."*

2. Ground 4 – Doctor's evidence

The Clinical Officer is said to have been paid by the Chief to treat the complainant, it is not clear as to what was the purpose of the payment. The offences needed no money as the chief and the doctor were able government officers.

*The P3 form indicated alleged assault instead of rape which could have justified my conviction. This supported by the nature of injuries. I content that the doctor's evidence was not credible and the whole prosecution case was an error and the trial court failed to apply the correct principle of rape and that no justice was accorded to me. I further submit the case of **Zahira Habibullah Sheikh and another v. State of Gujarat and others** Criminal Appeal 446-449 of 2004, "It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There cannot be analytical all comprehensive or exhaustive definition of fair trial and may have to be determined is seemingly infinite variety of actual situations with the ultimately object in mind, whether something that was said or done either before or the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted failure to accord fair hearing either to be accused or the prosecution violated even the minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere pretence. The trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principle in substance to find out the truth and prevent miscarriage of justice."*

The vital elements were not brought up in the case before as what the expert witness would have availed never came up.

3. Ground 5 – my defence

*I knew them very well and the husband of the complainant was a great friend. The husband had not been informed of all what had befallen her during the whole day until the time I was arrested. I refer to the case of **Auma v. Republic** [1988] KLR it was held: “at the time of evaluating the prosecution’s evidence the court must have in mind the accused person’s defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is any doubt goes to the accused person.” My defence was disregarded for no cogent reason.*

Prosecutions oral submissions – Ms. Kenei, Prosecution Counsel

“Grounds of appeal 1, 2 and 3.

Evidence before the trial court were consistent by Pw1 at p. 10-20 stated that the appellant found her grazing her goats and he requested for sex. He pushed her to the ground and raped her. The appellant had threatened Pw1 not to report him. When the act was complete they left together and she went up to the Chief’s Office at Kuikui and reported the matter to Pw4 whose evidence at p. 13 line 14-15 noted that Pw1 had dust on her clothes and at the back of her head. He looked for Pw3 the clinical officer to treat Pw1 and later called Pw2 to arrest the appellant who arrested him on the same date and took him to Kinyach. Two exhibits by Pw3 which was P3 form did not show any injuries on the complainant and this corroborates her testimony that she did not fight the appellant.

Evidence of the appellant was considered at the trial court and dismissed the same, and the same suspect that his denial of the incident, the trial court also found that Pw1 had demonstrated herself as a truthful witness and under section 124 of the evidence Act the court proceeded to convict the appellant on the evidence of Pw1 only.

*The P3 form did not show any notable injuries. The court relied on the case of **David Masese Mogaka v. Republic** [2013] eKLR in which the Court Appeal noted that the offence of rape was complete once there is penetration. Bad blood between the complainant and the appellant. Appellant cross-examined the complainant at p. 11-12 and never alluded to the issue of bad blood, we submit that the same is an afterthought. He also did not raise it when his defence. We pray that the conviction and sentence be upheld.”*

Issue for determination

7. The question for determination in this appeal is whether allegation that the complainant was raped by the accused appellant was proved by the prosecution beyond reasonable doubt.

Determination

8. As the first Appellate Court it is the duty of this court to look at the evidence afresh and arrive on its own independent determination, giving allowance to the fact that the Appellate Court has, unlike the trial court, not seen or heard the witnesses. See **Okeno v. Republic** [1972] EA 32.

Single witness evidence

9. As a single witness on whose evidence the prosecution primarily relies, the complainant must not be shown in evidence to have acted in a manner inconsistent with his/her telling the truth. As stated by the Court of Appeal in **Ndungu Kimanyi v. Republic** [1979] KLR 282 –

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

Inconsistencies in the evidence

10. There are several inconsistencies in the evidence of the complainant *inter se* and as related to the evidence of the other witnesses as to make it impossible to hold that she was a witness of the truth.

11. PW1 the complainant stated that the appellant came to where she was while tending to goats and asked her for sex, she refused and the appellant raped her. It is the statement of PW1 that the accused/appellant raped her three times and told her not to scream and after he was done asked her to accompany her to the centre where she managed to escape and made a run to the hospital. It is also her statement that before making it to the hospital she met one Chemamet but she was afraid to let him know what had transpired. On cross-examination, she said that she did not scream or report the incident to persons she met on the way because she did not want to risk the appellant getting to know of it and carry out his threat to kill her before she got to the hospital, indicating that the hospital was her first port of call after the incident.

12. There is contradiction between the evidence of the complainant, Pw3 and Pw4 about the time the complainant had visited the hospital. Pw1 claimed to have gone to the hospital before she reported the matter to the Chief as follows:

*“The accused had pulled my pant. He did not use a condom when he raped me. Since the accused had threatened to kill me if I screamed, I had asked him to complete raping me. **When he finished he asked me to follow him. We had gone to one house where cards were played and when I stayed for a while I had escaped and I went to Kuikui hospital where I was examined and treated. I had then gone to the Chief’s Office at Kuikui on the same day and I reported the incident.***

The accused was arrested on the same night. We had gone to hospital on the following day and we were examined again. We had then gone to Kasisit Police Post where the accused was left. I was issued with p3 and it was filled and I had left it at the police station.”

13. Pw3 stated that the complainant had met the Assistant Chief Pw4 at Kuikui centre and the latter paid him to go and treat the complainant at the health centre, ***“The complainant had come to Kuikui Trading Centre on 5/12/2014 where we met the Chief and the Chief paid me and asked me to go and treat her”***. However, Pw4 the Assistant Chief stated that the complainant came to him and told him what had transpired and he went to the centre and looked for the Clinical Officer paid him and asked him to treat the complainant, as follows:-

“On 5/12/2014 I was at the centre Kuikui at 5 pm when E S T came and asked me to talk to me. She had informed me that a person had gone to where she was taking care of goats and he had raped her and he had threatened her that she was to kill her if she screamed. The said person had then raped her.

The complainant was with dust on her clothes and back of her head. The complainant was crying as she explained to me what had happened. I had then looked for a doctor, a Clinical Officer at the centre and the complainant went to hospital for examination.”

14. The evidence of the complainant that she escaped from the appellant and went to hospital before reporting the matter to the chief is contradicted by the evidence of the two other prosecution witnesses, PW3 and PW4 in that respect. The question arises as to who between the complainant and her two witnesses were telling the truth.

15. As regards the dust on the complainant’s head and clothes which the trial court found corroborative of the complainant’s evidence that she was raped, it is inconceivable that a person who had taken all precautionary measures as held by the trial court to oblige the appellant so that he did not carry out his threat to kill and who had followed the appellant to a gaming house after the rape without screaming for help or reporting the matter to persons she met on the way, could not have dusted herself to remove the dust on head and clothes so as not to betray what had befallen her and risk the wrath of the appellant.

16. Moreover, circumstantial evidence must be inexplicable upon any other hypothesis other than that of guilt of the accused. See ***R v. Kipkering Arap Koske and Anor.*** [1949] 16 EACA 135 and ***Mwendwa v. R*** [2006] 1 KLR 133. There could be other explanations for dust on clothes and head of the complainant, including that she may innocently have fallen on the ground or struggled with someone including the appellant in a fight or rape attempt, in view of the lack of medical evidence of penetration, and not necessarily as evidence of rape by the appellant.

Gaps in the Prosecution case

17. One Chemamet who according to the complainant was a person she had met on the road after the alleged incident on her way to hospital was not called to testify as he could have shed light on the complainant’s appearance after the alleged rape. Nor was any person called to testify of her appearance with the appellant at the *“one house where cards were played”* where she said she had *“stayed for a while [before] I had escaped”*.

18. The Clinical Officer Pw3 stated that *“I went with the complainant to the hospital when I took samples from Lab testing. The lab technician was not there as I had preserved the specimen to the following day the sample was conducted but there was no evidence of spermatozoa or anything unusual with the complainant’s private parts. She had no injuries on her private parts. The complainant’s clothes had creases.”* Although the lab tests conducted the day after on samples taken the day of the alleged rape did not disclose any evidence of rape there was no explanation why the clinical officer observations of the complainant when he examined a few hours after the incident did not reveal any injuries to the complainant’s private parts. I agree with the holding in ***David Masese Mogaka v. R***, supra, following ***Andrew Apiyo Dunga and Another v. R*** [2010] eKLR, that lack of presence of spermatozoa inside a complainant is not fatal to proof of rape, but it is a factor to be considered in determining the credibility and reliability of the single witness evidence of the complainant.

19. In these circumstances, the alibi defence of the appellant may well have been truthful in view of the inconsistencies in the evidence of the complainant and other prosecution witnesses. The benefit of the doubt must be given to the accused/appellant.

20. In convicting the appellant on the evidence of a single witness, the trial magistrate relied on the proviso of section 124 of the Evidence Act which allows the court in sexual offence cases to convict on the basis of uncorroborated evidence of a single witness if satisfied that the complainant was telling the truth.

21. The single witness evidence of the complainant although permitted by section 124 of the Evidence Act in cases of sexual offences was in the circumstances of this case not safe to convict on in view of its obvious credibility gaps.

Orders

22. Accordingly, for the reasons set out above, I find that the appellant’s appeal has merit and the conviction for the offence of rape contrary to section 3 (1)(a) (b) (3) of the Sexual Offences Act is quashed and the sentence of imprisonment for 10 years is set aside.

23. There shall, therefore, be an order for the immediate release from custody of the appellant, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED ON THIS 11TH DAY OF JULY, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Kenei, Prosecution Counsel for the Respondent.