



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL APPEAL NO. 58 OF 2017

SIMON MWAURA MBATIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment delivered on 29th October, 2015 by Hon. E. Michieka (Senior Resident Magistrate) Senior Principal Magistrate's Courts at Kikuyu in Criminal Case No. 391of 2013).

JUDGMENT

1. The Appellant Simon Mwaura Mbatia was charged with 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 being that the Appellant on the 6th day of November, 2016 in Kiambu County within central region, intentionally and unlawfully caused his penis to penetrate the vagina of V W K without consent.

2. In the alternative the Appellant faced the **offence of committing an indecent act with an adult contrary to Section 11(A) of the Sexual offences Act No. 3 of 2006.**

The particulars of the offence were that the Appellant on the 6th day of November 2012 in Kiambu County within central region, intentionally and unlawfully touched the vagina of V W K with his penis against her will.

3. The prosecution case was that PW1, V W, a singer and a pastor who lived in Keroguya was telephoned by a man who wanted to buy her music CDs. She travelled to Kiambaa and met the said man at a bus stop. The man purchased 15 CDs for Ksh.1,800/=. The man then requested her to meet his pastor at PCEA Kiambaa so that she could perform in their church and get more customers. While they were walking through a shamba he told her to undress and kicked her and she fell down. The man then whipped put a knife from his trousers. She screamed. He grabbed her throat and threatened to kill her and dump her body. He then tore off her inner wear and proceeded to insert his penis in her vagina. When he was done he took her hand bag, the phone, Ksh.3,500/=:, the CDs and left.

4. The complainant went to a nearby house and asked for help. She was taken to the area chief. Her family was contacted and she went to hospital for treatment and reported the matter at Kikuyu Police Station. The Appellant was later arrested following a tip off. After investigations the Appellant was charged with the offence herein.

5. The Appellant gave sworn evidence in his defence case. He stated that he sells charcoal and was at a bus stage in Kiambaa waiting to pick some supplies of charcoal when three police officers arrested him together with other people who were at the bus stage. He was informed of the offence herein. That he told the police officers that he had a wife. He was escorted to Kikuyu Police Station where he was charged with the offences herein. He denied the offences and stated that he did not know the victim and has never seen her.

6. The trial court found that Appellant guilty of the offence of rape and convicted him accordingly. The Appellant was sentenced to serve ten (10) years imprisonment.

7. The Appellant was aggrieved by the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

(a) That the prosecution evidence was contradictory.

(b) That the evidence of identification was not full proof.

(c) That the Appellant was not accorded a fair trial as provided under Article 50(1) (2) (c) (j) of the constitution.

(d) That the prosecution case was not proved beyond reasonable doubt.

8. During the hearing of the appeal, Appellant relied on his written submissions. He stated that his rights to a fair trial were violated by the prosecution who failed to supply him with a copy of charge sheet and the witness statements. He expounded on his written submissions and contended that there was no evidence on how the member of the public who tipped off the police who arrested him came to know of the report made to the police.

9. The learned counsel for the state opposed the appeal. He submitted on the sufficiency of the prosecution evidence.

10. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno v Republic (1972) EA 32**.

11. The complainant (PW1) narrated her ordeal to the court and stated that she was raped. The circumstances she described leave no doubt that she was raped. The complainant's evidence is corroborated by that of PW2, Samuel Waitika the chief to whom she made a report immediately after the incident. The chief's evidence was that the complainant's clothes were dirty and that she had also been robbed of her properties and he assisted her with bus fare.

12. PW4 Dr. Dorcas Mwangi testified that the complainant was examined and found to have bruises in the vagina. The doctors conclusion was that there was evidence of sexual assault. PW3 produced the P3 form and a medical report as exhibits. The said medical documents reflect that the complainant was crying and had a dirty skirt. That her genitalia was normal with no tear or laceration. The diagnosis is reflected as sexual assault. Based on these findings, the Appellant argued that the medical evidence contradicts the evidence of the complainant and the doctor who testified (PW4) that there were no bruises in the complainant's genitalia.

13. I have combed through the evidence of the complainant. She did not mention any tears or lacerations. The doctor (PW4) gave evidence on behalf of Dr. Kinuthia who examined and treated the complainant, filled in the P3 form and made the medical report. Although PW4 stated that the complainant had bruises in her genitalia, it is noted that the medical documents do not mention the same. There is therefore no contradiction between the complainants evidence and the documents produced.

14. I now turn to the question of identification. The complainant's evidence shows that the offence took place in broad daylight. The complainant's evidence shows that she had considerable time and opportunity to see her assailant as they interacted closely during the sale of the CDs, walking together through the shamba and the close contact during the attack and eventual rape. The complainants evidence further reflects that she identified the Appellant at an identification parade.

15. The evidence of PW6 IP. Dewy Eganza is that he conducted the identification parade wherein the complainant identified the Appellant. The evidence of PW6 shows the identification parade was carried out in a regular manner. There is no allegation made by the Appellant that the identification parade was faulty.

16. Having analyzed the evidence on identification, this court is satisfied that the identification of the Appellant was positive and free from any possibility of error. (See for example **Francis Kariuki Njiru & 7 others v Republic CR APP. No. 6/2007**).

17. The defence raised by the Appellant that he was arrested for an offence that he had not committed is not convincing. There are no reasons that emerge from the record why the complainant would frame him up with this case. The trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanour believed the complainant. I have no reasons to differ with the findings of the trial magistrate.

18. On whether the Appellant was accorded a fair hearing, I have perused the proceedings of the Lower Court. It is noted that the trial court made orders on 28th June, 2013 and on 2nd August, 2013 that the Appellant be supplied with the statements of the prosecution witnesses following an application made by the Appellant when the trial commenced on 29th May, 2014. There was no further request for statements by the Appellant nor any complaint that the statements had not been supplied. The trial proceeded and the Appellant cross-examined witnesses who testified on that day and on the subsequent dates. It appears the issue is arising now as an afterthought.

19. The purpose of being supplied with witness statements is for preparation for the hearing. The Appellant is presumed to have been ready to proceed with the trial when he proceeded with the same for over a period of one year and after the court had already made orders that he be supplied with the same.

20. The Appellant in his submissions raised issues regarding the details of the report made by the police informer. In the case at hand, PW3 Sergeant Paul Serem the arresting officer gave evidence that the Appellant was pointed out to him by a member of public testified herein. The Appellant therefore had the opportunity to cross examine on the details of the tip off given to the police officers but failed to do so. Raising the matter in his submissions is rather late in the day and not helpful.

21. Having evaluated the evidence from both the prosecution and the defence, I am satisfied that the prosecution case was proved beyond any reasonable doubts. I find no merits in the appeal and dismiss the same.

Dated, signed and delivered in Kiambu this 6th day of July, 2018

B. THURANIRA JADEN

JUDGE