



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 147 OF 2013

PETER MBITHI MBUVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence in Machakos Chief Magistrates Court Criminal Case No. 1394 of 2012 delivered on 28th March, 2013 by Hon. M. W. Murage (CM))

JUDGEMENT

1. The Appellant was charged with attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006 and an alternative charge of committing indecent act with an adult contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. He faced a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code.

2. Facts were that on 30th April, 2010 J M M alighted from a matatu at Iyuuni at around 7.30 pm. He lifted charcoal and the Appellant helped her with one paper bag. They walked for a while then the Appellant gave her the paper bag and held her as she lifted it up. She dropped the charcoal and struggled with the Appellant as she screamed. The Appellant threatened to rape and kill her. He tore her skirt and blouse then removed her pant and beat her on the face. She stated that the Appellant was drunk. Her cousin M came and called the Appellant by the name Kamau and asked him why he did so and the Appellant ran away. She and M reported to Catherine Musyoka (PW4) who is the Assistant Chief. She accompanied them to the scene where they recovered shoes. They heard the Appellant who had fallen in a ditch screaming as he had sustained a fracture. He was arrested and handed over to the police then taken to Machakos Hospital. Dr. Emmanuel Leiposo of Machakos Level 5 Hospital stated that PW1 was in a fair general condition and had marks on the face, frictions on neck and bruises. R M M (PW3) stated that he heard screams and went out together with his brother M. He saw a sack and heard more screams in a bush. He shouted inquiring as to who was there and PW1 responded saying "Mama M". Someone then sprung and took on his heels. They then assisted PW1 whose skirt and blouse were torn. He then heard a man screaming asking for help. When he approached him, he found the Appellant. On cross examination, PW3 stated that he saw the Appellant where PW1 was. PW4 stated that PW1 reported the incident to her. On their way to the scene, they heard the Appellant scream. He was assisted and handed over to the police. She stated that PW1 had scratches and marks on her face and her skirt and blouse were torn. PC Gua Otieno (PW5) received the report from PW1 who informed to her that she had alighted and was heading home when the Appellant turned against her and attempted to rape her. That the Appellant fell into a ditch as he ran away and broke his leg. She issued her with a p3 form and the Appellant was later charged. She produced the blouse and skirt as P. Exhibit 1 and 2. Corporal Elijah Chepchieng (PW6) stated that he was at Katua AP post when PW4 came with the Appellant with a report that he had attempted to rape PW1. He took the Appellant to Machakos Police Station where he was charged.

3. The Appellant was found to have a case to answer and was put on his defence. He gave a sworn statement as follows. That he met his friend PW1 whom he had not seen for seven (7) years and who asked him to accompany her home and he agreed. On their way home, they met three men he could not identify. They asked him what he was doing with their wife. He told them that PW1 was his wife and they threatened him and chased him. It is at that point that he fell into a ditch and broke his leg since he was drunk.

4. The Appellant was aggrieved by the conviction and sentence and filed this appeal on the following grounds:

- a) That the learned trial magistrate erred in both law and facts when he did not consider the gaps in the prosecution evidence.
- b) That the learned trial magistrate erred in both law and fact in convicting and sentencing the Appellant on inconsistent and contradictory evidence.
- c) That the learned magistrate erred in both law and fact by convicting the Appellant and failing to appreciate the facts that the Appellant was not fully informed of all his rights as enshrined in the Constitution of Kenya contrary to Article 49 (1) (a) and 50 (1) (2) (a) (b) (c) (g) (h) and (3).
- d) That the magistrate erred in both law and fact in convicting the Appellant but failing to consider the Appellant's defence under

section 169 (1) of the Criminal Procedure Code.

5. The Appellant submitted that it was unclear from PW1's evidence why she failed to seek treatment immediately after the incident. That PW3 merely stated that someone sprung and ran away without indicating to which direction the person went. He stated that the evidence on record was inconsistent and uncorroborated therefore the conviction was not safe. He submitted that PW1 in her statement stated that she went for treatment on 30th April, 2010 while on cross examination she stated that she went for treatment on 1st May, 2011 and the doctor indicated that she was examined 6 days after the incident. That although the doctor indicated that a sharp object was used, no such object was produced rather only a sack was found at the scene. That from PW3's evidence, he was not at the scene when the incident occurred and his evidence cannot be relied upon. To illustrate the effects of contradictions, the Appellant cited **Ramkrishan Pandya 1967 EACA 339** and **Alexander Nyachiru Marube v. Republic No. 159 of 1984**.

6. The Respondent on the other hand cited **Philip Nzaka Watu v. Republic [2016] eKLR** and submitted that the alleged discrepancies were not prejudicial since they were not fundamental. Citing **Karisa Chengo and 2 others v. Republic [2015] eKLR**, it was submitted that the Appellant's rights as alleged were not infringed since he was not faced with a capital offence to suggest that he was not in a position to conduct his case. That the trial court exhaustively examined the entire prosecution evidence in totality and weighed it against the Appellants.

7. I have given due consideration to the appeal herein and the submissions tendered. The Appellant does not deny being at the scene. The evidence tendered by the prosecution witnesses, even though the Appellant stated that they were inconsistent, were not materially inconsistent in my view. It emerged that when PW 3 came to inquire as to what was going on, the Appellant took off. PW1's clothes were also found to be torn and although the Appellant stated that he was threatened by some men, he failed to explain at what point PW1's clothes were torn. This leaves the Appellant as the perpetrator. The complainant was quite categorical that the Appellant was her assailant. Indeed the Appellant in hi evidence confirmed that three men found him in company of the complainant.

8. On the Appellant's argument on legal representation, the substantive law on legal representation is Article 50 (2) (h) of the Constitution which is in the following terms:

“(2) Every accused person has the right to a fair trial, which includes the right-

(h) to have an advocate assigned to the accused person by the State at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;” (Emphasis mine)

Legal representation is therefore not only available to persons charged with capital offences but also to persons likely to suffer substantial injustice if not represented and I am guided by the Court of Appeal's reasoning in the case of **David Njoroge Macharia v. Republic [2011] eKLR** where the Court had this to say:

“Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence... We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where penalty is loss of life have the right to legal representation at State expense.”

The Court in discussing the essence of legal representation to such persons stated:

“The counsel's role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact, sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel's participation was succinctly articulated by Lord Denning in his decision in Pett v. Greyhound Racing Association (1968) 2 All E.R 545, at 549. He had this to say:

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon 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; and who better than a lawyer who has been trained for the task?”

9. The Appellant herein must thus establish that he suffered injustice by lack of representation. From my analysis of the record, I am unable to identify any complex issues that arose. The Appellant was able to take plea, request for statements cross examine the witnesses and also offer testimony in his defence. In the circumstances I find that he had an understanding of the case and cannot be said to have been exposed to any injustice or rather suffered any. This limb therefore fails.

10. Looking at the Appellant's defence evidence, I find the same did not shake that of the prosecution which was quite overwhelming against him. The Appellant in his defence testimony confirmed having met the complainant and escorted her home. He was arrested at the scene of the crime.

11. As regards the sentence imposed by the trial court, I find the same was the minimum possible in law. The trial court did consider the Applicant's mitigation and handed down the sentences which are not excessive in the circumstances.

12. In the result I find no merit in the appeal. The same is ordered dismissed. The conviction and sentence by the trial court is hereby upheld.

Dated signed and delivered at Machakos this 20th day of September 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Peter Mbithi Mbuvi - for the Appellant

Machogu - for the Respondent

Josephine - Court Assistant