



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 48 OF 2017

JAMES MUIRURI MWAURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No 6638 of 2012 delivered by Hon. Wakumile SPM, on 9/07/2018).

JUDGMENT

Background

1. James Muiruri Mwaura, the Appellant herein was charged on the 27/12/2012 with two counts and one alternative charge. The first charge was robbery with violence contrary to **Section 295** as read with **Section 296(2) of the Penal Code**. The Particulars were that on 24/12/2012 at [particulars withheld] House along Ronald Ngala street in Nairobi within Nairobi county jointly with others not before court while armed with offensive weapon namely knife robbed **J M K** a mobile phone make Nokia 1100 valued at KSh 2300/- and cash Ksh. 3300/- and at the time of such robbery threatened to use actual violence to the said **J M K**.

2. In the second count he was charged with Rape contrary to **Section 3 of the Sexual Offences Act No.3 of 2006** in that on 24/12/2012 at [particulars withheld] house along Ronald Ngala Street in Nairobi within Nairobi County intentionally and unlawfully caused his penis to penetrate the vagina of **J M K** by use of force. The alternative charge was committing an indecent act with an adult contrary to **section 11 (A) (6) of the sexual offences Act no. 3 of 2006** in that he intentionally touched the breasts and vagina of **J M K** with hands against her will. The Appellant was convicted of the second count contrary to **Section 3 of sexual offences Act no.3 of 2006** and sentenced to serve fifteen years imprisonment.

3. The Appellant's Petition of Appeal was filed on his behalf by learned counsel, M/S Kangahi and Associates. It sets out eight grounds of appeal which I have condensed into six as follows; that the prosecution's evidence was insufficient, contradictory and inconsistent to warrant a conviction, that the elements of the offence of rape were not established, that the Appellant was not positively identified as the culprit, that crucial witnesses were not called and on the whole that the case was not proved beyond a reasonable doubt.

Evidence

4. **PW1**, J.M.K was the complainant in both counts. Her testimony was that she was inside her cousin's house which was a single room near Nakumatt supermarket within city centre when the watchman knocked and enquired about her cousin. The watchman left after she told him that her cousin was not in. She was accosted and attacked by unknown assailants who were posing as police officers ten minutes later. The assailants demanded money and threatened to kill her. She claimed that the Appellant grabbed her wallet and put it in his pocket. She sat on the bed where the Appellant proceeded to sit on her thighs, started caressing her breasts while removing her clothes. He then ripped her clothes off including her undergarments using a knife. He proceeded to tie her hands to her neck using a headscarf. The men made no effort to conceal their identity. There was electric lighting so ideal identification conditions were prevailing. He was wearing dirty shorts. He also grabbed her phone while ransacking the house demanding for money before untying her briefly. The men left and the Appellant was left alone. He threatened her with violence and demanded for a condom. When she denied having one, he proceeded to rape her. The Appellant however left in a hurry upon hearing the arrival of **PW2** and the police who came in and untied her. **PW1** noted that her purse contained about Ksh. 5000/-. She was issued with a P3 Form after reporting the matter at Kamukunji Police Station. She also noted that **PW2** was bleeding from the head. **PW1** identified the Appellant on arrest. On cross examination, **PW1** noted that her cousin also confirmed being assaulted by the Appellant and that her hands were tied using her clothes.

5. **PW2**, **J M** confirmed that **PW1** was his first cousin. He testified that at about 6.00 p.m. he had been to his house but left for shopping. On coming back he knocked the gate. The watchman failed to open the main door at about 7.30 p.m. After six minutes of waiting he came and

opened and escorted him inside. As he (PW2) went up the flight of stairs the watchman remained behind. He was struck with a blunt object and then two men emerged from either side pushing him to the floor. They tied his hands and legs using pieces of clothes. They ransacked his pockets and began making calls while the gatekeeper opened the gate for more men to get in. They embarked on a looting spree. PW2 was carried into his room where he found PW1 also tied up. After a while there was silence and so he untied himself, then PW1.

6. The matter was reported to the police and as PW2 was returning he found police officers having recovered two gunny bags that contained household goods. The officers decided to inspect handcarts usually parked next to the building where they found two men hiding underneath them, amongst them the Appellant. The Appellant was identified by PW2 on account of his name, 'Muiruri'. He was wearing dirty shorts that were similar to what he wore during the robbery. The Appellant had covered his face when he attacked PW2. No P3 form was issued to PW2.

7. **PW3, Dr Japheth Mbai** of Nairobi Women's Hospital adduced a medical report in respect of PW1. The same was filled on 25/12/2012 and had been prepared by Dr. Kamunde who had since left the hospital. The diagnosis was sexual assault. The report was produced as exhibit 1. **PW4, Officer No. 62489 Sgt Nyazuwa** of Kamukunji Police Station was the investigating officer. He testified that the complainant identified the Appellant after arrest. On Cross examination, he affirmed that the arrest was done in his absence. He stated that he met the Appellant in the police cells.

8. At the close of the prosecution case the court ruled that a prima facie case had been established and that the Appellant would be called to give a statement of defence. He opted to give an unsworn statement in which he denied he committed the offence. He stated that he was arrested on the 24/12/12 at 8.30 p.m. while walking toward Eastleigh bus stage when he came across six men including the complainant. Three of the men were police officers who arrested him on account that the complainant had complained that he had raped her.

Submissions.

10. The Appellant was initially represented by the afore stated counsel. On the date of the hearing, he informed the court that he had not been in touch with his advocate and sought leave of the court to conduct the hearing by himself. He urged the court to ignore the submissions that had been filed by his advocate and instead, rely on the ones he had personally filed in High Court Criminal Appeal No. 145 of 2015. The latter appeal which was filed in person was withdrawn after the Appellant's counsel filed the instant one. The withdrawal notwithstanding, nothing stops the court from making reference to the submissions the Appellant filed therein. The same were filed on 21st November, 2017.

11. The Appellant first issue of contestation respected his identification. He submitted that he was identified by a single witness in difficult circumstances. He took issue with the fact that it was at night and no arresting officer was called as a prosecution witness to shed light under what circumstances he was arrested. He argued that in the circumstances an identification parade ought to have been conducted. And because none was conducted his conviction on account that he was identified was unsafe.

12. He submitted that he was denied access to witness statements during the trial. He went on to state that the medical report relied upon was adduced as evidence by a person other than the author and no effort was made to ascertain the authenticity of the same. He finally noted that there were no P3 Forms and medical reports to prove the allegation of rape; and in any case the elements of the offence of rape were not established. He submitted that no sentence was passed and as such, **Section 169 of the criminal procedure code** was not complied with.

13. The Respondent in written submissions filed on 18th July, 2018 noted that the elements of the charge had been proved. Firstly, that the accused had been positively identified by the clothing and name. Secondly, that penetration had been demonstrated vide MF1.1 which was the medical report. The Respondent did admit however that the medical report relied upon in the lower court cannot be traced in the record of appeal but that the same does not negate the fact that sufficient evidence was adduced in support of the charge for which the Appellant was convicted. Third, that force had been used during rape when the Appellant ripped off the clothes of PW1 with a knife before raping her without using protection. The use of force negated that consent had been obtained.

Determination

14. I have considered the evidence on record and the respective rival submissions. The major issue for determination is whether the prosecution proved its case beyond a reasonable doubt. The prosecution was enjoined to establish penetration, the absence of consent and the identity of the perpetrator.

15. Section 2 of the Sexual Offences Act describes penetration as:

"The partial or complete insertion of the genital organs of a person into the genital organs of another person."

16. As such, the first question before this court is whether there was indeed penetration. PW1 gave an account of how the Appellant hurriedly raped her after ripping off her undergarments with a knife. The prosecution called medical evidence to corroborate penetration. The Appellant submitted that the record of proceedings did not have a medical report hence there was lacking sufficient evidence to corroborate PW1's evidence. With regards to the P3 Form it is clear that the investigating officer, PW4, testified that he gave PW1 a P3 Form and this is corroborated by PW1 who testified that she was issued with one which was filled by a doctor. It was identified in court as MFI 1. It is also clear that PW3 testified to issuing PW1 with a medical report which was also identified and produced as exhibit 1. It is therefore apparent that the trial court was correct in relying on the medical evidence as corroborating evidence that PW1 was raped.

17. The absence of the medical documents currently in the record of appeal means that some hand has deliberately removed them. But by the fact that they were adduced as exhibits gives this court the authority to reevaluate what evidence in them was adduced in support of the case. The same can be glimpsed from the oral evidence of the witnesses.

18. In the sworn oral evidence of PW3, the doctor from Nairobi Women's Hospital, the medical report was dated 22/10/2013 and the patient

was attended to on the 25/12/2012. These dates seem to suggest that though PW1 was attended to on the 25/12/2012, the report was prepared approximately eleven months later. This is further complicated by the fact that PW1 testified on 11th October, 2013 when she only identified the P3 Form. Although she testified that she was treated at the Nairobi Women's Hospital, she did not testify to having been issued with a medical report from the hospital or identify a medical report from the hospital. It begs at what point and by whose authority the medical report was authorized. Besides, the delay in preparing it was never given which would persuade the court to think that PW1 was in court at the behest of some forces.

19. Be that as it may, its authenticity has not been challenged. It was an expert report prepared by Dr. Kamunde who worked in the same hospital with Dr. Mbai who adduced it. Section 77(2) of the Evidence Act allows an expert document to be adduced in evidence by another expert who can attest to the author's handwriting and expertise in the field of the evidence being adduced. It is for this reason I would find that the medical report was good corroborative evidence of penetration, anyway.

20. Before I determine whether or not the sex was consensual I would first revert to the issue of identification. PW1 testified that the room was properly illuminated at the time of the offence and that she was therefore in a position to view her attackers. She singled out the Appellant as the man who raped her during which time he also robbed her. She testified that the Appellant did not make any attempts to disguise his appearance. She recalled that he was wearing dirty shorts during the incidence. This was a distinctive part of the Appellant's attire that clearly caught the eye of the complainant and therefore formed a crucial part of the identification. However, its distinctiveness is not of such nature that the court would be bound to find that it links the Appellant to the commission of the offence beyond reasonable doubt as the uniqueness of such shorts is clearly in doubt. It was possible that any other person other than the Appellant would have been wearing dirty shorts at the same time. Furthermore, the shorts were never produced in court to corroborate the fact that the Appellant was arrested wearing them.

21. The next piece of evidence that was relied upon to tie the Appellant to the offence was his name. PW2 testified that the Appellant had a similar name to one of the offenders. The name in question was "Muiruri" which is also the Appellant's middle name. PW1's evidence did not however bear this out which appeared strange given the amount of time she spent with her assailants. She was more likely to have heard the name given her contention that the robbers did not attempt to conceal their identities.

22. The evidence of PW2 is further rendered with doubts given that he suffered a head injury as he went up a staircase by what he described as two men. He testified that he could not identify any of the men who attacked him except "Muiruri". He clarified how he heard the name during the ordeal when one of the robbers was on the phone and in the conversation he divulged being alongside "Muiruri". While evidence of a perpetrator's name may be relied upon to prove identification such reliance is not permissible where, like in the present case, the name is common with a particular community and no other manner as to how the Appellant was positively identified was plausible.

23. The final piece of the identification evidence was that the Appellant was arrested alongside another soon after the offence near the *locus in quo*. PW1 testified that the Appellant was arrested by police officers hiding under a handcart. She did not testify as to her presence during the arrest with the most cogent evidence emanating from PW2 who testified that after reporting the matter at Kamukunji Police Station they returned to the house where they found police officers who had recovered two gunny bags containing household items. That after loading the bags into their vehicle the officers proceeded to carry out a search during which they found two men hiding underneath some hand carts. The men were thus arrested.

24. It is noteworthy that PW2 did not testify that the recovered goods were found in possession of the Appellant or any of the accused persons. His evidence was that the police had already recovered the goods before the arrest took place. No arresting officer was called to testify to shed light on the circumstances leading to the arrest of the Appellant and his co-accused persons. Nothing points to what predicated the Appellant's arrest.

25. The prosecution evidence is further shattered by PW2's evidence that he identified the Appellant after the arrest after which he informed the police that the Appellant was called Muiruri. The Appellant's name did not feature at the time the report was made at the police station. It neither was explained how PW1 or PW2 knew the Appellant. The court is unable to fathom the basis upon which the mere arrest of the Appellant linked him to the offence.

26. The circumstances of his arrest falls far short of the threshold required for a positive identification. He just but was a victim of the circumstances, being at the wrong place at the wrong time. On account of lack of a positive identification, I find that the conviction was unsafe. I need not further delve into the element of whether sex was consensual, having found that the rape could not be linked to the Appellant on account of lack of a positive identification.

27. In the end, I find that the case was not proved beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 16th day of October, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*
2. *Ms. Atina for the Respondent.*